THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. XII.

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TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barnard. Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
Bro. P. C.	Brown. Cases in Parliament.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode. K. B.
Bunb.	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. S. C.	Burrows. Settlement Cases.

[1891] Ch. .....Law Reports, Chancery (1891 onwards).
C. B. .....Common Bench Reports.
C. L. R. .....Common Law Reports (1853—1855).
C. P. D. .....Law Reports, Common Pleas Division (1875—1880).
Cab. & E. .....Cababé and Ellis. Nisi Prius.
Cald. S. C. .....Caldecott. Settlement Cases.
Camp. .....Campbell. Nisi Prius.
Car. & K. .....Carrington and Kirwan. Nisi Prius.
Car. & M. .....Carrington and Marshman. Nisi Prius.
Car. & P. .....Carrington and Payne. Nisi Prius.
Carter .....Carter. C. P.
Carth. .....Carthew. K. B.
Cary .....Cary. Ch.
Cas. t. Hardwicke ..Cases temp. Hardwicke. K. B.
Cas. t. Talbot .....Cases temp. Talbot. Ch.
Ch. Cas. .....Cases in Chancery.
Ch. Cas. Ch. .....Choice Cases in Chancery.
Ch. D. .....Law Reports, Chancery (1876—1890).
Ch. Pre. .....Precedents in Chancery.
Ch. Rep. .....Reports in Chancery.
Chit. .....Chitty. Bail Court.
Cl. & F. .....Clark and Finnelly. H. L.
Co. Rep. .....Coke. K. B.
Coll. C. C. .....Collyer. Ch.
Colles .....Colles' Cases in Parliament.
Colt. .....Coltman. Registration.
Comb. .....Comberbach. K. B.
Comyns .....Comyns. K. B.
Coop. t. Brough. ....Cooper. Cases temp. Brougham.
Coop. t. Cott. .....Cooper. Cases in Chancery temp. Cottenham.
G. Cooper .....Ch.
C. P. Cooper .....C. P. Cooper. Ch.
C. & J. .....Crompton and Jervis. Ex.
C. & M. .....Crompton and Meeson. Ex.
C. M. & R. .....Crompton, Meeson and Roscoe. Ex.
Con. & L. .....Connor and Lawson. Ch. (Ireland).
Cooper .....Cooper. Ch.
Ct. of Sess. Cas. ....Court of Session Cases (Scotland).
Cowp. .....Cowper. K. B.
Cox .....Cox. Ch.
Cox, C. C. .....Cox. Crown Cases.
Cr. & Ph. .....Craig and Phillips. Ch.
Craw. & D. .....Crawford and Dix (Ireland).
Curt. .....Curteis. Eccl.

D. P. C. .....Dowling. Practice Cases.
D. (N.S.) .....Dowling. Practice Cases, New Series.
D. & L. .....Dowling and Lowndes. Practice Cases.
D. & R. .....Dowling and Ryland. K. B.
Daniell .....Daniell. Ex. Eq.
Dans. & Ll. .....Danson and Lloyd. Mercantile.
Dav. & M. .....Davison and Merivale. Q. B.
Deac. .....Deacon. Bky.
Deac. & C. .....Deacon and Chitty. Bky.
Dears. & B. .....Dearsley and Bell. Crown Cases.
Dears. C. C. .....Dearsley. Crown Cases.
De G. .....De Gex. Bky.
De G. F. & J. .....De Gex, Fisher, and Jones. Ch. App.
De G. & J. .....De Gex and Jones. Ch. App.
De G. J. & S. .....De Gex, Jones, and Smith. Ch. App.
De G. M. & G. .....De Gex, Macnaghten and Gordon. Ch. App.
De G. & Sm. .....De Gex and Smale. Ch.

Den. C. C. .....Denison. Crown Cases.
Dick. .....Dickens. Ch.
Dod. .....Dodson. Adm.
Dougl. .....Douglas. K. B.
Dow .....Dow. H. L.
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Dr. & Sm. .....Drewry and Smale. Ch.
Drew. .....Drewry. Ch.
Dr. .....Drury. Ch. (Ireland).
Dr. & Wal. .....Drury and Walsh. Ch. (Ireland).
Dr. & War. .....Drury and Warren. Ch. (Ireland).
Drink. .....Drinkwater. C. P.
Dyer .....Dyer. K. B.

East. .....East. K. B.
East, P. C. .....East's Pleas of the Crown.
Eden .....Eden. Ch.
Edwards .....Edwards. Adm.
El. & Bl. .....Ellis and Blackburn. Q. B.
El. Bl. & El. .....Ellis, Blackburn and Ellis. Q. B.
El. & El. .....Ellis and Ellis. Q. B.
Eq. Ca. Abr. .....Equity Cases Abridged.
Eq. R. .....Equity Reports (1853—1855).
Esp. .....Espinasse. Nisi Prius.
Ex. .....Exchequer Reports (1848—1856).
Ex. D. .....Law Reports, Exchequer Division (1875—1880).

F. & F. .....Foster and Finlason. N. P.
Fl. & K. .....Flanagan and Kelly. Rolls (Ireland).
Falc. & F. .....Falconer and Fitzherbert. Election.
Fitzg. .....Fitzgibbon. K. B.
Fonb. (N.R.) .....Fonblanque. Bankruptcy.
Forrest .....Forrest. Ex.
Fort. .....Fortescue. K. B.
Foster .....Foster. Crown Cases.
Fox .....Fox. Registration.
Free. C. C. .....Freeman. Ch.
Free. K. B. .....Freeman. K. B.

G. & D. .....Gale and Davison. Q. B.
Gale .....Gale. Ex.
G. Coop. .....G. Cooper. Ch.
Giff. .....Giffard. Ch.
Gilb. Eq. .....Gilbert. Ch.
Glyn & J. .....Glyn and Jameson. Bky.
Godb. .....Godbolt. K. B.
Gow. .....Gow. Nisi Prius.

H. Bl. .....H. Blackstone. C. P.
H. L. Cas. .....House of Lords Cases.
H. & C. .....Hurlstone and Coltman. Ex.
H. & H. .....Horn and Hurlstone. Ex.
H. & M. .....Hemming and Miller. Ch.
H. & N. .....Hurlstone and Norman. Ex.
H. & R. .....Harrison and Rutherford. C. P.
H. & W. .....Harrison and Wollaston. Bail Court.
Hag. Adm. .....Haggard. Adm.
Hag. Cons. .....Haggard. Consistory.
Hag. Ecc. .....Haggard. Eccl.
Hall & Tw. .....Hall and Twells. Ch.
Hardr. .....Hardres. Ex.

Hare .....Hare. Ch.
Hawk. P. C. .....Hawkins's Pleas of the Crown.
Hay. & J. .....Hayes and Jones. Ex. (Ireland).
Hayes .....Hayes. Ex. (Ireland).
Hob. .....Hobart. K. B.
Hodges .....Hodges. C. P.
Hog. .....Hogan. Rolls (Ireland).
Holt .....Holt. K B.
Holt, Eq. .....Holt. Eq.
Holt, N. P. .....Holt. Nisi Prius.
Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
Ir. Ch. R. .....Irish Chancery (1850—1866).
Ir. Eq. R. .....Irish Equity Reports.
[1894] Ir. R. .....Irish Law Reports (1894 onwards).
Ir. R. C. L. .....Irish Com. Law (1866—1878).
Ir. R. Eq. .....Irish Equity (1866—1878).

J. & H. .....Johnson and Hemming. Ch.
J. & W. .....Jacob and Walker. Ch.
J. Kelyng .....Sir J. Kelyng. Crown Cases.
J. P. .....The Justice of the Peace.
Jacob .....Jacob. Ch.
Jenk. .....Jenkins. Ex.
Jo. & Lat. .....Jones and Latouche. Ch. (Ireland).
Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
Jones & C. .....Jones and Carey. Ex. (Ireland).
Jur. .....The Jurist.

K. & G. .....Keane and Grant. Registration.
K. & J. .....Kay and Johnson. Ch.
Kay .....Kay. Ch.
Keb. .....Keble. K. B.
Keen .....Keen. Rolls Court.
Keilw. .....Keilway. K. B.
Kel. .....Kelyng, Sir John. K. B.
Ken. .....Kenyon. K. B.
Knapp .....Knapp. P. C.
Knapp & O. .....Knapp and Ombler. Election.

L. & C. .....Leigh and Cave. Crown Cases.
L. & M. .....Lowndes and Maxwell. Bail Court.
L. M. & P. .....Lowndes, Maxwell, and Pollock. Bail Court.
L. T. .....Law Times, New Series.
L. J. (o.s.) Ch. K.B. etc. .....Law Journal Reports, 1822 to 1831.
L. J. Ch. .....Chancery.
,, Bk. .....Bankruptcy.
,, C. P. .....Common Pleas.
,, Ex. .....Exchequer.
,, M. C. .....Magistrates' Cases.
,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

From 1831 onwards.

L. R. H. L. .....
L. R. P. C. .....
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L. R. Eq. .....
L. R. Q. B. .....
L. R. C. P. ..... } Law Reports, 1866 to 1875 inclusive.
L. R. Ex. .....
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L. R. A. & E. .....
L. R. C. C. .....
L. R. H. L. Sc. .....

L. R. Ir. ..... Irish Law Reports (1879—1893).
Latch ..... Latch. K. B.
Leach, C. C. ..... Leach. Crown Cases.
Ld. Raym. ..... Lord Raymond. K. B.
Lev. ..... Levinz. K. B.
Lewin, C. C. ..... Lewin. Crown Cases.
Lit. Rep. ..... Littleton. C. P.
Ll. & G. ..... Lloyd and Goold. Ch. (Ireland).
Lofft ..... Lofft. K. B.
Longf. & T. ..... Longfield and Townsend. Ex. (Ireland).
Lush. ..... Lushington. Adm.
Lutw. ..... Lutwyche. C. P.
Lutw. Reg. Cas. .... Lutwyche. Registration.

M. C. C. ..... Moody. Crown Cases.
M. & H. ..... Murphy and Hurlstone. Ex.
M. & M. ..... Moody and Malkin. Nisi Prius.
M. & P. ..... Moore and Payne. C. P.
M. & Rob. ..... Moody and Robinson. Nisi Prius.
M. & S. ..... Maule and Selwyn. K. B.
M. & Sc. ..... Moore and Scott. C. P.
M. & W. ..... Meeson and Welsby. Ex.
Macl. & R. ..... Maclean and Robinson. Scotch Appeals.
Mac. & G. ..... Macnaghten and Gordon. Ch.
M'Cle. ..... M'Cleland. Ex.
M'Cle. & Y. ..... M'Cleland and Young. Ex.
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Madd. ..... Maddock. Ch.
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Man. & Ry. ..... Manning and Ryland. K. B.
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Mont. & C. ..... Montagu and Chitty. Bky.
Mont & M'Ar. ..... Montagu and M'Arthur. Bky.
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Moseley ..... Moseley. Ch.
Myl. & Cr. ..... Mylne and Craig. Ch.
Myl. & K. ..... Mylne and Keen. Ch.

N. & M. ..... Neville and Manning. K. B.
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[1891] P. .....Law Reports, Probate (1891 onwards).
P. D. .....Law Reports, Probate Division (1876—1890).
P. & D. .....Perry and Davison. K. B.
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[1891] Q. B. .....Law Reports, Queen's Bench (1891 onwards).

R. .....The Reports, 1893—1895.
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Raym. (Ld.) .....Lord Raymond. K. B.
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Ridgw. .....Ridgway. Parliamentary Cases.
Rep. Ch. .....Reports in Chancery.
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W. Rob. .....W. Robinson. Adm. (1838—1847).
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Ry. & M. .....Ryan and Moody. Nisi Prius.

Salk. .....Salkeld. K. B.
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Saund. .....Saunders. K. B.
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Sch. & Lef. .....Schoales and Lefroy. Ch. (Ireland).
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Spinks.....Adm.
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Swanst. .....Swanston. Ch.

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T. Raym. .....Sir T. Raymond. K. B.
Tam. .....Tamlyn. Rolls Court.
Taunt. .....Taunton. C. P.
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Tothill.....Tothill. Ch.
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Tyrw. .....Tyrwhitt. Ex.
Tyrw. & G. .....Tyrwhitt and Granger. Ex.

Vent. .....Ventris. K. B.
Vern. .....Vernon. Ch.
Vern. & S. .....Vernon and Scriven. K. B.
Ves. sen. .....Vesey, sen. Ch.
Ves. .....Vesey, jun. Ch.
V. & B. .....Vesey and Beames. Ch.

W. Bl. .....Sir Wm. Blackstone. K. B.
W. Jones .....Sir W. Jones. K. B.
W. Kelynge .....Sir W. Kelynge. Ch.
W. R. .....Weekly Reporter.
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W. W. & H. .....Wilmore, Wollaston and Hodges. K. B.
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Willes .....Willes. C. P.
Wilmot .....Wilmot's Notes. K. B.
Wils. Ch. .....Wilson. Ch.
Wils. Ex. .....Wilson. Ex.
Wils. K. B. .....Wilson. K. B.
Wms. Saund. .....Williams' Saunders. K. B.

Y. & C. .....Younge and Collyer. Eq. Ex.
Y. & C. C. C. .....Younge and Collyer. Ch.
Y. & J. .....Younge and Jervis. Ex.
Yelv. .....Yelverton. K. B.
Younge .....Younge. Ex. Eq.

The Digest

OF

ENGLISH CASE LAW.

RECEIVER.

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I. APPOINTMENT.

1. GENERALLY.

a. Where no Cause Pending.

Judicature Act, 1873.]—By the Judicature Act, 1873, s. 25 (8), *a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms as the court shall think just.*

"Just or convenient" must be read as just and convenient. *N. L. Ry.* v. *G. N. Ry.*, 52 L. J., Q. B. 380; 11 Q. B. D. 30; 48 L. T. 695; 31 W. R. 490.

Section 25 (8) has enlarged very much the powers which courts of equity formerly possessed of granting injunctions and receivers—per Jessel, M.R. *Anglo-Italian Bank* v. *Davies*, 47 L. J., Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3.

As to the jurisdiction generally under this sub-s., see *Beddow* v. *Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89; 26 W. R. 570: *Gaskin* v. *Balls*, 13 Ch. D. 324; 28 W. R. 552: *Day* v. *Brownrigg*, 48 L. J., Ch. 173; 10 Ch. D. 294; 39 L. T. 553; 27 W. R. 217: *Foxwell* v. *Van Grutten*, 66 L. J., Ch. 53; [1897] 1 Ch. 64; 75 L. T. 368: *Aslatt* v. *Southampton Corporation*, 50 L. J., Ch. 31; 16 Ch. D. 118; 43 L. T. 464; 29 W. R. 147: *Cook* v. *Rooney*, 7 L. R., Ir. 191. *And see* col. 22.

Cases before the Judicature Act.]—The court has not a jurisdiction to appoint a receiver unless a cause be depending. *Whitfield, Ex parte*, 2 Atk. 315.

Order for the appointment of a person to act as guardian (the father being living), and for a reference as to maintenance, but not for a receiver, upon a petition, without any suit instituted. *Mountford, Ex parte*, 15 Ves. 445. But see *Id.*, n.

When the result of a suit in the probate court to set aside a will had been, in effect, to put the property comprised therein in such a position that no person had a legal right to deal with it, and litigation was impending in the same court, as to who ought to be the legal personal representative of the testator, a caveat having been also entered:—Held, that although there was no litigation actually pending, yet, under the circumstances, the court had jurisdiction to make an order for the appointment of a receiver. *Grimston* v. *Turner*, 22 L. T. 292; 18 W. R. 724. *And see* 22 L. T. 646; 18 W. R. 747; 18 W. R. 781.

On Ex parte Application.]—A manager and receiver appointed, on a motion ex parte, to carry on the business of an intestate before grant of letters of administration had been obtained. *Blackett* v. *Blackett*, 24 L. T. 276; 19 W. R. 559.

Ex parte applications for a receiver ought not to be granted even after judgment, except in cases of emergency. *Lucas* v. *Harris*, 56 L. J., Q. B. 15; 18 Q. B. D. 127; 55 L. T. 685; 35 W. R. 112—C. A. And see *Caillard* v. *Caillard*, 25 Beav. 512.

b. Before Service.

Bankrupt Trustee.]—When bankruptcy, and consequent loss to a trust estate, is expected, a receiver may be appointed before the service of the writ in an action. *H., In re, H.* v. *H.*, 45 L. J., Ch. 749; 1 Ch. D. 276; 24 W. R. 317.

Absconding Debtor.]—When a defendant had disappeared after failing to arrange with his creditors in bankruptcy, and a bill was filed by the plaintiffs as equitable mortgagees, service of which could not be effected, the court appointed a receiver of the mortgaged property on an ex parte motion. *London and South Western Bank* v. *Facey*, 24 L. T. 126; 19 W. R. 676.

c. Before Appearance or Answer.

Leave to Serve Notice of Motion.]—An injunction may be obtained before appearance upon personal service of the notice of motion, but a receiver cannot, except leave be given to serve the notice personally. *Ramsbottom* v. *Freeman*, 4 Beav. 145; 10 L. J., Ch. 362.

Such leave will not be granted unless it appear that the plaintiff has used due diligence to compel appearance. *Ib.*

—— **On Affidavits.**]—Receiver appointed, on affidavits before answer. *Duckworth* v. *Trafford*, 18 Ves. 283.

Defendant Absconding to Avoid Service.]—Order for a receiver made before appearance against a defendant, who had absconded to avoid service. *Dowling* v. *Hudson*, 14 Beav. 423.

A receiver appointed, on application of a plaintiff, over the estate of a defendant who absconded, to avoid being served with a subpœna to answer. *Maguire* v. *Allen*, 1 Ball & B. 75.

Defendant Staying out of Jurisdiction to Avoid Service.]—Receiver will be appointed over possession of grantor of rent-charge, who resides out of jurisdiction, on an affidavit that he stayed out of jurisdiction to avoid service of process. *Quin* v. *Gunn*, 1 Hog. 75. And see *Gibbins* v. *Mainwaring*, 9 Sim. 77.

Purchaser Pendente lite.]—Receiver granted before answer upon the bill of a purchaser pendente lite, viz. a suit instituted by the wife of the vendor, claiming under a settlement voluntary, as being after marriage. *Metcalfe* v. *Pulvertoft*, 1 Ves. & B. 180.

Trustee Declining to Act.]—Receiver appointed before answer in a case of a devise to four trustees, of whom two declined to act, all parties being before the court, and consenting. *Brodie* v. *Barry*, 3 Mer. 695.

Receiver to Compel Appearance—Simple Contract Creditor.]—A receiver to compel the appearance of the defendant, will not be granted in a suit instituted by a bond or simple contract creditor for payment of his debt, out of the real estate of his debtor. *Conolly* v. *Codd*, Hay. & J. 62.

—— **Specific Charge or Lien.**]—A receiver will not be appointed over a defendant's property, to enforce his appearance in the cause, if he resides out of the jurisdiction, unless the plaintiff has a specific lien on the land, or there is danger of immediate loss of the property. *Arthurs* v. *Arthur*, 1 Hog. 95.

Where a defendant resides out of the jurisdiction of the court, and a bill is filed against him to raise a charge specifically affecting his lands, a receiver will be appointed over them in order to compel appearance. *Nash* v. *Hughes*, 1 Hay. & J. 400. And see *Bennett* v. *Bayley*, *Geoghegan* v. ——, *Greene* v. *Kernon*, *Id.* 401, n.

Waste, in Action for.]—Motion for a receiver, in a strong case of waste, granted before answer. *Vann* v. *Barnett*, 2 Bro. C. C. 158.

Joint Stock Bank Stopping Payment—Bankers' Act.]—Upon a creditors' bill, founded on the equity of the 33 Geo. 2 (Bankers' Act), against the public officer of a joint stock banking company, consisting of a very large number of persons, incorporated and registered pursuant to the provisions of the 6 Geo. 4, c. 42, the bank having stopped payment, an injunction was granted to restrain the directors, &c., from interfering, and a receiver to collect the joint property, &c., was appointed before answer, the defendant having made an affidavit for the purpose of resisting the motion, and going into the merits of the case. *Acheson* v. *Hodges*, 3 Ir. Eq. R. 516, 523.

For form of order in such case, authority, and duties of receiver, his recognisance, sureties, and remuneration, see *Ib.*

Receiver Appointed by Puisne Incumbrancer—Prior Incumbrancer.]—Where a receiver has been appointed by a puisne incumbrancer, the court will not extend him to the suit of a prior incumbrancer before answer, upon the consent of the inheritor, as the puisne incumbrancers would be thereby deprived of the rents received, until the receiver could be extended after answer. *Lynch* v. *Nolan*, 10 Ir. Eq. R. 57. *See* col. 27.

Grantor of Annuity going Abroad.]—The grantor of an annuity secured by an equitable charge on certain lands which are subject to a prior charge, goes to reside abroad, but by his agent continues in receipt of the rents and profits. The court, on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit. *Tanfield* v. *Irvine*, 2 Russ. 149.

Equitable Mortgagee—Leave to Parties to Propose themselves.]—Upon the bill of an equitable mortgagee, leave was given to serve the defendant, the mortgagor, before appearance, with notice of motion for a receiver (the bill not asking for an injunction); and the order was made, upon affidavit of service, for the appointment of the receiver, with liberty to the parties to propose themselves, according to the notice. *Meaden* v. *Sealey*, 6 Hare, 620; 18 L. J., Ch. 168.

Infant Defendant's Interest in Danger.]—The court, upon the application of the plaintiff, appointed a receiver over the lands of a minor defendant, before his appearance or answer, upon an affidavit that the rents could not be enforced from the under-tenants of the minor (who was not a ward in chancery), and that his interest was in danger of being evicted, the head-landlord having served ejectments for the non-payment of the head-rent. *Whitelaw* v. *Sandys*, 12 Ir. Eq. R. 393.

Amendment of Bill between Notice of Motion and Hearing.]—A motion, for an injunction and receiver, is irregular where the plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion. *Gouthwaite* v. *Rippon*, 1 Beav. 54; 3 Jur. 7.

The plaintiff amended his bill after he had given notice of a motion for a receiver. Motion refused with costs. *Smith* v. *Dixon*, 4 N. R. 259; 12 W. R. 934.

Agreement to Execute Bill of Sale—Chattels in Danger.]—In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an ex parte motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the vice-chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the court, and to abide by any order which the court might make as to damages or otherwise. *Taylor* v. *Eckersley*, 45 L. J., Ch. 527; 2 Ch. D. 302; 34 L. T. 637; 24 W. R. 450.

d. Before Hearing or Decree.

Interlocutory Application.]—Receiver and manager of the property of a limited mining company appointed on an interlocutory application. *Peek* v. *Trimsaran Coal and Iron Co.*, 45 L. J., Ch. 281; 2 Ch. D. 115; 24 W. R. 361.

"Interlocutory Order."]—The words "interlocutory order" in s. 25, sub-s. 8, of the Judica-

ture Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A.

On Motion for Judgment.]—The court has jurisdiction on motion for judgment to appoint a receiver. *Capper, In re, Robertson* v. *Capper*, 26 W. R. 434.

Discretion of Court.]—In all cases where the court interferes by appointing a receiver of property in the possession of a defendant before the title is established by decree it exercises a discretion to be governed by all the circumstances of this case. In such a case the court expects the plaintiff to proceed with the most complete and honest diligence to obtain a decree. *Owen* v. *Homan*, 4 H. L. Cas. 997; 1 Eq. Rep. 370; 17 Jur. 861.

Suit Wrongly Framed no Bar.]—The court will interfere on an interlocutory application to appoint a receiver, notwithstanding grave doubts as to the propriety of the frame of the suit, and the necessity of making additional parties. *Fripp* v. *Chard Ry.*, 11 Hare, 241; 1 Eq. Rep. 503; 22 L. J., Ch. 1084; 17 Jur. 887; 1 W. R. 477.

Possession not Disturbed because Plaintiff a Good Title.]—The court will not, before the hearing of the cause, appoint a receiver of the rents and profits of real estate, on the mere ground that the party making the application has a good title, no fraud or spoliation being alleged against the party in possession. *Toldervy* v. *Colt*, 1 Y. & Coll. 621; 5 L. J., Ex. Eq. 25.

Mining Property.]—Receiver and manager of the property of a limited mining company appointed on an interlocutory application. *Peek* v. *Trimsaran Coal, Iron, & Steel Co.*, 45 L. J., Ch. 281. And see *Porter* v. *Lopes*, 37 L. T. 824; L. R. 7 Ch. D. 358. *And see* COMPANY.

Enforcing Decree—Debts Secured by Trust Deed.]—An application by creditors, whose debts, secured by a trust deed, had been established by a decree of the court of chancery in England, to appoint a receiver over the trust estates in possession of defendant, the debtor, refused, it being doubtful, as the record was framed, whether at the hearing of the cause the plaintiffs would be entitled to a decree. For the record to carry the English decree into execution was so imperfectly framed, that the defendant, by joining issue on the original record, would be at liberty to impeach the securities so established; which he could not do on a bill filed solely and exclusively to aid the execution of the English decree. *Houlditch* v. *Donegal* (*Lord*), Beat. 146.

Administration Suit—No Personal Estate.]—Where it appears by the answer that the real estate must be responsible, as that there is no personal estate to be first applied to debts, a receiver will be granted in the first instance. *Williams* v. *M'Namara*, 8 Ves. 71.

Profits of Office Assigned—Receiver Pending Decision as to Validity.]—The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment. *Palmer* v. *Vaughan*, 3 Swanst. 173.

Assignment of Allowance to Treasury Counsel.] The court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury before the hearing. Whether the allowance be assignable, quære. *Cooper* v. *Reilly*, 1 Russ. & M. 560. *See* 2 Sim. 560.

Compelling Partners to keep within Deed.]—The court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered; and where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus, where in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed, that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and in 1822, parties, then entitled under the former proprietors to seven-eighths of the theatre, entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; the court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const* v. *Harris*, Turn. & R. 496; 24 R. R. 108.

Decree of Foreign Court—Enforcing.]—An application by the plaintiff for a receiver after answer, but before hearing, in a suit to carry into execution a decree of a foreign court, refused; for this court cannot do any act to disturb the existing possession, until it shall, by a regular adjudication, have taken cognisance of the whole subject, and have made a declaratory decree that it ought to carry into execution the foreign decree against the property of the defendant within its jurisdiction. *Houlditch* v. *Donegal* (*Lord*), Beat. 390.

Suit for Appointment of New Trustees.]—Receiver appointed upon motion in a suit for the appointment of new trustees, reasons being assigned for the delay in bringing the cause to a hearing. *Bartley* v. *Bartley*, 9 Jur. 224.

Suit for Receiver—Pendente lite—Non-Prosecution.]—A suit for a receiver pendente lite is never brought to a hearing; therefore a motion to dismiss for want of prosecution was refused, with costs. *Edwards* v. *Edwards*, 22 L. J., Ch. 1055; 17 Jur. 826. And see *Anderson* v. *Guichard*, 9 Hare, 275.

—— **Probate Suit in Ecclesiastical Court.**]—A suit for a receiver pending a litigation for probate in the ecclesiastical court, is never brought to a hearing, and therefore cannot be dismissed for want of prosecution, but after the litigation is ended in the ecclesiastical court, the court will on motion dispose of the costs of the suit.

Barton v. *Rock*, 22 Beav. 81. *See now* Probate Act (20 & 21 Vict. c. 77) ss. 70, 71.

—— **Before Probate.**]—Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate, and made preparations to dispose of a portion of it, the court gave leave to the co-executor to issue a writ against him claiming an injunction, and praying for the appointment of a receiver. *Moore, In the Goods of*, 57 L. J., P. 37; 13 P. D. 36; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200.

See WILL.

e. After Decree.

Final Judgment — Whether New Action Necessary—"Cause or Matter Pending."]—So long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of s. 24, sub-s. 7, of the Judicature Act, 1873, and consequently, in an action by a creditor against a debtor in which the plaintiff has obtained final judgment, the court has power, under that sub-s., in order to satisfy the judgment, to grant equitable execution against the defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose. *Salt* v. *Cooper*, 50 L. J., Ch. 529; 16 Ch. D. 544; 43 L. T. 682; 29 W. R. 553—C. A. See also *Peace and Waller, In re*, 24 Ch. D. 405; 31 W. R. 899—C. A. And *Anglo-Italian Bank* v. *Davies*, 47 L. J., Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3—C. A.

When Granted.]—A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order. *Cooke* v. *Gwyn*, 3 Atk. 690. And see *Barker* v. *Roe*, 1 L. & T. 655. *S. C.*, Ir. Eq. R. 692.

—— **Urgency.**]—A receiver appointed after decree upon motion, in an urgent case. *Thomas* v. *Davies*, 11 Beav. 29.

—— **Decree for Sale.**]—Receiver appointed after a decree for sale. *Bywater's Estate, In re*, 1 Jur. (N.S.) 227.

—— **Executor Allowing Ground Rents to get into Arrear.**]—A receiver appointed where the executrix, being in possession of certain leasehold and other personal estate, had allowed ground rents to be in arrear, although the plaintiff had already obtained an order equivalent to a decree for sale and administration. *Bywater's Estate, In re*, 1 Jur. (N.S.) 227.

—— **Collection of Rents and Payment of Outgoings.**]—In a suit praying the declaration of the rights of parties, but not praying for a receiver after decree, matters having occurred showing a necessity for arrangements for the collection of rents, and for making provision for outgoings, the court granted a receiver. *Wright* v. *Vernon*, 3 Drew. 112.

—— **Creditor's Suit—Receiver not Prayed by Bill.**]—Motion by plaintiff in a creditor's suit after decree, but before report, for the appointment of a receiver, the bill not praying for a receiver. Refused with costs. *Fallows* v. *Dillon (Lord)*, 1 W. R. 101.

f. Indorsement of Writ and Prayer of Bill.

Plaintiff should Indorse Writ for.]—A plaintiff should indorse his writ with a claim for an injunction or for a receiver when the obtaining of either is a substantial object of his action. *Colebourne* v. *Colebourne*, 45 L. J., Ch. 749; 1 Ch. D. 690; 24 W. R. 235.

Receiver not asked — Power to Appoint at Hearing.]—A prayer for a receiver is not necessary to get a receiver appointed, if the facts stated authorise the appointment of a receiver. *Malcolm* v. *Montgomery*, 2 Moll. 500.

A receiver may be appointed at the hearing, though not prayed for. *Osborne* v. *Harvey*, 1 Y. & Coll. C. C. 116; 11 L. J., Ch. 42; *Bowman* v. *Bell*, 14 Sim. 392; 14 L. J., Ch. 119.

—— **On Interlocutory Motion.**]—The court will not appoint a receiver upon an interlocutory motion, unless the appointment of a receiver is prayed for by the bill. *Pare* v. *Clegg*, 7 Jur. (N.S.) 1136; 3 L. T. 648; 9 W. R. 216.

Partition Suit—Preservation of Property.]—In a suit for determining the right as between the plaintiff and defendant to certain estates, a decree was made declaring the right of the plaintiff and one of the defendants to two-thirds; owing to a previous partition suit, the decree contained no specific direction that the defendant, against whom the decree was, should deliver up possession. The bill did not pray nor make a case for a receiver, nor did the decree appoint a receiver. After the decree from which an appeal was pending, the defendant did not deliver up possession; there were charges and outgoings to be provided for, and owing to disputes between the parties, the tenants refused to pay their rents, either to the plaintiff or to the defendants. A receiver was appointed of the lands let to tenants, but not of the mansion-house and land in the personal occupation of the defendant, the court expressly refusing to make the appointment of a receiver ancillary to the exclusion of the defendant from possession, and granting it only to provide for the due receipt of the rents, and providing for the preservation of the property, and the payment of liabilities and outgoings. *Wright* v. *Vernon*, 3 Drew. 112.

Representatives of Estate out of Jurisdiction.]—The court will not appoint a receiver, in a cause, where the persons representing the estate are out of the jurisdiction, and have not appeared in the suit. *Shaw* v. *Shore*, 5 L. T., Ch. 79.

g. By Summons in Chambers.

Since Judicature Act—Originating Summons.]—Semble, that a receiver may be appointed under an originating summons. *Gee* v. *Bell*, 35 Ch. D. 160; 56 L. T. 305; 35 W. R. 805.

In an administration action, commenced by originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Francke, In re, Drake* v. *Francke*, 57 L. J., Ch. 437; 58 L. T. 305.

A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard a receiver was appointed. A statement of claim was delivered, but the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment:—Held, that the plaintiff should have proceeded by originating summons. The court made the usual foreclosure order, but directed the taxing-master to allow such costs as the plaintiff would have been entitled to if he had proceeded by originating summons and no more. *Barr* v. *Harding*, 58 L. T. 74; 36 W. R. 216.

Service of Summons on Foreigner out of Jurisdiction.]—There is no jurisdiction to give leave to serve a summons for appointment of a receiver on a judgment debtor who is a foreigner residing out of the jurisdiction. *Weldon* v. *Gounod*, 15 Q. B. D. 622.

Before Judicature Act—Supplying place of Receiver already Appointed.]—When the application for the appointment of a receiver is made for the first time in the cause it must be heard in court; but where the application is only to supply the place of a receiver already appointed, and whose office has become vacant by death or otherwise, it may be made in chambers. *Grote* v. *Bing*, 9 Hare (App.) 1; 1 W. R. 80.

Appointment by Consent.]—Application for appointment of receiver by consent should be by summons at chambers. *Blackborough* v. *Ravenhill*, 16 Jur. 1085; 1 W. R. 56.

Management of Property—15 & 16 Vict. c. 80, s. 26.]—In an administration suit, where an order had been made that the trustees of the estate of the testator in the cause should continue to receive the rents and profits and proceeds of the estate, and keep down the annuities bequeathed by his will, and from time to time pass their accounts in chambers, and pay in their balances, an order appointing a receiver was made in chambers by a vice-chancellor personally, upon the application of some of the beneficiaries, upon the ground that the trustees had made default in passing their accounts. The trustees and other parties opposed the application:—Held, that this was a matter connected with the management of property within the 15 & 16 Vict. c. 80, s. 26, and that the judge had jurisdiction to make the order in chambers. *Booth* v. *Coulton*, 16 W. R. 683.

After Elegit returned.]—A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver:—Held, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A.

Motion or Summons—Chancery Division.]—A motion was made in an action for the appointment of a receiver by way of equitable execution of the property of two defendants in an action, for the purpose of obtaining payment of costs which they had been ordered to pay. It was contended on the part of the two defendants that the application should have been made by the less costly method of summons in chambers, according to the practice of the queen's bench division, and that such an appointment should not be made unless it was shown to be absolutely necessary in order to obtain payment of debt:—Held, that the applicants were justified in proceeding by motion according to the practice in the chancery division, but that it was worthy of consideration whether such an application should not be made in chambers in the future, and that where such an application was made by motion it would be a question for consideration whether the applicant should have the whole of his costs; and the appointment asked for was made, as it did not appear that the defendants possessed sufficient property available for obtaining payment of the costs in any other way. *Hartley, In re, Nuttall v. Whittaker*, 66 L. T. 588. *See* col. 31.

h. On Application of Defendant.

Judicature Act, Under.]—Under Judicature Act, Ord. LII. r. 4, a defendant in an action may, before judgment, apply for an injunction and a receiver. *Sargant* v. *Read*, 45 L. J., Ch. 206; 1 Ch. D. 600.

A defendant may do so notwithstanding that the plaintiff has already served notice of motion for the like purpose; and in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to the plaintiff. *Ib.*

A receiver may now be appointed in a partnership suit at the instance of the defendant. *Ib.*

Executor against Co-executor.]—A motion by a defendant for a receiver is irregular, even in a case where one executor filed a bill against the co-executor, insisting that a receiver was necessary. *Robinson* v. *Hadley*, 11 Beav. 614; 18 L. J., Ch. 428.

Redemption Suit, in.]—Quære, whether on petition, by the defendant in a suit for redemption, a receiver can be granted against the plaintiff, the mortgagor in possession, none being asked by the bill. *Barlow* v. *Gains*, 8 Beav. 329.

Cross Bill.]—Semble, defendant seeking to appoint a receiver before decree must file a cross-bill. *Grote* v. *Bury*, 1 W. R. 92.

i. Form of Order.

Should state over what Property Receiver Appointed.]—An order for a receiver ought to state distinctly on the face of it over what property the receiver is appointed. *Crow* v. *Wood*, 13 Beav. 271.

Further Consideration—Minutes.]—Where a receiver has been appointed generally in an action it is unnecessary, when the action comes on upon further consideration, to insert in the minutes a direction to continue the receiver.

Underwood, In re, Underwood v. *Underwood*, 60 L. T. 384; 37 W. R. 428.

j. Date of Appointment.

Giving Security.]—An order was made at the suit of an equitable mortgagee "that C. E. M., upon his giving security, be appointed receiver," of certain chattels comprised in the security. After this order, but before security had been given, an execution creditor of the mortgagor took the chattels in execution:—Held, that the receiver was not constituted receiver till he had given security, and that the taking the chattels in execution was not a contempt of court. *Edwards* v. *Edwards*, 45 L. J., Ch. 391; 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713—C. A.

But when the security is given the order relates back to the date when it was made. *Evans, Ex parte, Watkins, In re*, 49 L. J., Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127—C. A.

—— **Validity of Execution.**] — An action was brought by debenture-holders to realise their security. On the 10th Jan., 1883, A. was appointed interim receiver, with power to take possession of the property of the company. On the 12th Jan., 1883, he was continued as receiver. In neither order was there any direction as to his giving security. The receiver entered into possession and remained, and was in possession on the 18th March, 1888, when a judgment creditor of the company levied execution on the goods and chattels of the company, then in the possession of the receiver. The receiver gave notice of his claim on behalf of the debenture-holders, and an interpleader issue was directed. On the 21st April, 1888, the ordinary judgment in a debenture-holders' action was taken, and the receiver was continued and was directed to give security:—Held, that the receiver had been duly appointed with directions to take possession; that he was therefore validly in possession; and that the judgment creditor was not entitled to the goods. *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588.

—— **Liability of Receiver.**]—The principle that the appointment of a receiver is merely conditional until his security is perfected, applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received and expended by him as receiver. *Smart* v. *Flood*, 49 L. T. 467.

k. Costs.

Debtor in Person—Court not Properly Assisted.]—On appeal by the defendant to the lord chancellor, his lordship ordered the plaintiff's motion for a receiver and manager before the master of the rolls to be dismissed, but refused the costs of that motion, on the ground that the defendant, who had appeared in person, had in so doing prevented the court below from having all the assistance which was necessary for a right decision in the case, and had thus led to the plaintiff's obtaining the order appealed from, and which his lordship discharged. *Hall* v. *Hall*, 3 Mac. & G. 79; 20 L. J., Ch. 585; 15 Jur. 363.

Costs of Appointment of Receiver and Landlord's Claim for Rent.]—The petitioner is entitled to be paid the costs of the appointment of a receiver out of a fund realised by him in priority to the landlord's claim for rent. *Read* v. *Corcoran*, 1 Ir. Ch. R. 235.

In Partnership Suit.]—A motion for a receiver made by a plaintiff in a partnership suit was ordered to stand over till the hearing of the cause, and no order was made as to the costs of the motion. Afterwards the common order was made for dismissing the bill for want of prosecution:—Held, that the defendant's costs of the motion must be allowed him as costs in the cause. *Corcoran* v. *Witt*, 41 L. J., Ch. 67; L. R. 13 Eq. 53; 25 L. T. 653.

Receiver Pendente lite in Probate Suit—Liability of Executors.]—When a will had been proved and afterwards impeached and declared void, the executors condemned in costs, and a suit instituted for a receiver pendente lite which had failed, a motion to make the executors pay the costs of the suit for the receiver was refused. *Grimston* v. *Timms*, 22 L. T. 646; 18 W. R. 747.

l. Receiver and Manager, of.

See COMPANY (DEBENTURES)—PARTNERSHIP.

2. FOR WHOSE BENEFIT.

Receiver of Court Holds on Behalf of All.]—A receiver appointed by the court is appointed on behalf of all parties. *Davis* v. *Marlborough (Duke)*, 2 Swanst. 118.

Money in a receiver's hands is in custodiâ legis, for whoever can make out a title to it. When a puisne incumbrancer obtains the appointment of a receiver, any prior creditor may file a bill, and attach the rents in his hands. *Delany* v. *Mansfield*, 1 Hog. 234.

N. and P., incumbrancers, moved that their reported demand should be paid out of the rents paid in by the receiver, which they insisted should, as to T., an incumbrancer to whose cause the receiver was extended, be considered as bygone rents, having been collected by their diligence in causes to which T. was not a party, and long before T. had obtained a decree or receiver:—Held, that the fund could not be paid out without regard to the priority of T., and that it should accordingly be extended to all the causes; that a fund in court is never to be considered as bygone rents, but in custodiâ legis for the persons entitled in priority. *Murtagh* v. *Tisdall*, 2 Ir. Eq. R. 41.

—— **An Officer of the Court.**]—The rights of parties are not affected by the appointment of a receiver by the court. The receiver is an officer of the court, holding the property for the party who may ultimately appear to be entitled to it. *Portman* v. *Mill*, 8 L. J., Ch. 161.

A receiver, who had been appointed, in consequence of the misconduct and incapacity of trustees under a will, discharged upon the appointment of new trustees by the court. *Bainbrigge* v. *Blair*, 3 Beav. 421; 10 L. J., Ch. 193.

A receiver is appointed for the benefit of all parties interested, and will not therefore be discharged merely on the application of the party at whose instance he was appointed. *Ib.*

A receiver appointed by the court of chancery in an adverse suit, is not the receiver of the

inheritor within the meaning of the 4 & 5 Will. 4, c. 82. *Anon.*, 3 Ir. Eq. R. 501.

Incumbrancers.]—The appointment of receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and they choose to avail themselves of it. *Gresley* v. *Adderley*, 1 Swanst. 579; 18 R. R. 146.

Specific Performance.]—Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm* v. *Wood*, Turn. & R. 345.

Possession of Receiver.]—Money in the hands of a receiver is not in custodiâ legis in the same way as it is when in the hands of a sequestrator. *Hoare, In re, Hoare* v. *Owen*, 61 L. J., Ch. 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R. 105.

A receiver was appointed by the court of an estate which had been mortgaged to A. By a decree dated in December, 1827, the receiver was ordered to be discharged, and pay the balance in his hands to A. The receiver continued to receive the rents until 1830, but paid them over to A., and, after that time, the rents were paid by the tenants to A:—Held, that the possession of the receiver after December, 1827, was the possession of A., and that, therefore, A. had been in possession from that time. *Horlock* v. *Smith*, 11 L. J., Ch. 157; 6 Jur. 478.

The trustee and executor of A. B., the owner of one moiety of a plantation in Jamaica, took a lease of the other moiety from E. and F., the owners of it, at a certain rent, and with covenants to keep it in repair, &c. A suit was subsequently instituted in England, by the parties interested under the will of A. B., for the execution of the trusts of the will, and certain parties in Jamaica were appointed receivers and managers of the estates of A. B. These parties entered into possession of the entire plantation, and remitted the proceeds to the consignees in England appointed in the suit, who paid the sums received into court. No rent having, for many years, been received by E. and F. in respect of their moiety of the plantation, a petition was presented by them for payment out of the funds in court of the arrears of rent due, and also of a sum which they claimed in respect of dilapidations during the receiver's occupation. E. and F. were not parties to the suit:—Held, that, notwithstanding that some of the parties interested under the will of A. B. were under disability, yet that they were bound by the occupation of the receivers, and that E. and F. were entitled to an order for payment of the arrears of rent, and to a reference in respect of the dilapidations. *Neate* v. *Pink*, 3 Mac. & G. 476; 21 L. J. Ch. 574; 16 Jur. 69.

Inspectorship Deed.]—When a receiver is appointed under an ordinary inspectorship deed, the inspectors, though they appoint and may remove him, are not responsible for his default, as if he were their agent. *Hobson* v. *Jones*, 39 L. J., Ch. 245; L. R. 9 Eq. 456; 22 L. T. 143; 18 W. R. 477.

3. Other Matters.

Application under 4 & 5 Will. 4, c. 55.]—The receiver in the cause is the proper person to present the petition, and to make the verifying affidavit for a receiver under the 4 & 5 Will. 4, c. 55, upon a tenant's recognisance. *Daly* v. *Lynch*, 9 Ir. Eq. R. 2.

Affidavit going beyond Allegations in Bill.]—Where facts, not founded on allegation in the bill, are introduced into affidavits in support of an application for a receiver, the court will disregard them, and a defendant acts properly in not answering them. *Dawson* v. *Yates*, 1 Beav. 301; 2 Jur. 960.

Interference with Receiver—Contempt.]—Any interference with a receiver appointed by the court is a contempt. *Helmore* v. *Smith*. *See* col. 62.

Administration Action, in.]—*See* Executor and Administrator.

Debenture-holders' Action, in.]—*See* Company.

Equitable Execution, by way of.]—*See* col. 31, and Execution.

Mortgagee, by.]—*See* Mortgage.

Partnership Action, in.]—*See* Partnership.

Railway Companies Act, Under.]—*See* Railway.

II. Who may be.

1. General Principles.

Nominee of Person having Carriage of Order.]—The nominee of the party who has the carriage of the order for a receiver, will be appointed, unless some other party shall propose a more eligible person. *Wilson* v. *Poe*, 1 Hog. 322.

Receiver undertaking to Act under Directions of Expert.]—The appointment of a person as receiver over a kind of property, the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it, is proper. *Lupton* v. *Stephenson*, 11 Ir. Eq. R. 484.

The appointment of a receiver, who acts under the direction of a defendant, is objectionable. *Ib.*

A reference to appoint a receiver sent back to the master, though the master's selection had been affirmed by the master of the rolls. *Ib.*

Lunatic's Estate—Nominee of Master.]—The person whom the master has approved for the office of receiver of lunatic's estate must, to reject him, be shown incompetent, not merely another person more eligible. *Bangor (Lord), In re*, 2 Moll. 518.

Discretion of Court—Appeal.]—The court of appeal will not, except in an extreme case, disturb the selection of a receiver by a judge, unless there is some objection, in point of principle, to the person appointed. *Cookes* v. *Cookes*, 2 De G. J. & S. 526.

How objections in point of principle are to be treated where the order gives the person objected to liberty to propose himself as receiver. *Ib.*

Liquidator appointed Receiver.]—An order

having been made for continuing under supervision the voluntary winding-up of a company, under which a liquidator had been appointed, an equitable mortgagee of property of the company filed a bill to enforce his security, and obtained an order for a receiver. The company proposed the liquidator as receiver, but the judge in chambers appointed another person, who had been proposed by the plaintiff:—Held, that the liquidator, inasmuch as no personal objection was alleged against him, ought to have been appointed receiver, since the appointment of another person would cause great and unnecessary expense; and that this was a matter of principle, so that an appeal from the appointment by the judge could be entertained. *Perry* v. *Oriental Hotels Co.*, L. R. 5 Ch. 420; 23 L. T. 525; 18 W. R. 779. *See* COMPANY.

Appointment without Salary — Security — Premiums paid to Guarantee Society—How to be Borne.]—Where a receiver is appointed without salary, but has to find security, premiums paid by him to a guarantee society for joining in the security will be allowed to him in his accounts, but such payments will not be allowed in the case of a receiver appointed with salary. *Harris* v. *Sleep*, 66 L. J., Ch. 511; [1897] 2 Ch. 80; 76 L. T. 458; 45 W. R. 536.

—— Extra Work — Wages — Allowances — Time of Application.]—A person who agrees to act as receiver and manager without salary, and does not at the time of his appointment obtain the sanction of the court to his receipt of wages for extra work done for the business, runs a risk of losing those wages altogether; but the court will in a proper case make allowances for extraordinary services. *Harris* v. *Sleep*, 66 L. J., Ch. 596; [1897] 2 Ch. 80; 76 L. T. 670; 45 W. R. 680—C. A. *See* col. 58.

2. PARTICULAR PERSONS.

Barrister.]—The master's judgment is conclusive in appointing a receiver, unless some substantial objection is shown. It is no objection to a receiver that he is a practising barrister; but the solicitor in the cause cannot be receiver. *Garland* v. *Garland*, 2 Ves. J. 137.

Petition to change a receiver. The master's judgment not absolutely conclusive, but the court interferes with reluctance. The recommendation of the testator, and the respect due to a considerable family, are to be attended to in the appointment. The circumstances of the person proposed (in this instance a relation of the family), a resident, distant from the estate, being in parliament, and a practising barrister in town, though no absolute disqualification, are to be considerably regarded. Distinction with reference to such circumstances, between an auditor and a receiver with powers to let and manage, &c. *Wynne* v. *Newborough* (*Lord*), 15 Ves. 283.

Clergyman.]—Motion that receiver being a clergyman (having cure of souls), may be discharged, as he cannot now act under the late stat. 5 Geo. 4, c. 91, s. 2. Ordered. *Mayne* v. *Mayne*, 2 Moll. 362.

Heir-at-Law.]—The heir-at-law may be appointed the receiver, but, except by consent, without poundage. A direction that the heir-at-law should be at liberty to offer himself to the master, has no effect further than to put aside the disability under which a party ordinarily is of becoming receiver in the cause in which he is a party. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

Next Friend.]—Prochain ami of infant plaintiffs not permitted to act as receiver. *Stone* v. *Wishart*, 2 Madd. 64.

Partner.] — A retired partner, who had advanced all the capital, and was liable to the partnership debts, appointed receiver of the partnership assets on his own application. *Hoffman* v. *Duncan*, 18 Jur. 69. *See* PARTNERSHIP.

Peer.]—Peer not to be a receiver. *Att.-Gen.* v. *Gee*, 2 Ves. & B. 208.

Solicitor.]—A solicitor is eligible as receiver, but he cannot act as solicitor in any of the proceedings which it may be necessary for him to take as receiver. *Wilson* v. *Poe*, 1 Hog. 322.

Solicitor under a commission of lunacy not to be appointed receiver of the estate of the lunatic. *Pincke*, *Ex parte*, 2 Mer. 452.

The 143rd general order, forbidding any clerk or agent of a solicitor to be appointed a receiver, is general, and not confined to clerks or agents of the solicitors in the cause or matter. *Stokes*, *In re*, 1 Jo. & Lat. 675; 7 Ir. Eq. R. 450.

The 143rd general order applies as well to the extension as to the appointment of a receiver; and therefore where a solicitor's clerk was appointed a receiver before the making of the order, he will not be extended to other lands of the debtor on the application of another judgment creditor. *Meara* v. *Egan*, 9 Ir. Eq. R. 259.

A., who was a member of a firm of solicitors, was appointed executor of a will, probate of which was contested. Immediately after the testator's death A. commenced against his widow an action in the chancery division to administer his estate, the writ in which was by leave of the court amended by asking for a receiver pending the litigation in the probate division. A.'s firm appeared for both the plaintiff and defendant in the chancery action, and an order was made appointing A. to be receiver of the personal estate until the decision of the probate action, and also to receive the rents of the real estate, the only security ordered being the payment of 2,000*l.* into court, though the rents were about 3,500*l.* per annum. The widow afterwards obtained an order to change her solicitors, and moved to discharge A. from being receiver. She denied having given the firm any authority to appear for her, and it was established, at all events, beyond doubt that she had never sanctioned the appointment of A. as receiver:—Held, by the court of appeal, that the appointment of A. as receiver was improper, for that the appointment of a member of the firm of the plaintiff's solicitors to be receiver makes it impossible to secure the proper checking of the receiver's accounts, and that a party to the action ought not, except in an extreme case, to be appointed a receiver without the assent of the other party. A. was accordingly discharged from being receiver and ordered to pay the costs both in the appeal court and in the court below. *Lloyd*, *In re*, *Allan* v. *Lloyd*, 12 Ch. D. 447; 41 L. T. 171; 28 W. R. 8—C. A.

Trustee.]—General rule, that a trustee shall not be the receiver, with emolument. *Sutton* v. *Jones*, 15 Ves. 584.

Trustee not to be receiver, unless a special case, and without emolument. *Sykes* v. *Hastings*, 11 Ves. 363.

The trustee cannot be receiver. *Anon.*, 3 Ves. 515.

Where a trustee offers to act as receiver without salary, he will be allowed to propose himself, but the master is not bound to accept him. *Banks* v. *Banks*, 14 Jur. 659.

A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property is not under ordinary circumstances entitled to a salary as receiver. *Pilkington* v. *Baker*, 24 W. R. 234.

3. Party to Suit.

No Objection to Appointment of Party.]—It is no objection to a receiver that he is a party in the cause. *Downshire* v. *Tyrrell*, Hayes, 354.

Judgment Creditor.]—The plaintiff, who had obtained judgment against the defendants, husband and wife, was upon his application ex parte appointed receiver of the income of the wife's reversionary interest under a will. *Fuggle* v. *Bland*, 11 Q. B. D. 711.

Married Woman—Separate Estate—Remuneration.]—In an action against a married woman alleged to be possessed of separate estate, no defence was delivered, and the master found that she was entitled to separate property vested in trustees and subject to certain charges. The plaintiff was appointed receiver without security of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without remuneration. *M'Garry* v. *White*, 16 L. R., Ir. 322.

Mortgagee.]—A defendant, a mortgagee, in the absence of any direct authority to be found in the books, was appointed the consignee, manager, and receiver of the mortgaged estates. *Davis* v. *Barrett*, 13 L. J., Ch. 304.

Partner.]—Pending the winding up of the business of a partnership, which had become dissolved by the death of one of the partners, it is a ground for appointing a receiver and manager, and for not appointing the surviving partner to the office, that the latter has, while carrying on the business after his partner's death, so acted as to diminish the value of the assets by transferring to a new business to be carried on by himself, the benefit of the custom and goodwill of the business. *Young* v. *Buckett*, 51 L. J., Ch. 504; 46 L. T. 266; 30 W. R. 511. *See* Partnership.

Plaintiff in Action for Specific Performance.]—In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the court of appeal (no previous application having been made to the divisional court or a judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the court might make in the matter. *Hyde* v. *Warden*, 1 Ex. D. 399; 25 W. R. 65.

In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an ex parte motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the vice-chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the court, and to abide by any order which the court might make as to damages or otherwise. *Taylor* v. *Eckersley*, 45 L. J., Ch. 527; 2 Ch. D. 302; 34 L. T. 637; 24 W. R. 450—C. A.

Residuary Legatee.]—A testator devised all his real and personal estate to his daughter and her husband for life, "with reversion at their deaths to his granddaughter S. L. R.," and he appointed the husband of his daughter sole executor. On a bill by S. L. R. against the executor, alleging irreparable waste and injury to the testator's estate, some parts of the testator's personal estate having been taken in execution by the sheriff under a judgment, recovered against the executor for his own private debt, and a threatened immediate sale thereunder: S. L. R. was appointed receiver instanter on waiving all salary, and giving the usual security. *Rawson* v. *Rawson*, 11 L. T. 595.

Unpaid Vendor.]—On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary. *Boyle* v. *Bettws Llantwit Colliery Co.*, 45 L. J., Ch. 748; 2 Ch. D. 726; 34 L. T. 844.

4. Master's Report.

Exceptions to—Impeaching Propriety of Appointment.]—Exceptions to a master's report of a proper person to be receiver, overruled, as the report ought to stand till the party approved is impeached as an improper person. *Creuze* v. *London (Bishop)*, 2 Bro. C. C. 253; Dick. 687. *Thomas* v. *Dawkin*, 3 Bro. C. C. 508; 1 Ves. 452.

Proper way to bring report appointing receiver before court, is by exceptions to it. *S. C.*, Dick. 687.

To maintain an exception to the master's appointment of a receiver, a strong case of disqualification is necessary. *Tharpe* v. *Tharpe*, 12 Ves. 317; *Wilkins* v. *Williams*, 3 Ves. 588; *Anon.*, 3 Ves. 515.

III. IN WHAT CASES AND OVER WHAT PROPERTY.

1. General Principles.

a. Before Judicature Act, 1873, s. 25 (8).

Receiver against Legal Title.]—A receiver will not be appointed where the rights, as between the plaintiff and defendant, are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to his security is alleged. The plaintiff sued as heir,

and the answer neither admitted nor denied that he held that character :—Held, that this alone was not a sufficient ground for refusing a receiver. *Lancashire* v. *Lancashire*, 9 Beav. 120 ; 15 L. J., Ch. 54 ; 9 Jur. 956.

The authorities as to the jurisdiction of the court of chancery to interfere, where parties are claiming real estate under a legal title, by appointing a receiver and restraining waste, considered. *Talbot (Earl)* v. *Scott*, 4 Kay & J. 96 ; 27 L. J., Ch. 273 ; 4 Jur. (N.S.) 1172 ; 6 W. R. 269.

It is settled beyond doubt that the court will not interfere, at the instance of a person merely alleging a legal title to realty, to grant a receiver as against other persons who are in possession of the estate. And the fact that the amount of the rents at stake is very large does not alter the case. *Ib.*

The court will not grant a receiver of real estate pending litigation between adverse claimants where the claimants are merely legal, notwithstanding the possession at the time of filing the bill is vacant. *Dunn* v. *Ferrior*, 37 L. J., Ch. 569 ; L. R. 3 Ch. 719 ; 18 L. T. 65, 806 ; 16 W. R. 454, 922 ; *Cremen* v. *Hawkes*, 2 Jo. & Lat. 674 ; 8 Ir. Eq. R. 503.

There is no jurisdiction in lunacy to interfere between adverse claimants to the real estate of a deceased lunatic ; therefore, the lords justices sitting in lunacy will not entertain an application for the appointment of a receiver after the death of the lunatic, but will impound the title-deeds in the hands of the committee of the lunatic's estate pending the litigation, and will leave the matter to be dealt with under the original jurisdiction of the court below. *Ib.*

Property in Danger.]—Where the right to property, which is the subject of litigation, depends on questions to be decided at law, the jurisdiction in equity to grant a receiver is only to be exercised when there is a reasonable probability of success, and the property, the subject of the suit, is in danger. *Bainbrigge* v. *Baddeley*, 3 Mac. & G. 413. Reversing, 20 L. J., Ch. 139.

Fraud.]—A receiver may be appointed against the legal title in a strong case of fraud upon affidavits ; but under the circumstances of this case, an application after answer for that purpose, an injunction against committing waste and disposing of the estate was refused. *Lloyd* v. *Passingham*, 16 Ves. 59 ; 3 Mer. 697 ; *Stilwell* v. *Williams*, 6 Madd. 49.

Abused Confidence.]—Receiver upon motion against the legal estate under a conveyance, upon a strong suspicion of abused confidence arising upon the answer. *Huguenin* v. *Baseley*, 13 Ves. 105 ; 9 R. R. 148, 276.

Rents in Danger.]—The court will not order the receiver of an estate where the matters in dispute depend on a mere legal title, except strong ground of title is shown, and the rents are in danger. *Mordaunt* v. *Hooper*, Ambl. 311.

Danger of Eviction.]—The court will interfere by a receiver to preserve a property where there is danger of eviction, even although the plaintiff's demand is disputed, if he has a primâ facie right. *Fetherstone* v. *Mitchell*, 9 Ir. Eq. R. 480.

Receiver at Instance of Heir-at-Law.]—A receiver of rents of real estate will not be appointed at the instance of a person who has been found to be the testator's heir-at-law by the chief clerk's certificate, on a reference for that purpose in a creditor's suit. *Topping* v. *Searson*, 6 L. T. 449.

Mine—Laches in Raising Claim.]—Motion for a receiver on a mining concern refused, upon a claim of partnership in the equitable interest, not raised until the concern, at a great expense, became prosperous, and denied by answer. *Norway* v. *Rowe*, 19 Ves. 144 ; 12 R. R. 157.

b. Since Judicature Act.

Judicature Act, 1873, s. 25 (8).]—*A receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just.*

Section 25 (8) has very much enlarged the powers which courts of equity formerly possessed of granting receivers. *Anglo-Italian Bank* v. *Davies*, 47 L. J., Ch. 833 ; 9 Ch. D. 275 ; 39 L. T. 244 ; 27 W. R. 3.

Discretion of Court—Interlocutory Application.]—Under sub-s. 8 of s. 25 of the Judicature Act, 1873, the court has a discretion as to the appointment of a receiver. The power given by sub-s. 8 of s. 25 can be exercised at the trial of an action, as well as upon an interlocutory application. *Prytherch, In re, Prytherch* v. *Williams*, 59 L. J., Ch. 79 ; 42 Ch. D. 590 ; 61 L. T. 799 ; 38 W. R. 61.

Just and Convenient.]—"Just or convenient" must be read just and convenient. *N. L. Ry.* v. *G. N. Ry.*, col. 3.

—— **Title to Property in Dispute.**]—The court has power under the Judicature Act, 1873, s. 25, to appoint a receiver where the title to the property is disputed. *Dunn* v. *Ferrior* (L. R. 3 Ch. 719) and *Talbot* v. *Hope-Scott* (4 Kay & J. 139) are no longer law. *Berry* v. *Keen*, 51 L. J., Ch. 912.

The plaintiff in an ejectment action which was set down for trial, but had been stayed until another action affecting the same property, and brought by the defendant in ejectment against the plaintiff and others, should be ready for trial, moved for a receiver and for attornment to him. The defendant in ejectment set up a defence that in equity the plaintiff was only a sub-mortgagee. The evidence in support of the motion showed that the property was wasting, and that, even if the plaintiff was only sub-mortgagee, it was insufficient for the original mortgage upon it ; and this evidence was not met to the satisfaction of the court :—Held, that under the circumstances it was just and convenient within the Judicature Act, 1873, s. 25, sub-s. 8, now to appoint a receiver ; and an order was made accordingly, unless the defendant elected within four days to pay an occupation rent into court, the amount to be settled in chambers. *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 706.

Legal Mortgagee—Properties Mixed.]—The plaintiff was legal mortgagee over some property

and equitable mortgagee over other, the properties being mixed, and the whole comprised in one security. On motion for the appointment of a receiver over the whole:—Held, that the Judicature Act, 1873, s. 25, sub-s. 8, gave the court power to appoint a receiver over the legal as well as the equitable property, where, as in this case, it was "just or convenient" to do so. *Pease* v. *Fletcher*, 45 L. J., Ch. 265; 1 Ch. D. 273; 33 L. T. 644; 24 W. R. 158.

—— **Mortgagee in Possession.**]—A receiver may be appointed at the instance of a legal mortgagee, but he has no absolute right to a receiver. A mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasure; having once assumed the responsibilities attaching to a mortgagee in possession, he cannot at his own pleasure get rid of them, and as a general rule the court will not by appointing a receiver assist him to do so. *Mason* v. *Westoby* (32 Ch. D. 206) considered. *Prytherch, In re, Prytherch* v. *Williams*, supra.

Legal Mortgagee prevented from Taking Possession.]—A legal mortgagee of business premises such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises. Form of order appointing a receiver and manager, with an injunction. *Truman* v. *Redgrave*, 50 L. J., Ch. 830; 18 Ch. D. 547; 45 L. T. 605; 30 W. R. 421.

Receiver in Lieu of Sequestration.]—Plaintiff in an action, which had been followed by a cross action, obtained an order in both actions that his costs of the cross action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the defendant's address, so as to serve the subpœna for costs. He then moved the court for a receiver, under s. 25, sub-s. 8 of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:—Held, that the principle of *Anglo-Italian Bank* v. *Davies* (9 Ch. D. 275) applied, and that the plaintiff was entitled to a receiver. *Bryant* v. *Bull*, 48 L. J., Ch. 325; 10 Ch. D. 153; 39 L. T. 470; 27 W. R. 246. *See also* Partnership Act, 1890, s. 23 (2).

Defendant before Judgment.]—Under Ord. LII. r. 4, a defendant in an action may, before judgment, apply for an injunction and a receiver. *Sargant* v. *Read*, 45 L. J., Ch. 206; 1 Ch. D. 600.

A defendant may do so notwithstanding that the plaintiff has already served notice of motion for the like purpose; and in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to the plaintiff. *Ib.*

A receiver may now be appointed in a partnership suit at the instance of the defendant. *Ib.*

Enforcing Order of another Branch of the Court — Alimony.]—The probate and divorce division ordered a husband, against whom it granted a divorce, to pay alimony. The divorced wife brought an action in the chancery division against her late husband, and the trustees of a post-nuptial settlement made by him during the continuance of a former marriage, to enforce payment of arrears, and recurring payments of alimony, by the appointment of a receiver of his life interest under such settlement:—Held, that she was entitled to the appointment of a receiver, and that the court would not take into consideration the injury done to the children of the former marriage, by depriving their father of his power to consent to their advancement out of the settlement funds. *Oliver* v. *Lowther*, 42 L. T. 47; 28 W. R. 381.

Real Estate in Ireland—Discretion of English Court.]—On an application for the appointment of a receiver of real estate in Ireland great weight ought to be given to the provisions of the legislature for dealing with such matters under the Supreme Court of Judicature Act (Ireland), 1877, and s. 57 thereof. But where the applicants were willing that the present agent of the Irish estates, who had never experienced any difficulty in collecting the rents, should be appointed receiver, the court considering that the difficulties attending the appointment of a receiver of Irish estates by the English court were considerably modified by that circumstance, appointed him receiver. *Bolton* v. *Curre*, 70 L. T. 759.

Where Interpleader Issue directed.]—An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8, and Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed. *Howell* v. *Dawson*, 13 Q. B. D. 67.

2. Special Cases.

a. Administration Action.

The court will not appoint a receiver against an executor unless due cause is shown. *Richmond* v. *White*, 48 L. J., Ch. 798; 12 Ch. D. 361; 41 L. T. 570; 27 W. R. 878. And see *Wells, In re, Molony* v. *Brooke*, 59 L. J., Ch. 810; 45 Ch. D. 569; 63 L. T. 521; 39 W. R. 139; and *Harris* v. *Harris*, 56 L. J., Ch. 754; 56 L. T. 507; 35 W. R. 710.

Consent Proceedings in Mayor's Court—Receiver in Chancery Division.]—A trader in the city of London against whom proceedings in bankruptcy were pending died insolvent before adjudication, leaving all his property to his wife and appointing her his executrix. A creditor immediately filed a bill for a receiver until a personal representative should be constituted. The wife proved the will before a receiver had been appointed, and the creditor thereupon amended his bill, praying administration of the estate and a receiver. On the day on which the amended bill was served a bill for administration was filed by another creditor in the mayor's court, a decree taken by consent for administration, and a receiver appointed. The creditor in that suit was a friend of the testator, who had just before the testator's death supported a proposal made by him for a composition with his creditors. Part of the assets was out of the

jurisdiction of the mayor's court:—Held, that although the court will not generally interfere with the proceedings of another court which has power to do complete justice, yet, in the peculiar circumstances of the case, it was right to appoint a receiver in the chancery suit. *Nothard* v. *Proctor*, 45 L. J., Ch. 302; 1 Ch. D. 4; 33 L. T. 709; 24 W. R. 34—C. A.

Proceedings in two Courts.]—An action was commenced in the court of one of the vice-chancellors for the administration of the estate of a testator, against the administrator with the will annexed. The administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in the court of a different vice-chancellor, and then became bankrupt. The plaintiff in the first suit moved in that suit that a receiver of the estate might be appointed, and that the plaintiff might be permitted to prosecute the second action in the name of the administrator:—Held, that the plaintiff was entitled to the order asked for, and that it was properly made in the court to which the first action was attached. In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bankrupt executor or administrator. *Hopkins, In re, Dowd* v. *Hawtin*, 19 Ch. D. 61; 30 W. R. 601—C. A.

Action commenced in District Registry.]—In a creditor's action for the administration of a testator's real and personal estate, which was commenced in a district registry, it was held, that the court had jurisdiction to appoint a receiver. *Capper, In re, Robertson* v. *Capper*, 26 W. R. 434.

After Grant of Administration.]—When administration has been granted the court will not exercise its jurisdiction to appoint a receiver of personal estate, unless a special case is made—a rule which will be strictly enforced, since the 20 & 21 Vict. c. 77, enables the court of probate to appoint an administrator pendente lite, with powers similar to those of a receiver. *Hitchin* v. *Birks*, L. R. 10 Eq. 471; 23 L. T. 335; 18 W. R. 1015.

b. Benefices and Offices.

Charge of Annuity by Vicar—Exchange of Livings.]—A vicar, whilst the 13 Eliz. c. 20, against charging benefices was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and devising the new living, and that, in the meantime, it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Eliz.:—Held, that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. *Metcalfe* v. *York* (*Archbishop*), 6 Sim. 224; 1 Myl. & C. 547; 6 L. J., Ch. 65.

Incumbrancers on Rectory.]—A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer. *White* v. *Peterborough* (*Bishop*), 3 Swan. 109; 19 R. R. 183.

A receiver appointed of the profits of a rectory under sequestration, and an injunction granted against enforcing sequestration. *Silver* v. *Norwich* (*Bishop*) 3 Swan. 112, n.

Charge of Annuity on Benefice.]—A receiver will be appointed over the tithes and glebe of the grantor of an annuity who has charged it on the benefice he had at the time of the grant, and covenanted to charge it on any benefice he might thereafter possess, on his being promoted, if a sufficient arrear of annuity is due. *Strange* v. *Ormsby*, 2 Hog. 55.

Repairs of Church.]—Where a receiver is appointed over tithe rent-charge, the funds realised by him are applicable, in the first instance, to the repairs of the church. *Cullen* v. *Killaloe* (*Dean and Chapter*), 2 Ir. Ch. R. 133.

Charge on Canonry—Public Policy.]—Where a canon was entitled to a share of the revenues of lands, &c., vested in the corporation, in consideration of future duties to be performed during the year, for his own and not for the public benefit, and he had assigned his canonry by way of mortgage:—Held, that such security was valid, and a case for the appointment of a receiver. Principles of public policy on which pay, pensions, &c., are held to be inalienable. *Grenfell* v. *Windsor* (*Dean*), 2 Beav. 544.

Judgment against Incumbent.]—Where a creditor has obtained a judgment against an incumbent, the court can, on a case for a receiver being made, appoint a receiver of the profits of the living. *Hawkins* v. *Gathercole*, 1 Sim. (N.S.) 63; 20 L. J., Ch. 59; 14 Jur. 1103.

Motion by judgment creditors for the appointment of a receiver of the profits of an ecclesiastical benefice so as to put a subsequent judgment creditor who had obtained a sequestration out of possession:—Refused, on the grounds, first, that the court would not disturb a subsequent incumbrancer, who had got in aid a legal right by his greater diligence; and secondly, that the plaintiffs had, by express contract with the incumbent, renounced in his favour their right to receive the ecclesiastical profits. *Bates* v. *Brothers*, 2 Eq. Rep. 321; 23 L. J., Ch. 150, 782; 17 Jur. 1174; 18 Jur. 715; 2 W. R. 116.

Charging of Benefices—13 Eliz. c. 20.]—In 1803 the act 43 Geo. 3, c. 84, repealed the act 13 Eliz. c. 20, which prohibited the charging of benefices. In 1817 the act 43 Geo. 3 was repealed, and the effect of such repeal was to revive the act of Eliz. In 1811 an incumbent duly charged his then present benefice with an annuity, and covenanted, that if he should afterwards be preferred to any other benefice, he would fully charge the same with the annuity; and that in the meantime, the same should be charged and chargeable with the annuity. In 1814 the incumbent was preferred to another benefice, but no legal charge upon it was executed until 1818:—Held, in the court below, and upon appeal, that the deed of 1811 constituted a good equitable charge, which attached upon the new benefice, as soon as it was acquired. There being subsequent incumbrancers, an order for a receiver was made at the hearing, and affirmed on appeal. *Metcalfe* v. *York* (*Archbishop*), 1 Myl. & C. 547; 6 Sim. 224; 6 L. J., Ch. 65.

Master Forester of Royal Forest.]—Receiver granted, at the suit of a judgment creditor of the office of master forester of the royal forest. *Blanchard* v. *Cawthorne*, 4 Sim. 566.

Fellowship, Emoluments of—Assignment.]—An assignment of the emoluments of a fellow of a college in the university is valid in equity, and effect will be given to a security thereon, out of the dividends apportioned to such fellow from time to time, in respect of his fellowship. *Feistel* v. *King's College, Cambridge*, 10 Beav. 491 ; 16 L. J., Ch. 339 ; 11 Jur. 506.

Motion by an incumbrancer on a fellowship for a receiver and injunction refused with costs. *Berkeley* v. *King's College, Cambridge*, 10 Beav. 602.

Clerk of Peace, Office of.]—The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment. *Palmer* v. *Vaughan*, 3 Swan. 173.

Assistant Parliamentary Counsel.]—The salary of the assistant parliamentary counsel to the treasury is not assignable, and the court will not appoint a receiver of it. *Cooper* v. *Reilly*, 2 Sim. 560 ; 1 Russ. & M. 560.

c. Charges and Incumbrances.

Legal Mortgagee.]—A receiver may be appointed at the instance of a legal mortgagee, but he has no absolute right to a receiver. *Prytherch, In re, Prytherch* v. *Williams*, 42 Ch. D. 590 ; 38 W. R. 61. And see *Pease* v. *Fletcher*, 45 L. J., Ch. 265 ; 1 Ch. D. 273 ; 33 L. T. 644 ; 24 W. R. 158.

First Incumbrancer—Power to Appoint Receiver.]—The court will, on the hearing of an incumbrancer's suit, appoint a receiver, although the first incumbrancer has, by his deed, a power to appoint one. *Bord* v. *Tollemache*, 1 N. R. 177 ; 5 L. T. 526.

Life Estate—Arrears accrued during prior Life Estate.]—A receiver will not be appointed over a life estate, to raise arrears of interest which accrued due during the time of the former tenant for life. *Garnett* v. *Pratt*, Hay. & J. 303.

Tenant for Life subject to Term to raise Portions.]—Receiver granted against tenant for life subject to a term to raise portions, he refusing to produce title-deeds necessary for raising such portions. *Brigstacke* v. *Mansel*, 3 Madd. 47.

Annuitants.]—A prior annuitant may obtain a receiver over the possession of a custodee. *O'Neill* v. *Ward*, 1 Hog. 111.

—— **Extension to other Property.**]—On bill to raise arrears of annuity charged on lands named and on all other property of defendant, a receiver was appointed over the named lands ; on discovery of other property, his power was extended over that also on motion. *Lyne* v. *Lockwood*, 2 Moll. 498.

English Annuity—Trust of Real Estates in Ireland—Annuity Act.]—An annuity granted in England, secured by a trust of real estates in Ireland, is regulated by the provisions of the Annuity Act in England, in respect of the trust, as well as the personal covenant. If it is void, the collateral grant, being subsidiary, falls along with it. But a receiver was appointed, the plaintiff having primâ facie evidence in the deed executed by the defendant, though now impeached by the answer. *Richards* v. *Goold*, 1 Moll. 22.

Grantor of Annuity allowing Arrear of Head Rent.]—If a grantor of an annuity allows an arrear of head rent to fall due, it is sufficient ground for an application by the annuitant for a receiver, without regard to the amount of arrear of the annuity which is due. On a motion for a receiver, on the defendant's answer, the plaintiff may use an affidavit to ascertain the exact amount of arrears of an annuity due to him. *Hogan* v. *Bodkin*, 1 Hog. 374.

Grantor of Annuity going Abroad.]—The grantor of an annuity secured by an equitable charge on certain lands which are subject to a prior charge, goes to reside abroad, but by his agent continues in receipt of the rents and profits. The court, on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit. *Tanfield* v. *Irvine*, 2 Russ. 149.

Ireland—Receiver on Answer.]—In a suit for payment of an annuity, the court of exchequer (Ireland) will appoint a receiver on the answer, and an affidavit of the sum due, though an issuable term and vacation have elapsed since the answer was filed. *Fay* v. *Fay*, 2 Jones, 350.

—— **Matters in Derogation of Plaintiff's Title.**]—The court, in the exercise of its concurrent jurisdiction, decreed the appointment of a receiver to raise the arrears of an annuity charged on lands held for a term of years, where there were questions which could at least be raised in a court of law, which might interfere with the right of the plaintiff to recover. *Beamish* v. *Austen*, Ir. R. 9 Eq. 361.

—— **Three Half-Year's Interest in Arrear.**]—By an act of Irish parliament 1772, a mortgagee, when three half-years' interest is in arrear, may, by summary application, get a receiver of estate, in order to keep down arrear, &c., of interest. An application of this kind was made by respondent in Irish chancery ; and though appellant held office of chief remembrancer in exchequer there, he was held incapable of pleading any privilege of office against application. *Clanbrassill* v. *Taylor*, 5 Bro. P. C. 319.

Annuity Deed Impeached as Evasion of Usury Laws.]—The defendant executed a deed purporting to grant to the plaintiff an annuity of 52*l.* for the defendant's life, in consideration of 350*l.* paid by plaintiff to defendant upon the execution of the deed. The annuity being in arrear, the plaintiff filed a bill to raise the amount due by sale of the premises charged, and for a receiver in the meantime, and now moved on the bill for a receiver. The defendant, by her answer and affidavit, impeached the grant of the annuity on several grounds, and insisted that the deed was not bonâ fide, but merely an evasion of the statutes against usury ; that the real agreement was an usurious loan, the repayment of which was secured by an insurance on the defendant's life, to be kept up at her cost ; and referred to the letters of the plaintiff's own agent, in which the transaction was treated as a loan, and not as a purchase ; she also denied that the consideration was duly paid. The court held, there was a primâ facie case for a receiver, as the defendant's unproved allegations could not avail

against her solemn deed. *Kelly* v. *Butler*, 1 Ir. Eq. R. 435.

Fee-farm Rent — Power of Distress and Re-entry.]—Where the deed reserving a fee-farm rent out of certain lands thereby conveyed in fee was of ancient date, and the rent, after various mesne assignments, was vested in the plaintiff as assignee, and was in arrear; and the estate conveyed by the deed, after various mesne assignments, was vested in the defendant as assignee; upon a bill by the assignee of the rent, praying a receiver, &c., and the defendant's answer admitting the plaintiff's title, but insisting that his remedy was at law, the court granted a receiver over the premises conveyed by the deed, to pay the arrears and future accruing gales of the rent, although the deed contained clauses of distress and re-entry in case of non-payment. *Stevelly* v. *Murphy*, 2 Ir. Eq. R. 448. And see *Id.* 451, n.

Annuitant with Power of Self-help.] — A testator gave an annuity, which he directed to be paid by his son, and, subject to and charged with the payments of his debts and the legacies and annuity thereinbefore mentioned, he devised and bequeathed his real and personal property to his son absolutely. The annuity fell in arrear, after having been paid for twenty years, and the annuitant filed a bill to enforce payment, and moved for a receiver:—Held, that the annuity being charged upon land, with a power of distress superadded by 4 Geo. 2, c. 28, he had power to help himself, and was not entitled to a receiver. *Sillory* v. *Leaver*, L. R. 9 Eq. 22; 21 L. T. 453; 18 W. R. 59.

Lady Annuitant becoming a Nun.] — The doctrine of civil death by profession ceased to be law at the reformation, and was not revived by the Roman Catholic Emancipation Act (10 Geo. 4, c. 7). Therefore the court granted a receiver on a bill filed to raise the arrears of an annuity devised in trust for a lady who afterwards became a nun, during such period of her natural life as she should continue unmarried. *Evans* v. *Cassidy*, 11 Ir. Eq. R. 242.

Mortgage—Undivided Share.]—A receiver may be appointed over the whole of a property at the instance of a mortgagee of an undivided share. *Sumsion* v. *Crutwell*, 31 W. R. 399.

Mortgagee of Business Premises.]—A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises. Form of order appointing a receiver and manager, with an injunction. *Truman* v. *Redgrave*, 50 L. J., Ch. 830; 18 Ch. D. 547; 45 L. T. 605; 30 W. R. 421.

Priorities of Mortgagees and Annuitants.]—A., having charged his estates by mortgages and other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates, with verbal directions to pay the interest to the mortgagees, and to pay over the surplus of the rents to himself; on the making a fifth mortgage, A., by deed, appointed B. receiver of the estates comprised in that mortgage, in trust to keep down the interest of that mortgage, and to pay over the residue of the rents to himself. A. afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee for securing the said annuities in manner therein mentioned; and, subject thereto, to permit A. to receive the surplus for his benefit. At the time of granting these annuities, A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. and B. (without making any of the prior incumbrancers parties), the court will restrain B. from paying over any part of the rents to A., and will appoint a receiver without prejudice to the prior mortgagees taking possession. *Dalmer* v. *Dashwood*, 2 Cox, 378.

Mortgage of Mines—Receiver and Manager.]—The court has jurisdiction, at the instance of mortgagees of collieries held under leases containing working covenants, to appoint a receiver and manager of the property and business, notwithstanding that the latter is not specifically referred to in the mortgage security. *Campbell* v. *Lloyds Bank*, 58 L. J., Ch. 424.

A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of the minerals. *Ib.* And see *Gibbs* v. *David*, 44 L. J., Ch. 770; L. R. 20 Eq. 373; 33 L. T. 298; 23 W. R. 786.

Newspaper—Mortgage of.]—On motion by a mortgagee of a newspaper, a receiver and manager of the mortgaged property was appointed until the hearing of the cause, on undertaking to print, publish, and edit the paper in the meantime, and forthwith to register himself as proprietor. *Chaplin* v. *Young*, 6 L. T. 97 —L. C.

—— **By Part Owner—Sale.**]—K. obtained a decree that he was entitled to a moiety of a newspaper, subject to a lien thereon in favour of his co-owner H., and the decree directed certain accounts to be taken. H. had mortgaged his interest (including his lien on K.'s share) to M. K. had no interest in the premises where the business of printing and publishing the newspaper was carried on, nor in the plant used in the business. The books of account were in the possession of H. Great delay took place in taking the accounts, both H. and M. placing every obstacle they could in the way. Ultimately M. purported, as mortgagee, to sell the whole interest in the newspaper to J. Thereupon K. filed another bill against M. and H. and J., praying that the sale to J. might be declared void as against K., and that the newspaper might be sold by the court, and that till sale a receiver and manager might be appointed, and that, if necessary, the suit might be treated as supplemental to the first suit:—Held, that a receiver and manager ought to be appointed. *Kelly* v. *Hutton*, 20 L. T. 201; 17 W. R. 425.

Notice of Motion—Amending Title.]—The notice of motion for a receiver and manager having been entitled only in the second suit, the vice-chancellor amended it by entitling it also in the first suit, and made the order in both suits:—Held, that it was competent to the vice-chancellor to make the order in both suits. *Ib.*

Effect of Statutory Provisions.]—The commissioners appointed under a local act were empowered to raise money upon the security of the rates for the purposes of local improvements. Of the money so borrowed the sum of 100*l.* at the least in every year was to be repaid to such of the mortgagees as should be selected by ballot. The interest upon the mortgage was duly paid, and annual instalments were paid in the prescribed manner, though not with complete regularity. The mortgagees gave notice to the commissioners, requiring them to pay off their mortgage (800*l.*) in six months. The commissioners refused to do so, whereupon the mortgagees filed a bill to establish their right to be paid off, and for a receiver of the rates:—Held, that they had no right to have their mortgage debt paid off, except under the provisions of the act, and that the court had no jurisdiction to appoint a receiver of the rates. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 760; L. R. 7 Ch. 655; 27 L. T. 87; 20 W. R. 875.

And see MORTGAGE.

d. Debenture Holders Actions, In.

See COMPANY (DEBENTURES).

e. Ejectment Action in.

See col. 36.

f. Equitable Execution, by way of.

See R. S. C. 1883, Ord. L. r. 15A.

"Equitable execution is a process which the court allows for the purpose of enabling a judgment creditor to obtain payment of his debt when the position of the real estate is such that ordinary execution will not reach it"—per Chitty, J. *Wills* v. *Luff*, 57 L. J., Ch. 563; 38 Ch. D. 197; 36 W. R. 571. And see *Shephard, In re, Atkins* v. *Shephard*, 59 L. J., Ch. 83; 43 Ch. D. 131; 62 L. T. 337; 38 W. R. 133.

Judgment Creditor, at Suit of.]—In an action brought by judgment creditors claiming a declaration that they were entitled to a charge upon the property of the debtor, and for a receiver and an injunction, they had sued out an elegit against the debtor's lands, but were unable to obtain delivery by the sheriff by reason of the legal estate being outstanding, the debtor being only entitled to an equity of redemption therein:—Held, that any equitable rights which judgment creditors had previously to 27 & 28 Vict. c. 112, were not affected or taken away by that act or by the Judicature Act, 1873; and that the plaintiffs were entitled to have, before decree, a receiver appointed for the protection of the property available to answer their judgment. *Anglo-Italian Bank* v. *Davies*, 47 L. J., Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3—C. A.

Plaintiff in an action, which had been followed by a cross action, obtained an order in both actions that his costs of the cross action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the defendant's address, so as to serve the subpœna for costs. He then moved the court for a receiver, under s. 25, sub-s. 8 of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:—Held, that the principle of *Anglo-Italian Bank* v. *Davies* (supra) applied, and that the plaintiff was entitled to a receiver *Bryant* v. *Bull*, 48 L. J., Ch. 325; 10 Ch. D. 153; 39 L. T. 470; 27 W. R. 246.

So long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of s. 24, sub-s. 7 of the Judicature Act, 1873, and consequently, in an action by a creditor against a debtor in which the plaintiff has obtained final judgment, the court has power, under that subsection, in order to satisfy the judgment, to grant equitable execution against the defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose. *Salt* v. *Cooper*, 50 L. J., Ch. 529; 16 Ch. D. 544; 43 L. T. 682; 29 W. R. 553—C. A.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made, on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate, capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid:—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 31 W. R. 899—C. A.

A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order, it appeared that the August instalment had been paid:—Held, that the money could not be attached, but semble, that the proper course for the judgment creditor to adopt was to apply for the appointment of a receiver under the practice in the chancery division. *Webb* v. *Stenton*, 52 L. J., Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432—C. A. And see *McGarry* v. *White*, 16 L. R., Ir. 322; *Watson* v. *Arundel*, Ir. R. 8 Eq. 324.

—— **Evidence of Property.**]—Where a plaintiff obtained judgment and issued execution, and the sheriff returned nulla bona, the court will not appoint a receiver on the ground that since the return the defendant has been found to be possessed of a patent the value of which did not appear from the evidence before the court. *Smith* v. *Carter*, 52 J. P. 615.

—— **After Writ of Elegit sued out.**]—A judgment creditor who has sued out an elegit, and obtained a return from the sheriff that the debtor was entitled to a life estate in realty, and registered the writ, may file a bill for a receiver of that estate. *Tillett* v. *Pearson*, 43 L. J., Ch. 93; 22 W. R. 209.

A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under an elegit, is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession, if he has not obtained beneficial possession. *Kingston* v. *Cowbridge Ry.*, 41 L. J., Ch. 152.

A judgment creditor who has sued out an elegit, but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties. *Wells* v. *Kilpin*, 44 L. J., Ch. 184; L. R. 18 Eq. 298; 22 W. R. 675.

A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver: —Held, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A.

Title of Receiver.]—A receiver's title is not completed till he has given security. *Edwards* v. *Edwards*, 45 L. J., Ch. 391; L. R. 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713.

Relation Back on Security Given.]—The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution. When the security is afterwards given the order relates back to the date when it was made. *Evans, Ex parte, Watkins, In re*, 49 L. J., Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127—C. A. And see *Smart* v. *Flood*, 49 L. T. 467.

—— **Security Dispensed with.**]—Where a judgment creditor, in an action for equitable execution, obtained the appointment of a receiver for the purpose of creating a charge upon the debtor's property subject to prior incumbrances, but not for the purpose of entering into possession or receiving the rents and profits, the receiver was not required to give security, the plaintiff and the receiver undertaking not to act without the leave of the court. *Hewett* v. *Murray*, 54 L. J., Ch. 572; 52 L. T. 380.

Person Prejudiced—Mode of Proceeding.]—A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not, without leave of the court, to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority, but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed. *Searle* v. *Choat*, 53 L. J., Ch. 506; 25 Ch. D. 723; 50 L. T. 470; 32 W. R. 397—C. A. *And see* EXECUTION.

g. Heir-at-Law or Devisee.

Contested Heirship.]—The court of chancery has no jurisdiction to appoint a receiver in a simple case of contested heirship. *Hitchen* v. *Birks*, L. R. 10 Eq. 471; 23 L. T. 335; 18 W. R. 1015.

Devisee against Heir—Probability of Success.]—A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir-at-law. *Clarke* v. *Dew*, 1 Russ. & M. 103.

A receiver will not be given against the heir pending the issue, except in a strong case, where the court feels clear from evidence that there is no ground to impeach the will, or where the heir throws a doubt upon his own title by moving to postpone the trial. *Fingal (Earl)* v. *Blake*, 1 Moll. 158.

A receiver appointed at the instance of a party claiming as devisee in trust under a will, the formal execution of which was admitted by the heir-at-law, but the effect controverted on the ground that there was no effectual devise so as to disinherit him. The trustee of the real estate being made a co-plaintiff with the executors, the pleading is proper in form; and the suit being properly framed, the court will, notwithstanding doubts as to the person to become beneficially entitled, and the effect of the dispositions, and whether the heir-at-law may not in the result be entitled, take the possession. *S. C.*, 2 Moll, 50.

Allegation of Undue Influence.]—Devise for life of mansion-house and demesne lands in occupation of testator to testator's wife, who, on death of testator, continued in possession; the heir-at-law disputing the validity of the will on the ground of undue influence, and on an issue directed having got a verdict; by private arrangement with the trustees of a prior legal estate evicting the devisee and getting the possession, a receiver at the instance of the devisee, refused; whether the trustees might be compelled to give security for the rents, quære. *Lloyd* v. *Trimleston (Lord)*, 2 Moll. 81.

Lands in Possession of Heir-at-Law.]—A receiver will not be appointed over lands in possession of heir-at-law, unless he admits the will, or it is proved against him. *Dobbin* v. *Adams*, 8 Ir. Eq. R. 157.

Heir-at-Law against Devisee.]—Receiver not appointed on behalf of heir-at-law as against a devisee unless there are strong circumstances. The heir must try the question at law. *Knight* v. *Duplessis*, 2 Ves. 360.

—— **Allegation of Forgery.**]—Where a bill was filed by an heir-at-law against devisees, alleging that the will was forged, and praying that it might be set aside, that the devisees might be directed to convey the estate to him, and that, if necessary, an issue devisavit vel non might be directed, the court, on motion by the plaintiff for an issue, or that he might be at liberty to proceed by ejectment, and for a receiver, made the order for an issue, but directed the motion for a receiver to stand over till the hearing. *Bonsor* v. *Bradshaw*, 4 Jur. (N.S.) 1011; 6 W. R. 427.

Pending Bill by Heir-at-Law against Devisee.]—Semble, where a bill is filed by an heir-at-law against a devisee, to try the validity of a will of real estate, the court under special circumstances

will appoint a receiver of the real estate. *Middleton* v. *Sherburne*, 4 Y. & Coll. 358.

No Personal Estate.]—Where it appears by the answer that the real estate must be responsible (as that there is no personal estate to be first applied to debts), a receiver will be granted in the first instance. *Williams* v. *Macnamara*, 8 Ves. 71.

Validity of Will in Question.]—Semble, under special circumstances the court will appoint a receiver of the real estate where the validity of a will is in question and an issue devisavit vel non is granted. *Middleton* v. *Sherburne*, 4 Y. & Coll. 358.

Issue Devisavit Vel Non.]—After a verdict upon an issue devisavit vel non, the court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this court, though an order nisi had been obtained for a new trial. *Bainbrigge* v. *Bainbrigge*, 20 L. J., Ch. 139.

h. Infant.

Before Bill Filed.]—The court will not appoint a receiver of an infant's estate where there is no bill filed. *Anon.*, 1 Atk. 489, 578.

In Ireland.]—The Lord Chancellor of Ireland has power under the stat. 4 & 5 Will. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor upon petition, and without the filing of a bill for that purpose. *Goode, In re*, 1 Ir. Ch. R. 256.

On Petition Without Suit.]—A receiver of the rent of real estates descended on an infant appointed on petition, without suit. *Leeming, In re, Gascoyne, In re*, 20 L. J., Ch. 550.

Immediately on Bill Filed.]—Receiver appointed of infant's estate immediately on filing bill. *Pitcher* v. *Hellier*, Dick. 580.

Lands of Infant Defendant.]—The court, upon the application of the plaintiff, appointed a receiver over the lands of a minor defendant, before his appearance or answer, upon an affidavit that the rents could not be enforced from the under-tenants of the minor (who was not a ward in chancery), and that his interest was in danger of being evicted, the head landlord having served ejectments for the non-payment of the head-rent. *Whitelaw* v. *Sandys*, 12 Ir. Eq. R. 393.

After Appointment of Testamentary Guardian.]—The appointment of a testamentary guardian of an infant by his father, does not, under the stat. 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the fant. *Gardner* v. *Blane*, 1 Hare, 381.

One of two Trustees for Infant Declining to Act.]—Where one of two trustees of real estate declines to act, the court will appoint a receiver on behalf of infant cestuis que trustent, but with liberty to either of the trustees to offer himself. *Tait* v. *Jenkins*, 1 Y. & Coll. C. C. 492.

Keeping Down Interest on Mortgage.]—Court will not order receiver of infant's estate to keep down interest of mortgage debt, unless master reports it due. *Anon.*, 6 Madd. 9.

Infant Tenants in Common—One coming of Age.]—A receiver appointed for the benefit of two infant tenants in common, not discharged on one coming of age. *Smith* v. *Lyster*, 4 Beav. 227; 10 L. J., Ch. 344.

Sale of Real Estate for Payment of Debts.]—Bill for sale of real estate for payment of debts. The heir-at-law being an infant, the parol demurred. The court will appoint a receiver, as in other cases. *Sweet* v. *Partridge*, 1 Cox, 433; Dick. 696. And see *Leg* v. *Turnbull*, 2 P. Wms. 409.

i. Inspectorship Deed.

Court of Bankruptcy no Jurisdiction.]—A bill having been filed by inspectors under a deed of inspectorship against the debtor, charging him with obstructing them in their duties as inspectors and with collecting assets and applying them to his own purposes, the plaintiffs moved for an injunction and the appointment of a receiver:—Held, that as the court of bankruptcy had, apparently, no jurisdiction to appoint a receiver, the court of chancery could do so. *Riches* v. *Owen*, 16 W. R. 963. Affirmed L. R. 3 Ch. 820; 16 W. R. 1072.

j. Litigation Pending.

Disputed Title—Recovery of Leaseholds.]—The court has power, under the Judicature Act, 1873, s. 25, to appoint a receiver where the title to the property is disputed. *Dunn* v. *Ferrier* (L. R. 3 Ch. 719) and *Talbot* v. *Hope Scott* (4 K. & J. 139) are no longer law. *Berry* v. *Keen*, 51 L. J., Ch. 912—C. A. And see *Gwatkin* v. *Bird*, 52 L. J., Q. B. 263, col. 39.

—— **Ejectment Action — Jurisdiction.**]—Under s. 25, sub-s. 8, of the Judicature Act, 1873, the court has jurisdiction to appoint a receiver wherever it shall appear just or convenient so to do, and consequently in an ejectment action where the title to real property is in dispute. *Foxwell* v. *Van Grutten*, 66 L. J., Ch. 53; [1897] 1 Ch. 64; 75 L. T. 368—C. A.

—— **Defendant in Possession—Judicial Discretion.**]—It is not a proper case for the exercise of this judicial discretion where the defendant in an action for ejectment is the admitted heir-at-law of the last owner, and has as such taken possession of the property in dispute, and there appears to be a question to be decided between the parties, and the property is safe, and there is no evidence of waste; and the mere fact that such defendant is impecunious is not a ground for the appointment of a receiver. *Ib.*

——**Form of Order.**]—*Per* KEKEWICH, J.—An order appointing a receiver in a case of disputed title to the real estate should be made subject to the rights of any incumbrancer. *Ib.*

Actual Pendency of Litigation.]—When the result of a suit in the probate court to set aside a will had been, in effect, to put the property comprised therein in such a position that no person had a legal right to deal with it, and litigation was impending in the same court, as to who ought to be the legal personal representative of the testator, a caveat having also been entered:—Held,

that although there was no litigation actually pending, yet, under the circumstances, the court had jurisdiction to make an order for the appointment of a receiver. *Grimston* v. *Timms*, 22 L. T. 292; 18 W. R. 724.

The appointment of a receiver in such a suit is a matter entirely within the discretion of the court. *Grimston* v. *Timms*, 18 W. R. 781.

Probate Suit—Caveat by Heir.]—The defendant as heir-at-law of a testator entered a caveat against the grant of probate of the will, and also forcibly took possession of part of the testator's real estate. No further proceedings were taken in the probate court beyond entering the caveat. Upon a motion by the executor of the will for a receiver of all the real and personal estate:—Held, that the court had jurisdiction to appoint a receiver of the real estate (except that part in the possession of the defendant) as well as of the personal estate. *Parkin* v. *Seddons*, 42 L. J., Ch. 470; L. R. 16 Eq. 34; 28 L. T. 353; 21 W. R. 538.

To keep Business going — Receiver and Manager.]—In a suit by a purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. *Gibbs* v. *David*, 44 L. J., Ch. 770; L. R. 20 Eq. 373; 33 L. T. 298; 23 W. R. 786.

The existence of disputes between different members of the governing body of a company which prevents its affairs being carried on properly, is a ground for the intervention of the court by injunction and receiver to protect the property of the company, but the interference of the court will be continued only until a governing body is duly appointed. *Trade Auxiliary Co.* v. *Vickers*, L. R. 16 Eq. 298; 21 W. R. 836.

Probate Action, Pending.]—*See* WILL.

k. Lunacy.

See Rules in Lunacy, 1892, and *Winkle, In re*, 63 L. J., Ch. 541; [1894] 2 Ch. 519; 70 L. T. 710; 42 W. R. 513. *Also* LUNACY.

l. Mortgage.

See col. 27 and MORTGAGE.

m. Partnership.

At Instance of Defendant.]—A receiver may be appointed in a partnership suit at the instance of the defendant. *Sargant* v. *Read*, 45 L. J., Ch. 206; 1 Ch. D. 600.

Dissolution not Claimed.]—In an action between partners, the writ filed in which claimed—(1) an injunction to restrain the defendant from drawing out of the partnership funds more than the amount stipulated in the articles by way of subsistence money; (2) a receiver; and (3) an account; but did not claim a dissolution of partnership:—Held, on an interim motion for a receiver, that the court could appoint a receiver, not being also a manager of the partnership business, although a dissolution was not claimed. *Medwin* v. *Ditcham*, 47 L. T. 250.

Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. *Roberts* v. *Eberhardt*, 1 Kay, 148; 23 L. J., Ch. 201; 2 W. R. 125.

Nor even in a suit to dissolve the partnership will the court appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application it must be shown that one partner has interfered so as to prevent the business being carried on. *Ib.*

See PARTNERSHIP—ESTATE.

n. Partition Action.

In a partition action where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction under the Judicature Act, 1873, s. 25 (8), to appoint a receiver until the hearing. *Porter* v. *Lopes*, 7 Ch. D. 358; 37 L. T. 824.

o. Probate Actions, In.

See WILL.

p. Property out of Jurisdiction.

Personal Property in Foreign Country.]—A receiver will be appointed to collect personal estate in a foreign country, and not only to get in rents, but also to sell the real estates in such foreign country, and receive the produce thereof when sold. *Hinton* v. *Galli*, 24 L. J., Ch. 121; 2 Eq. R. 479.

Irish Estates—Suit in England.]—As to the mode of giving effect over Irish estates to the appointment of a receiver in a suit in England, and generally to the proceedings in that suit. *Houlditch* v. *Wallace*, 5 Cl. & F. 629.

A court of equity in England will appoint a receiver over estates in Ireland; and although the court has no power of sending its officers to Ireland, to enforce its orders and decrees, yet if they be resisted by a party to the cause such party will be guilty of contempt. *Langford* v. *Langford*, 5 L. J., Ch. 60.

Estate in India—Receiver in England acting by Agent.]—Appointment of a receiver of an estate in India; the receiver to be in England, acting by an agent. ——v. *Lindsay*, 15 Ves. 91.

—— **Remitting to England—Inquiry.**]—A receiver had been appointed of the testator's estate, part of which was in India; and, it having become necessary to have it remitted:—Held, that the proper course was to refer it to the master, to inquire what would be the most advantageous course for receiving and remitting it to England. *Keys* v. *Keys*, 1 Beav. 425.

West India Estate.]—Plaintiff, entitled to a legacy, charged on a West India estate, subject to prior debts and legacies remaining unpaid, not entitled to have a receiver appointed over the estate. *Faulkner* v. *Daniel*, 3 Hare, 204, n.

Circumstances under which motion for appointment of a receiver and consignee refused. *S. C.*, 10 L. J., Ch. 33.

Italy—Real Estates in.]—In a creditor's suit a receiver was appointed of the rents of real estates situate in Italy and elsewhere, and of the produce of the sale of such real estates. *Hinton* v. *Galli*, 24 L. J., Ch. 121; 2 Eq. R. 479.

q. Railways, in Case of.

See RAILWAY.

r. Rates.

Future.]—A court of equity will not appoint a receiver of rates which are to be assessed by commissioners, and collected at a future period. *Drewry* v. *Barnes*, 3 Russ. 94; 5 L. J. (O.S.) Ch. 47.

Borrowing on—Right of Creditor to Receiver.]—A corporation was authorised by act of parliament to raise money for local improvements upon the security of the borough rates. The act contained a provision that the corporation should in every year pay off at least 100*l.* of the principal of the borrowed money together with the interest due thereon, and that the creditors to be paid off should be determined by ballot:—Held, that the creditors were entitled to be repaid their principal only in the way mentioned by the act, and that a creditor who was unpaid could not by giving notice to the corporation to repay his principal entitle himself to have a receiver of the rates appointed by the court. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 760; L. R. 7 Ch. 655; 27 L. T. 87; 20 W. R. 875.

In Action for Specific Performance of Agreement.]—In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an ex parte motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the vice-chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the court, and to abide by any order which the court might make as to damages or otherwise. *Taylor* v. *Eckersley*, 45 L. J., Ch. 527; 2 Ch. D. 302; 34 L. T. 637; 24 W. R. 450—C. A.

In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the court of appeal (no previous application having been made to the divisional court or a judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the court might make in the matter. *Hyde* v. *Warden*, 1 Ex. D. 309; 25 W. R. 65—C. A.

s. Recovery of Land.

In an action for recovery of land brought by a landlord against his tenant under a proviso for re-entry for breach of covenant in a lease, a receiver of the rents and profits of the land pending the trial of the action, may be appointed, on the plaintiff's application. *Gwatkin* v. *Bird*, 52 L. J., Q. B. 263. *And see* col. 36.

t. Tenants in Common.

Exclusion of one Tenant in Common by another.]—A receiver will not be granted on a bill of partition filed by one tenant in common against another, unless a case of exclusion is shown. *Spratt* v. *Ahearne*, 1 Jones, 50. *Tyson* v. *Fairclough*, 2 Sim. & S. 144.

Motion by tenant in common for a receiver against his co-tenant in possession refused; if not amounting to a case of exclusion. *Milbank* v. *Revett*, 2 Mer. 405.

The court refused, on the application of one of several equitable tenants in common, to appoint a receiver over the whole estate, against an equitable tenant in common in possession, there being no exclusion, but limited the appointment of receiver to the share of the plaintiffs only. *Sandford* v. *Ballard*, 30 Beav. 109.

A receiver of a moiety of an estate claimed by the plaintiff as tenant in common with the defendant who was in possession of the whole, granted under the circumstances. *Hargrave* v. *Hargrave*, 9 Beav. 549; 15 L. J., Ch. 280.

Security—In default Receiver.]—Tenant in common in possession ordered to give security for payment of the proportion of rents to his co-tenant; otherwise a receiver. *Street* v. *Anderton*, 4 Bro. C. C. 414.

Equitable Title.]—In appointing a receiver, the court will not proceed further upon the equitable right of a tenant in common, than it would upon his legal right. *Knowles* v. *Clayton*, 2 L. J. (O.S.) Ch. 181.

On a bill by one of several equitable tenants in common against his co-tenants, the court, at the hearing of the cause, and upon evidence of exclusion, appointed a receiver over the whole estate. *Sandford* v. *Ballard*, 33 Beav. 401; 33 L. J., Ch. 450; 10 Jur. (N.S.) 251.

Infant Tenants in Common—Receiver—Majority of one Tenant.]—A receiver appointed for the benefit of two infant tenants in common, not discharged on one coming of age. *Smith* v. *Lyster*, 4 Beav. 227; 10 L. J., Ch. 344.

Partnership at Will Dissolved.]—Where a partnership at will had been dissolved by one partner by notice, the court restrained that partner from excluding the other partner from the partnership premises pending the winding up of the concern, and from taking any advantage of his position with respect to the joint clients of the firm. Where two persons are owners or tenants in common of a mine, and have agreed to work it together, the court will not, on a bill not asking for dissolution of the partnership, and in a case where one of the tenants in common has not taken any active steps to obstruct the other, grant a manager and receiver of the mine. *Roberts* v. *Eberhardt*, 1 Kay, 148; 23 L. J., Ch. 201; 2 W. R. 125.

Disputes—Appointment of Joint Receiver.]—Where there was a dispute between tenants in common of real estate in reference to the receipts of rents, the court appointed one of the disputants who had an estate for life of one-fifth of the property, and another person nominated by the other parties, joint receivers of the whole estate. *Ramsden* v. *Fairthrop*, 1 N. R. 389.

And see ESTATE.

Mortgage of Undivided Share.]—A receiver may be appointed over the whole of a property at the instance of a mortgagee of undivided share. *Sumsion* v. *Crutwell*, 31 W. R. 399.

Action for Partition—Judicature Act.]—In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupa-

tion, of the property, the court has jurisdiction under the Judicature Act, 1873, s. 25, sub-s. 8, to appoint a receiver until the hearing. *Porter* v. *Lopes*, 7 Ch. D. 358 ; 37 L. T. 824.

In a suit for partition of a leasehold estate, a receiver of the rents of the whole estate granted, under the circumstances. *Tyson* v. *Fairclough* (2 Sim. & S. 142 ; 25 R. R. 175), remarked upon. *Searle* v. *Smales*, 3 W. R. 437.

Mining Concern.] — Receiver appointed of mines in which several persons were interested, the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land. *Jefferys* v. *Smith*, 1 Jac. & Walk. 298 ; 21 R. R. 175 ; *Frere* v. *Hibernian, Mining Co.*, 2 Hog. 30.

When part owners of a mine cannot agree on a plan for working it harmoniously, the court will interfere to appoint a manager and receiver, and will do so, if the circumstances seem to render such a course advisable, when a sale has been directed. *Lees* v. *Jones*, 3 Jur. (N.S.) 954.

u. Tolls.

Mortgage of.] — A mortgage of turnpike tolls and toll-houses which are leased and are subject also to other mortgages, may apply to have a receiver appointed, instead of taking steps to obtain possession at law. *Crewe* (*Lord*) v. *Edleston*, 1 De G. & J. 93 ; 3 Jur. (N.S.) 1061.

No Express Power in Act to Appoint Receiver.]—Where an act of parliament authorises a corporation to mortgage its tolls, the court has jurisdiction to appoint a receiver of them, though no such express power is given by the Act. But the receiver over such property ought not to have committed to him any powers of management which ought properly to be exercised by the corporation itself. *De Winton* v. *Brecon Corporation*, 26 Beav. 533 ; 28 L. J., Ch. 598.

Canal Company, by — Refusal to Repay Principal.] — A canal company, under the authority of various acts of parliament, raised money on mortgage of the undertaking. The instrument of mortgage assigned the navigation and the rates and tolls to the lender, his executors, administrators, and assigns, to hold till principal and interest were paid and satisfied ; and the acts provided that all the mortgages should be satisfied pari passu. A mortgagee gave the company six months' notice requiring to be paid off, and the company refused to do so :—Held, that he was entitled to have a receiver of the rates and tolls appointed by the court. *Hopkins* v. *Worcester and Birmingham Canal Navigation Co.*, 37 L. J., Ch. 729 ; L. R. 6 Eq. 437.

—— **Interest in Arrear.**]—Where several mortgages were made, under the authority of an act of parliament, of a canal navigation and undertaking, and the works, lands, hereditaments, and capital subscription calls, debts, sums of money, property estate, and effects belonging, due, or owing, or thereafter to belong, or be due, or owing thereto, and all tolls, rates, and duties arising by virtue of the acts under which the company was formed, the mortgagees being equally entitled, one with the other, to their proportions of the tolls and premises, the court, at the suit of one of the mortgagees, whose interest had been a long time unpaid, appointed a receiver of the tolls, rates, and duties, and of the estate of the company. *Fripp* v. *Chard Ry.*, 11 Hare, 241 ; 1 Eq. R. 503 ; 22 L. J., Ch. 1084 ; 17 Jur. 887 ; 1 W. R. 477.

Judgment Creditor—Leave to Levy subject to Mortgage.]—A canal company was incorporated by a special act of parliament, which authorised them to purchase lands for the purposes of the act, and for no other purpose, and empowered them to levy rates, tolls, and dues, and to borrow money on mortgage thereof, and contained a provision that all persons whatsoever might navigate upon the canal upon payment of the rates and dues thereby authorised to be taken. The company made several mortgages of the rates, tolls, and dues under the act. One of the mortgagees, on behalf of himself and all others, obtained the appointment of a receiver of the company's rates, tolls, and dues, who was ordered to pay thereout the expenses of carrying on the company's business, and then the interest on the said mortgages, and to pay the balance into court in the cause. A judgment creditor of the company presented a petition in the cause before the hearing, praying that he might be at liberty to sue out and execute a fi. fa. and elegit against the goods and lands respectively of the company:—Held, that he might execute a fi. fa., but that all he could take under the elegit would be such right in the lands as the company had, namely, subject to the mortgages and to the right of user of the canal by the public, and subject also to the powers of management of the company. *Potts* v. *Warwick and Birmingham Canal Co.*, 1 Kay, 142.

Ultra Vires Lease of Tolls.]—The commissioners of a canal make an agreement for letting tolls not warranted by the act under which they derive their authority, and prejudicial to an interest expressly reserved by the act to the public. This agreement is acquiesced in for forty-seven years without complaint on the part of any of the shareholders, and during that period the lessee remains in undisturbed possession of the tolls ; the court will not, at the suit of the shareholders, disturb his possession by the appointment of a receiver. *Gray* v. *Chaplin*, 2 Russ. 126 ; 3 L. J. (O.S.) Ch. 47 ; 26 R. R. 22.

Dock Company — Receiver-manager.] — An order made in a mortgagee's suit, appointing the chairman of the trustees of the Birkenhead docks receiver of the rates, tolls, and property, with powers to defray the expenses of carrying on the undertaking, following the form in *Potts* v. *Warwick and Birmingham Dock Co.* (Kay, 142), supported ; and a judgment creditor of the trustees restrained from proceeding against the rates and tolls due to the trustees by attachment and execution under the Common Law Procedure Act, 1854, ss. 60 to 67. *Ames* v. *Birkenhead Dock Co.*, 1 Jur. (N.S.) 529 ; 3 W. R. 381.

v. Vendor and Purchaser.

Bill to Set aside Purchase.]—On a bill to set aside a purchase, the answer of the defendants, the devisees of the purchasers, admitting great inadequacy of price, and stating th ir ignorance as to other circumstances of fraud alleged ; a receiver appointed. *Stilwell* v. *Williams*,

Jac. 280. *S. C.*, nom. *Stitwell* v. *Williams*, 6 Madd. 49 ; 23 R. R. 56.

Keeping Mine Going.]—In a suit by a purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. *Gibbs* v. *David*, 44 L. J., Ch. 770 ; L. R. 20 Eq. 373 ; 33 L. T. 298 ; 23 W. R. 786.

Purchaser taking Assignment of Term prior to Judgment.]—A purchaser, without notice of a prior judgment, took at the time of the purchase an assignment to a trustee for himself of an outstanding mortgage, prior to the judgment upon the petition of the judgment creditor, under the 5 & 6 Will. 4, s. 55 ; the court refused to appoint a receiver. *Chapman* v. *Dunbar*, Fl. & K. 86 ; 3 Ir. Eq., R. 202.

Purchaser with Notice of Judgment.] — M. being entitled to the equity of redemption in certain estates confessed a judgment. Afterwards he and the mortgagee, by his direction, conveyed the estate to a purchaser who had notice of the judgment. The court would not, at the instance of the judgment creditor, appoint a receiver over the estates in the hands of the purchaser. *Barrett* v. *Merrick*, 2 Jones, 193.

Costs of Discharged Purchaser.]—If a purchaser has been discharged on a report that a good title could not be made out, and there is no fund in court to pay his interest and costs ; a receiver will be appointed over the lands, with directions to apply the rents in discharge of his interest and costs. *Hill* v. *Kirwan*, 1 Hog. 175.

Suit for Specific Performance—Purchaser's Receiver.]—Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm* v. *Wood*, Turn. & Russ. 332, 345.

Pending Reference as to Title.]—Receiver appointed on the motion of the vendor pending a reference of title. *Boehm* v. *Wood*, 2 Jac. & Walk. 236 ; 22 R. R. 109.

Receiver after Answer of Purchaser.]—Receiver appointed after answer of purchaser under circumstances. *Hall* v. *Jenkinson*, 2 Ves. & B. 125 ; 13 R. R. 36.

Purchaser refusing to Pay Equitable Rentcharge.]—If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refuse to pay the rent-charge, a receiver will be appointed. *Pritchard* v. *Fleetwood*, 1 Mer. 54.

Unpaid Vendor of Company in Voluntary Liquidation.]—On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary. *Boyle* v. *Bettws Llantwit Colliery Co.*, 45 L. J., Ch. 748 ; 2 Ch. D. 726 ; 34 L. T. 844.

And see VENDOR AND PURCHASER.

w. In other Cases.

Discretion — Whole Circumstances.] — The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. Thus a receiver was refused in a case where important points arose upon the construction of deeds, that construction being attended with considerable doubt and difficulty. *Owen* v. *Homan*, 3 Mac. & G. 378 ; 20 L. J., Ch. 314 ; 15 Jur. 339. Reversing on this point 13 Beav. 196.

Quære, whether the court will interfere, by the appointment of a receiver, with the legal possession of property, at the instance of a general creditor who has no specific claim against the property ; and further, whether the circumstances of the defendant being a married woman, and having separate property, can make any difference in the consideration of the case. *S. C.*, 4 H. L. Cas. 997 ; 17 Jur. 861.

A creditor of a partnership, consisting of two persons, had received from one of them joint and several promissory notes, accepted by himself and a third party, a married woman, having a separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title-deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes and other securities he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of the creditor, and he had not taken any steps to inform the surety, as the notes became due, that she had become or continued liable upon them. In a bill for an account and a receiver, filed by the creditor, the surety put in an answer detailing these circumstances, and alleging fraud :—Held, affirming the decree of the lord chancellor (who had reversed an order of the master of the rolls), that this was not a case in which the court would interfere by appointing a receiver. *Ib.*

Bankruptcy.]—A commission of bankrupt cannot supersede a decree for a receiver, which is discretionary in the court and as useful a power as any that belongs to it, and it is provisional only, not affecting the rights of the parties. *Skip* v. *Harwood*, 3 Atk. 564.

—— Trust Property—Assignees to Account.]—Where assignees have possessed themselves of effects which belonged to bankrupts as executors only, the court, upon an application of testator's creditors, will, for securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate. *Ellis, Ex parte*, 1 Atk. 101.

Evidence of Debts.]—A plaintiff having been appointed the assignee of an insolvent a considerable time after the insolvency, is not sufficient proof of there being debts to justify the court in granting a receiver over the insolvent's property upon bill, and answer when it is sworn by the answer, that the plaintiff and all the creditors have been paid. *Fogarty* v. *Burke*, 1 Con. & L. 565 ; 2 Dr. & War. 580.

Creditor's Deed—Subsequent Elegit Creditor.]—A debtor vests all his estates in trustees for payment of debts, reserving to himself an annuity for his own life :—Held, that a subsequent

elegit creditor, who had extended a moiety of the annuity, is entitled to have a receiver appointed over the moiety, or a competent part of it. *Plasket* v. *Dillon* (*Lord*), 1 Hog. 324.

Breach of Trust by Trustees of Benefit Society.]—In a suit by persons interested in the funds of a benefit society against the trustees, claiming a lien on the funds, and charging the defendants with breach of duty, the plaintiffs moved for an injunction and a receiver. The motion was refused by vice-chancellor Kindersley, but on appeal the application was granted by the lords justices, who held, that it was no objection to the motion that the bill was multifarious or deficient for want of parties, the funds being really in danger. *Evans* v. *Coventry*, 3 Drew. 75. And on appeal 3 Eq. R. 545; 3 W. R. 149.

Married Woman Executrix—Husband of Unsound Mind.]—The court will not restrain a married woman whose husband is of unsound mind from taking out probate of a will of which she is named an executrix. Semble, the court will restrain her, if she does prove, from intermeddling with her testator's estate. *Yetts* v. *Palmer*, 2 N. R. 255; 8 L. T. 528; 11 W. R. 765.

Powers of sale over real estate, and of receiving the rents in the meantime, were, under a will, vested in a married woman, her husband being of unsound mind, as a trustee:—Held, that a receiver ought to be appointed. *Ib.*

To get in Insurance Moneys.]—Demurrer to a bill by principal against agent, stating the pendency of the suit for an account between the same parties before a foreign tribunal; and praying an injunction to restrain proceedings at law by the agent against underwriters, with whom the agent had insured on behalf of the principal; the appointment of a receiver to get in the insurance money, and for all necessary accounts and inquiries. Demurrer overruled. *Transatlantic Co.* v. *Pietroni*, 1 Johns. 604; 6 Jur. (N.S.) 532.

Custodee—Prior Judgment Creditor.]—A receiver will be put over the possession of a custodee at the suit of a prior judgment creditor. *Seymour* v. *Montgomery*, 1 Hog. 329.

Of Annuity—Doubtful Character of Recipient.]—A. had acted in some manner as the agent of both parties in negotiating a loan, by way of annuity, secured upon a rent-charge for the life of the grantor, and afterwards in paying the annuity and keeping up a policy of insurance. A. received from the grantor a sum of money for the re-purchase of the annuity, and persuaded the grantee to execute a re-assignment without signing any receipt for the consideration-money, which re-assignment was to be kept by A. until it should be paid; A. falsely representing that the grantor wished to delay the payment for some time; and without the grantor's knowledge the annuity was paid regularly to the annuitant by A., until he died insolvent:—Held, that the question in what character A. received the money for re-purchasing the annuity was sufficiently doubtful to warrant the appointment of a receiver upon motion. *Vandeleur* v. *Blagrave*, 2 Jur. 176.

Sale of West Indian Estate—Proceeds of Consignments.]—In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, and had got into possession without paying the purchase-money, and to which the consignees of the estate were also defendants, an application for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a subpœna. *Stratton* v. *Davidson*, 1 Russ. & M. 484.

Of Separate Property—Application by Married Woman.]—An application by a married woman for a receiver of her separate estate granted without a reference, notwithstanding a strong affidavit of unfitness of the person nominated. *Bagot* v. *Bagot*, 2 Jur. 1063.

Adult Plaintiff's Own Estate.]—An adult plaintiff cannot obtain an order for the appointment of a receiver over his own estate. *Piers* v. *Latouche*, 1 Hog. 310.

Stranger cannot Propose Receiver.]—Quære, whether master can propose a receiver, or an application should be made to the court, when parties neglect to propose one before the master. A stranger cannot propose a receiver. In this case, the neglect being accounted for, master was directed to review his report and receive proposal for receiver. *Att.-Gen.* v. *Day*, 2 Madd. 246.

Representation as to Settlement on Marriage—Purchaser.]—The plaintiff, previously to his marriage with A.'s daughter, wrote a letter to A., inquiring what fortune his daughter was entitled to. A. in reply wrote to the plaintiff, and stated that certain houses were entailed on his daughter after his decease. A. died leaving his daughter, his only child, and having devised all his real estates to his wife. It was then discovered that A. was tenant in tail male, of the houses, with reversion to himself in fee. In January, 1816, the plaintiff and his wife filed a bill against A.'s widow (who was in possession of the houses) to have the houses conveyed to the plaintiff's wife, conformably to the representation in the letter, and for a receiver, and an injunction to stay proceedings at law. An injunction was granted, and, the widow having put in her answer, the injunction was, in January, 1818, continued on the same day the plaintiff obtained an order to amend, but did not act upon it, or take any further proceedings till May, 1820. In April, 1818, the widow mortgaged the houses for 500 years, to H., and in May, 1819, she sold an annuity to M., and secured it by a conveyance of the houses to trustees in fee; and in May, 1819, she sold and conveyed the houses, subject to the mortgage and annuity, to W. in fee. Neither H., W., nor M. had then any notice of the suit, or of the plaintiff's claim. In January, 1820, at which time M. had notice, the houses were purchased by M., and conveyed to him by H. and W. In May, 1820, the bill was amended. The widow having gone abroad without answering the amended bill, a decree was taken pro confesso against her in November, 1822. In December following, the plaintiff had notice of the conveyance to M., but did not make him a party to the suit, and opposed his attending the master upon the inquiries directed by the decree. In March, 1831, the plaintiff filed a bill against M., stating the proceedings in the original suit, and praying that M. might be decreed to convey the houses to plaintiff's wife, and for a receiver. M. put in his answer, and

relied on the delay in the proceedings in the original suit, the decree having been taken pro confesso, the want of notice in H., and W., and in himself when he purchased the annuity, and on the plaintiff not having made him a party to that suit; but the court, on motion, granted a receiver. *Landon* v. *Morris*, 5 Sim. 247.

Costs of Dismissed Bill.]—An order dismissing a bill with costs, for want of prosecution, is an order within the meaning of the 3 & 4 Vict. c. 105, s. 27; and the court will, after taxation of such costs, and without any further order, appoint a receiver under that section. *Madden* v. *Davis*, Fl. & K. 475.

Bill of Married Woman.]—Quære, whether, if a bill by a married woman suing by her next friend, be dismissed with costs, the court has jurisdiction, on petition under 3 & 4 Vict. c. 105, or otherwise, to appoint a receiver for payment of the costs over separate property of the married woman, which was not the subject of her suit. *Hackett* v. *Farrell*, 4 Ir. Eq. R. 515; Fl. & K. 549. *See* HUSBAND AND WIFE.

Waiving Costs at Law—Elegit—Receiver.]—Where the petitioner issued an elegit, and obtained a finding on the inquisition, the court would not appoint a receiver, unless he consented to waive the costs at law. *Hudson* v. *Williams*, 1 Jones, 630.

Specialty Creditor.]—Receiver appointed in a suit by a specialty creditor, the assets being admitted by the answer to be insufficient to meet the demand. *Chalk* v. *Raine*, 7 Hare, 393; 18 L. J., Ch. 472; 13 Jur. 981.

Interference of One Court with Another.]—Although the court will not generally interfere with the proceedings of another court which has power to do complete justice, yet, in peculiar circumstances, it may be proper to do so by the appointment of a receiver. *Nothard* v. *Proctor*, 45 L. J., Ch. 302; 1 Ch. D. 4; 33 L. T. 709.

Ship's Husband — Dismissal — Detention of Machinery.]—Upon the purchase of a steam-vessel, it was agreed among the purchasers that two of them should be the ship's husbands, and should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charter-party for her, and they privately stipulated for a weekly payment, by way of commission for themselves, in addition to the weekly sum payable by the terms of the charter-party. In the month of May following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain; but the subsequent part of the conversation removed the suspicion. In October he acquired correct knowledge of what had been done, and, together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husbands denied the right to dismiss them, and they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs. The other part owners thereupon filed a bill, and moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, and for a receiver of the machinery:—Held, that the application was not too late; and, on it appearing that a decree of possession could not be obtained in the court of admiralty, by reason of the plaintiffs being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement:—Held, that the court of chancery had jurisdiction, upon motion, to appoint a receiver of the machinery, and to direct possession of it to be delivered to him; and an order was made accordingly, the captain being appointed receiver ad interim. *Brenan* v. *Preston*, 2 De G. M. & G. 813.

Protection of Untenanted Property—Grantees of Rent-charges — Disputes.]—In a suit on behalf of a number of grantees of rent-charges on the same property, who had powers of distress and entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rent-charges. *White* v. *Smale*, 22 Beav. 72.

IV. SURETIES AND SECURITY.

1. GENERALLY.

Appointment of Receiver—Condition—Relation Back of Title.]—The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional on the receiver giving security operates as an immediate delivery of the land in execution. When the security is afterwards given the order relates back to the date when it was made. *Evans, Ex parte, Watkins, In re*, 49 L. J., Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127—C. A.

The principle that the appointment of a receiver is merely conditional until his security is perfected applies only to cases where the question is as to his title against third parties. It has no application where the question is as to his own liability or that of his sureties in respect of moneys received and expended by him as receiver. *Smart* v. *Flood*, 49 L. T. 467. And see *Edwards* v. *Edwards*, 45 L. J., Ch. 391; 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713—C. A.

Surety Dying or Going Abroad.]—Where one of the sureties of a receiver died, not leaving any property, the court directed a new surety to be appointed. *Averall* v. *Wade*, Fl. & K. 341.

Where one of a receiver's sureties dies or goes abroad, and the receiver is unable to procure another surety, it is not the practice to charge the receiver with the expense of his discharge or the appointment of a new receiver. *Lane* v. *Townsend*, 2 Ir. Ch. R. 120.

Assets in India—Sureties in England.]—Receiver appointed, on application of executor, to collect assets in India; but receiver to find sureties in England. *Cockburn* v. *Raphael*, 2 Sim. & S. 453; 25 R. R. 244.

Appointment without Salary — Security — Premiums Paid to Guarantee Society — How to be Borne.]—Where a receiver is appointed without salary, but has to find security, premiums paid by him to a guarantee society for joining in the security will be allowed to him in his accounts, but such payments will not be allowed in the case of a receiver appointed with salary. *Harris* v. *Sleep*, 66 L. J., Ch. 511; [1897] 2 Ch. 80; 76 L. T. 458; 45 W. R. 536.

Attending Taking of Receiver's Account.]—A surety is not entitled semble to attend on the taking of a receiver's account except at his own expense. *Birmingham* v. *Bree & Co.*, 31 W. R. 415.

2. Form and Amount of Security.

Recognisance and Two Sureties.]—The course of the court requires a surety by the receiver, and two sureties in a recognisance; and taking the assignment of a mortgage belonging to a receiver instead, is very improper, and ought not to be done. *Mead* v. *Orrery (Lord)*, 3 Atk. 237.

Guarantee Society accepted as Surety.]—A receiver, being required to give security, named as his sureties two guarantee societies:—Held, that their security was sufficient. *Colmore* v. *North*, 42 L. J., Ch. 4; 27 L. T. 405; 21 W. R. 43.

The security of a guarantee society may be taken in the case of a receiver in a probate action. *Carpenter* v. *Solicitor to the Treasury, Stokes, In goods of*, 51 L. J., P. 91; 7 P. D. 235; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

Freehold Qualification not Necessary.]—The surety of a receiver need not qualify out of freehold estate. *Tottenham* v. *Tottenham*, Hayes, 575.

Uninrolled Recognisance.]—A recognisance not inrolled shall be looked upon as a bond, and paid as a debt by specialty. *Bothomly* v. *Fairfax*, 1 P. Wms. 334; 2 Vern. 750.

So a recognisance, not regularly taken, may be sued as an obligation. *Ib.*

Enrolment nunc pro tunc.]—Surety in recognisance of receiver discharged; fresh recognisance entered into; time for enrolment, elapsed, entered nunc pro tunc. *Vaughan* v. *Vaughan*, Dick. 90. S. P., *Blois* v. *Betts*, id. 336.

Conusor borrowing before Enrolment.]—A recognisance being inrolled by the special order of the court, after the time for inrolling it was elapsed, the conusor, betwixt the date of the recognisance and the inrolling of it, borrowed money of S. upon a judgment, which was now over-reached by the recognisance; and the estate of the conusor was in mortgage prior to the recognisance, so that neither the recognisance nor the judgment could reach the estate without the aid of equity. The court inclined to give the preference to the judgment creditor. *Fothergill* v. *Kendrick*, 2 Vern. 234.

Receiver in England having Property in Ireland.]—On affidavit that the proposed surety for a receiver has sufficient property in Ireland, but resides in England, he will be allowed to acknowledge the recognisances by letter of attorney. *Mahon* v. *Dawson*, 2 Hog. 269.

Receiver of Irish Estates appointed by English Court — Inrolment in Ireland.]—A receiver having been appointed by the court of chancery in England over estates in Ireland, and the recognisance directed to be taken and inrolled in the court, this court refused to do so, having no jurisdiction without a bill filed here. *Portarlington, In re*, 8 Ir. Eq. R. 369.

Extension of Receivership—Additional Security.]—When a receiver is extended over additional lands he must perfect additional security, or be removed from the receivership altogether. If in such a case the receiver be removed, and seeks the costs incident to his original appointment, he must make a special case for them. *Wise* v. *Ashe*, 1 Ir. Eq. R. 210.

Receiver and Manager without Salary — Extra Work — Wages — Allowances — Time of Application.]—A person who agrees to act as receiver and manager without salary, and does not at the time of his appointment obtain the sanction of the court to his receipt of wages for extra work done for the business, runs a risk of losing those wages altogether; but the court will in a proper case make allowances for extraordinary services. *Harris* v. *Sleep*, 66 L. J., Ch. 596; [1897] 2 Ch. 80; 76 L. T. 670; 45 W. R. 680—C. A.

3. Sureties, When Dispensed with.

Receiver not Appointed on his Own Security.]—The court of chancery will not in any case appoint a receiver upon his own security only. *Bailie* v. *Bailie*, 1 Ir. Eq. R. 413.

Application for leave to Act without Security.]—Where a reference has been made to appoint a receiver, the court will not, by consent even of the parties, dispense with the usual security. The proper course is for the parties, of their own authority, to nominate a receiver, and then to apply for liberty for him to act without security. *Manners* v. *Furze*, 11 Beav. 30; 17 L. J., Ch. 70; 12 Jur. 129. And see *Ridout* v. *Plymouth (Lord)*, Dick. 68; *Carlisle (Countess)* v. *Berkeley (Lord)*, Amb. 599, and *Conolly* v. *Codd*, Hay. & J. 624.

Parties Not Competent to Consent.]—A receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested. *Tylee* v. *Tylee*, 17 Beav. 583.

Receiver to get in Assets — Indemnity to Executor.]—A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor* v. *Allen*, 2 Atk. 213.

Form of Order.]—As to form of order dispensing with security, see *Hewett* v. *Murray*, 52 L. T. 380, 381.

4. Extent of Sureties' Liability.

Rents and Profits of Real Estate — Recognisance.]—The sureties for a receiver of rents and profits of real estate upon a recognisance drawn in the usual form (R. S. C., 1883, Appendix L., No. 21), are, notwithstanding the limited wording of the security, answerable up to the amount of their bond for all moneys for which the receiver himself is liable to account. *Graham, In re, Graham* v. *Noakes*, 64 L. J., Ch. 98; [1895] 1 Ch. 66; 13 R. 81; 71 L. T. 623; 43 W. R. 103.

Moneys Received Before and After Perfecting Security.]—A receiver is liable to account as such for all moneys coming to his hands in that capacity at any time, whether before or after the date of the perfecting of his security. A surety who has undertaken to account for what the receiver "should receive and become

liable to pay as such receiver," is liable to account for all such moneys as above mentioned. The principle that the appointment of a receiver is merely conditional until his security is perfected, applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received and expended by him as receiver. *Smart* v. *Flood*, 49 L. T. 467.

Amount of Recognisance the Limit.]—A receiver's sureties are not liable beyond the amount of the recognisance. The sureties having paid the amount of the recognisance into court:—Held, that they were not liable to the costs of removing the receiver, who was in default, and of appointing a new receiver, nor for the costs of a sci. fa. against themselves or their principal. *Walters* v. *Walters*, 11 Ir. Eq. R. 335.

Interest on Balance.]—A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust estate in a large sum, and for some time no steps were taken to have the accounts duly passed:—Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. Semble, that in general the sureties of a receiver are answerable for such interest, as well as for such principal as the receiver himself is liable to pay. *Dawson* v. *Raynes*, 2 Russ. 466; 26 R. R. 149.

A judgment having been entered on a bond executed by two sureties for a land agent:—Held, that interest on the balance due by him could not be claimed under the 3 & 4 Vict. c. 105, s. 26. *Templeton (Lord)* v. *Murdock*, 7 Ir. Eq. R. 470.

Defaulting Receiver—Liability of Guarantors—Costs of Orders against Receiver.]—A receiver made default in accounting for which his sureties admitted liability. Orders were made (1) discharging the receiver, (2) directing him to lodge his balance in court, and (3) appointing a new receiver. The petitioner having carriage was declared entitled to the costs of these orders, but the receiver was not specifically directed to pay them:—Held, that the sureties were liable for these costs. *Nugent's Estate, In re*, [1897] 1 Ir. R. 464.

Costs of Attachment of Receiver.]—A surety in a receiver's recognisance is to the extent of the amount of the recognisance answerable for the costs of an attachment against the receiver for not accounting, the costs of appointing a new receiver, and the costs of the order on the tenants to pay their rents to such new receiver. *Maunsell, Ex parte*, 3 Jo. & Lat. 251; 9 Ir. Eq. R. 283.

A receiver not having passed his account was attached, and subsequently discharged, and a new receiver appointed:—Held, that the first receiver's sureties were liable under the recognisance to the costs of the attachment, and to all costs of discharging the defaulting receiver, and appointing the new one. *Maunsell* v. *Egan*, 8 Ir. Eq. R. 372.

Costs of Enforcing Payment.]—The sureties in the recognisance of the committee of a lunatic for his obeying the orders of the lord chancellor with respect to the lunatic's estate:—Held, liable, on his making default, not only for the balance reported due from him, but also for the costs of the proceedings taken for enforcing the payment of such balance, although they may have had no notice of the default of their principal until after such proceedings taken. *Lockey, In re*, 1 Ph. 509; 14 L. J., Ch. 164.

—— **Costs of Orders against Receiver.**]—A receiver made default in accounting for which his sureties admitted liability. Orders were made (1) discharging the receiver, (2) directing him to lodge his balance in court, and (3) appointing a new receiver. The petitioner having carriage was declared entitled to the costs of these orders, but the receiver was not specifically directed to pay them:—Held, that the sureties were liable for these costs. *Nugent's Estate, In re*, [1897] 1 Ir. R. 464.

5. Indemnity to Sureties.

Surety stands in place of Receiver.]—A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and the same giving him therefore a lien on the money ordered to be paid to the receiver. *Glossop* v. *Harrison*, Coop. 61; 3 Ves. & B. 134.

Surety getting Receiver over Receiver's Estate.]—The surety of a defaulting receiver, having paid the sum due, obtained leave to proceed against him on his recognisance for recovery thereof, and having obtained judgment, presented a petition under the 5 & 6 Will. 4, c. 55, and 3 & 4 Vict. c. 105, for a receiver over his estate. The court granted the prayer of the petition. *Henderson* v. *Skerrett*, 5 Ir. Eq. R. 404.

Property Mortgaged to Surety.]—A., having been appointed receiver in a cause, mortgaged property to his surety by way of indemnity, and excepted from such mortgage his interest in certain shares in a testator's property which was in course of administration in the cause. A. made default, and his surety had to make good A.'s deficiency to the amount of his recognisance. A. was subsequently adjudicated bankrupt, and his assignees sold his interest in the shares which were excepted from the mortgage. Kindersley, vice-chancellor, made an order declaring, that, after making good to the other parties interested in the testator's estate the whole loss occasioned by A.'s default as receiver, the shares excepted from the mortgage were liable, as between the surety and the purchaser of such shares to make good to the surety the amount paid by him by reason of A.'s default. Appeal by the purchaser from so much of the order of the vice-chancellor as declared that the purchased shares were liable, as between the surety and the purchaser, to make good to the surety the amount paid by him in consequence of A.'s default, dismissed. *Brandon* v. *Brandon*, 28 L. J., Ch. 147; 5 Jur. (N.S.) 256; 7 W. R. 250—L.JJ.

Recovery of Interest.]—When one of two sureties has paid the full amount of a receiver's recognisance, he is entitled to use the recognisance for the purpose of recovering, out of the estate of his co-surety, not only one-half of the sum so paid by him, but also interest thereon

from the date of payment. *Swan, In re*, Ir. R. 4 Eq. 209.

6. Vacating Recognisances.

Not Vacated on Receiver's Discharge.]—The court will not vacate a receiver's recognisance at the same time he is discharged, even upon the consent of all the parties in the cause. *Fitzgerald* v. *Hill*, 2 Ir. Eq. R. 398.

Not Vacated during Continuance of Receivership.]—A person entering into a recognisance as a surety for a receiver, cannot get it vacated during the continuance of the receivership, unless underhand practice proved, and the person secured shown to be connected with such practice. *Hamilton* v. *Brewster*, 2 Moll. 407.

Sureties of receiver not discharged at their own request. *Griffith* v. *Griffith*, 2 Ves. 400.

One Surety discharged with Consent of Others.]—Where one of the sureties of a receiver seeks to be discharged, a consent, verified by affidavit and signed by the receiver and remaining surety, must be lodged with the registrar, stating that they consent that the surety shall be discharged without prejudice to their liability as to the past and future acts of the receiver, and a declaration that they will not rely on the vacating of the recognisance as to one of the parties in any proceedings against them on the recognisance. *O'Keeffe* v. *Armstrong*, 2 Ir. Ch. R. 115.

Receiver's Final Account passed.]—Where it appeared that the receiver had passed his final account in 1829, when there was a small sum due to him; that the purchaser under the decree in the cause was put into possession the same year, and that the receiver had not received any of the rents since his last account, the court granted an order to vacate the receiver's recognisance, although the receiver had not been formally discharged. The injunction to put the purchaser into possession amounts to a discharge of the receiver. *Anon.*, 2 Ir. Eq. R. 416.

Receiver Insane — Surety passing Final Account.]—The receiver being insane, the court made an order that his surviving surety might pass the accounts, and that on the balance being lodged the recognisance should be vacated, and gave the surety the costs of the motion, and of vacating the recognisance. *Webb* v. *Cashel*, 11 Ir. Eq. R. 558.

Payment of Balance by Surety.]—Proceedings were commenced in the common law side of this court against the surety of a receiver, to compel the payment of the balance ordered to be paid to the plaintiff. The surety paid the amount to the solicitor prosecuting the proceedings, and then applied to have his recognisances vacated. The petition was served on the plaintiff, who did not appear. The court refused to make the order, but directed the plaintiff to be served with a notice that the order would be made on a given day, unless the plaintiff showed cause to the contrary. The plaintiff not then appearing, the order was made. *Mann* v. *Stennett*, 8 Beav. 189; 9 Jur. 98.

Rules—Balance to be paid into Court.]—Rules of practice upon applications to discharge receivers and vacate their recognisances. *Lawson* v. *Ricketts*, 11 Beav. 627.

If the balance is to be paid into court, the same order may direct the recognisances to be vacated; but, if the balance is to be paid in any other mode, a second application becomes necessary. *Ib.*

7. Enforcing Recognisances.

Proceedings.]—Proceedings on the recognisance of a receiver. *Thurlow* v. *Thurlow*, 4 Jur. 962.

Money due a Debt of Record.]—Money not accounted for and due from a receiver under the court is, by his recognisance, made a debt of record, although the balance due has not been ascertained. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

Inquiry as to what Due and Payment by Instalments.]—Recognisance of surety for receiver being forfeited, and action brought against surety, on application, reference directed as to what was due, and order made for payment by instalments, and injunction to stay proceedings granted by consent on paying costs of application, and proceedings consequent on order. *Walker* v. *Wild*, 1 Madd. 528.

Unascertained Balance.]—The court will not allow a receiver's recognisance to be put in suit on a report showing merely that something is due from the receiver. The precise amount of what is due must be stated. *Ludgater* v. *Channell*, 15 Sim. 479; 16 L. J., Ch. 248; 11 Jur. 273.

Where in the lifetime of a receiver an unascertained balance was found by the master's report to be due from him, and he died without payment of such balance, the court ordered, upon petition, that his recognisance should be put in suit against his real and personal representatives, and against his sureties. *S. C.*, 3 Mac. & G. 175.

Defaulting Receiver concealing Himself.]—Where a receiver against whom an order for an attachment had been made, conceals himself so that his residence is unknown, service of an order to put his recognisance in suit will be substituted on his solicitor, with whom he is in communication. *O'Farrell* v. *M'Can*, 7 Ir. Eq. R. 63.

Scire Facias, Pleading to.]—A receiver, who has gone into receipt of rent under the court, will not be allowed to plead to a scire facias upon his recognisance, that the recognisance was taken by an unauthorised person. *Wellesley* v. *Mornington*, 13 Ir. Ch. R. 559. And see *Rex* v. *Lidwell*, 1 Dr. & Wal. 26.

Statute of Limitations.]—The Statute of Limitations is not pleadable to a scire facias on a receiver's recognisance. *Reg.* v. *Bayly*, 1 Dr. & War. 213; 4 Ir. Eq. R. 142.

A recognisance to the crown is not within the operation of the 8 Geo. 1, c. 4. *Ib.*

The period from which the twenty years specified in that statute are to be reckoned, is the issuing of the writ, and not the day upon which it bears teste. *Ib.*

The receiver is a trustee of such money for

the persons entitled thereto, and cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed and the recognisances vacated. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

V. SEVERAL AND EXTENDING ORDERS (IRELAND).

Only one Receiver appointed over same Estate.]—Only one receiver will be allowed to act over the same estate; and if the courts of chancery and exchequer have both appointed a receiver over the same estate, one or other must be discharged. *Biddulph* v. *Hickman*, 1 Hog. 244.

There ought not to be two receivers over the same land. Therefore this court will order that a receiver already appointed by the court of chancery, be extended to a cause here, upon his giving security proportionate to the additional lands, over which he may be appointed. *Downshire* v. *Tyrrell*, Hayes, 354.

Petitioner in Second Matter, Receiver in First.]—The petitioner in the second matter was receiver in the first. The court refused to extend him to the second matter, though the respondent consented. *Harvey* v. *Wallace*, 11 Ir. Eq. R. 339.

An order for appointment of a receiver should state that the court has been informed by the petitioner's solicitor that no order of a receiver has been made over any part of the lands of the respondent either in this court or in the court of exchequer, unless a special case is made for the appointment of a second receiver. *Clarke* v. *M'Mahon*, 9 Ir. Eq. R. 462.

Where by appointment of different receivers over distinct portions of the defendant's estates, the entire is extended, the court will remove all the receivers except one, who will be retained for the benefit of all parties. *Kelly* v. *Rutledge*, 8 Ir. Eq. R. 228.

Extension of Receiver.]—A receiver will not be appointed over the possession of another receiver; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one. And a defendant who appears on the motion, and makes the objection, may get the costs of his appearance, though in contempt. *Valle* v. *O'Reilly*, 1 Hog. 199; *Weldon* v. *O'Reilly*, Fl. & K. 320.

Confining Receiver to portion of Estate sufficient for Incumbrancers.]—If a receiver has been appointed over a larger estate than is necessary to satisfy the demands of the incumbrancers, the debtor may have him confined to such portion of the estate as will be sufficient for that purpose. *Magrath* v. *Veitch*, 1 Hog. 110.

Rents before Extension—Priorities.]—When a receiver appointed on the petition or in the suit of a puisne incumbrancer, is afterwards extended to the matter or suit of a prior incumbrancer, the rents received before the extension of the receiver belong to the puisne incumbrancer. *Abbott* v. *Stratten*, 3 Jo. & Lat. 603; 9 Ir. Eq. R. 233.

But rents due at the date of the extending order, and not received until afterwards, belong to the prior incumbrancer. *Ib.*

And rents due at the date of the order appointing a receiver under the Judgment Acts, but received afterwards, belong to the judgment creditor, and not to the debtor. *Ib.*

An equitable mortgagee is entitled to priority over a subsequent creditor, by judgment affecting the legal estate, who is in possession by a receiver, though the judgment was obtained without notice of the mortgage. *Ib.* And *Murtagh* v. *Tisdall*, 2 Ir. Eq. R. 41, and *Salt* v. *Donegall*, Ll. & G. t. Sugd. 82, and *Moore* v. *Donegal (Marquis of)*, 11 Ir. Eq. R. 364. Affirmed *id.* 412.

A receiver was appointed in an annuity cause, and was afterwards extended to the matter of a petition presented by a prior mortgagee under the mortgage act:—Held, that rents received by the receiver before the conditional order for extending the receiver to the matter was made, and which were still in court, belonging to the annuitant. *Davoren* v. *Collins*, 2 Jones, 806.

Receiver of Judgment creditor—Removal.]—A judgment creditor of a tenant for life presented a petition and obtained an order for the appointment of a receiver. Subsequently the trustee of the settlement filed a bill in chancery against the tenant for life, the infant tenant in tail, and the petitioner, alleging that there were incumbrances affecting the inheritance prior to the judgment of the petitioner, and that the rents were insufficient to keep down the interest on them, and prayed for the appointment of a receiver, and that he might be ordered to keep down the interest. A receiver having been appointed in that suit, the plaintiff in it applied to have the receiver of this court removed:—Held, that the right to remove the receiver first appointed, if it at all existed, was a right which belonged to a prior creditor; and that the plaintiff was not in that situation. *Burke* v. *Browne*, 6 Ir. Eq. R. 213.

Funds realised by Separate Creditors.]—D., tenant for life of estates in Ireland, by a deed of 1799, conveyed them for the payment of his debts to trustees, who issued debentures to the creditors. H., a debenture creditor, suing on behalf of himself and the other creditors, obtained a decree in the court of chancery in England, to carry into execution the trusts of the deed of 1799, and afterwards filed a bill in the court of chancery in Ireland, to enforce that decree; that bill was dismissed, but the decree of dismissal was reversed by the house of lords on appeal, which declared that the court of chancery in Ireland was bound to give effect to the English decree, and appoint a receiver over all the trust estates for the benefit of all the creditors. Before the bill was filed in Ireland by H., other debenture creditors had taken proceedings in this country, and subsequently, through the medium of receivers, realised a fund out of portions of the trust estates, which was lodged in court to the credit of their causes:—Held, that H., not having made those creditors parties to the bill filed by him in Ireland, was not entitled to any part of the fund realised by them, prior to the decree dismissing his bill; but as to the fund which accrued subsequently, he was entitled to come in, pari passu, with the other creditors; as, had the decree in his cause

been rightly pronounced by the court below, he would have obtained a receiver at that time. *Salt* v. *Donegall*, Ll. & G. t. Sugd. 82.

Order of Priority.]—Lord D. was tenant for life of certain estates subject to a charge on the inheritance of 15,000*l.* vested in S. A bill was filed by Lord D.'s creditors, claiming under a deed of the 20th of April, 1799, and a receiver was appointed over the life estate of Lord D. S. filed a bill to raise the charge of 15,000*l.* vested in him, which was created by a settlement of the 12th of November, 1761. Lord D., the tenant for life, died on the 5th October, 1844, and S. obtained an order on the 27th of January, 1845, from the last master of the rolls, that the receiver should be extended to S.'s cause, so far as related to the rents due at the time of the decease of Lord D., and then remaining uncollected, a sum being in the receiver's hands, consisting of rent due in Lord D.'s lifetime, part of which was collected before, and part after, the order of the 27th of January, 1845:—Held (affirming the master's allocation report), that the creditors of Lord D.'s life estate were entitled to the rents received before, and S. to the rents after, the order of the 27th of January, 1845. *Moore* v. *Donegal* (*Marquis*), 11 Ir. Eq. R. 364. Affirmed *id.* 412.

Persons to be Heard.]—On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver. *Walsh* v. *Walsh*, 11 Ir. Eq. R. 607.

Title of Suit.]—Where an application is made to extend a receiver from one cause to another, the notice of motion and affidavit should be intituled in both causes. *Tenant* v. *Watson*, 4 Ir. Eq. R. 700.

VI. REMUNERATION.

1. Rate and Amount.

See R. S. C. 1883, Ord. L. r. 16.

Percentage on Rent.]—A receiver is usually allowed 5*l.* per cent. upon the rents and profits of freehold and leasehold estates, and 2*l.* 5*s.* per cent. on gross sums: but this allowance will be increased or reduced at the discretion of the master, in cases of unusual difficulty or facility. *Day* v. *Croft*, 2 Beav. 488; 9 L. J., Ch. 287; 4 Jur. 429. See, however, *Prior* v. *Bagster*, 57 L. T. 760.

Where the master had allowed the receiver 5*l.* per cent. on a total amount, consisting partly of gross sums received by him, and partly of rents and profits which had been received with little trouble, such allowance was deemed too great, and it was referred back to the master to review his report. *Ib.*

A receiver is entitled to the usual poundage on all rent which is brought to his debit, and charged as received by him. *Hopkins* v. *Read*, 2 Hog. 267.

The testator, who had devised his real estates to his infant son, appointed as trustee and executor of his will D., who had for many years acted as receiver and manager of the property at a salary. The court continued D. as receiver of the property at a salary of three per cent. upon the rental. *Newport* v. *Bury*, 23 Beav. 30.

Appointment of Trustee as—Order not Providing for.]—Though a general it is not an inflexible rule that no remuneration will be allowed to a trustee appointed by the court receiver of the trust estate. The court has a discretion to grant or refuse it. The fact that nothing is said about remuneration in the judgment appointing a receiver does not preclude the court from subsequently allowing remuneration. *Bignell, In re, Bignell* v. *Chapman*, 61 L. J., Ch. 334; [1892] 1 Ch. 59; 66 L. T. 36; 40 W. R. 305—C. A.

Trustee Appointed on his own Undertaking.]—A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property is not under ordinary circumstances entitled to a salary as receiver. *Pilkington* v. *Baker*, *British Mutual Investment Co.* v. *Pilkington*, 24 W. R. 234.

Compensation for Attending Survey.]—A receiver is not entitled to any compensation for his trouble in attending a survey of the minor's estate, there being no order for his attendance. *Ormsby, In re*, 1 Ball & B. 189; 12 R. R. 13.

Journeys to Foreign Countries.]—A receiver is not entitled to be reimbursed the expenses of journeys to and residence in a foreign country, for the purpose of prosecuting proceedings for the recovery of property belonging to the estate, before the tribunals of that country, unless he has the express authority of the court for such journeys, &c. Principles and practice of the court with respect to allowances made to receivers for extraordinary services. *Malcolm* v. *O'Callaghan*, 3 Myl. & C. 52; 1 Jur. 838.

Special Orders as to Remuneration.]—Special order made by the lord chancellor, that instead of the further fee payable under the order of the 23rd October, 1852, for the certificate on passing a receiver's accounts, such fee should be paid as the judge to whose court the cause is attached should think reasonable. *Neave* v. *Douglas*, 26 L. J., Ch. 756.

Special order made by the lord chancellor that, instead of the sum payable under the 6th Order of 25th October, 1852, as a further fee for the certificate upon the passing of a receiver's and manager's account, there should be paid such a fee as the judge to whose court the cause was attached should think reasonable. *Wells* v. *Wales*, 4 De G. M. & G. 816; 3 W. R. 217.

In another case the lord chancellor directed the fee under the same order to be paid on each 100*l.* of the net profits of the business over which the receiver and manager had been appointed. *Ib.*

In the case of a receiver who was managing a business under the direction of the court, a special order was made that, instead of the further fee payable under the Order of the 30th January, 1857, in respect of his gross receipts, the fee should be payable in respect of the net profits; and a sum previously paid in respect of gross receipts was directed to be allowed in the payment of subsequent fees. *Buckmaster* v. *Buckmaster*, 28 L. J., Ch. 564.

Appointment without Salary—Security.]—Where a receiver is appointed without salary, but has to find security, premiums paid by him to a guarantee society for joining in the security will be allowed to him in his accounts, but such payments will not be allowed in the case of a receiver appointed with salary. *Harris* v. *Sleep*,

66 L. J., Ch. 511; [1897] 2 Ch. 80; 76 L. T. 458; 45 W. R. 536.

—— **Extra Work.**]—A person who agrees to act as receiver and manager without salary, and does not at the time of his appointment obtain the sanction of the court to his receipt of wages for extra work done for the business, runs a risk of losing such wages altogether; but the court will, in a proper case, make allowances for extraordinary services. *Harris* v. *Sleep*, 66 L. J., Ch. 596; [1897] 2 Ch. 80; 76 L. T. 670; 45 W. R. 680—C. A.

Partnership.]—A receiver and manager appointed by partners to wind up their business is in the absence of express stipulation entitled to a quantum meruit remuneration, not to remuneration according to the scale laid down for official receivers or under the 5 per cent. rule in *Day* v. *Croft* (2 Beav. 488). *Prior* v. *Bagster*, 57 L. T. 760.

2. Disallowance of.

Receiver not Passing his Accounts Regularly.]—Receiver who does not pass his accounts regularly, not to be allowed poundage. *White* v. *Lincoln* (*Lady*), 8 Ves. 371; 7 R. R. 71.

Receiver of the personal estate of the testator, not passing his accounts and paying in the balances, deprived of his salary and charged with interest, not upon each sum from the time it was received, according to the strict rule, applicable to a receiver of annual profits and rents, but as an executor would be charged. *Potts* v. *Leighton*, 15 Ves. 273.

—— **Charging with Interest.**]—A receiver, who neglected to pass his accounts according to an order made in the cause, but brought in on the same day the account for four years, was disallowed his poundage, and charged 5*l.* per cent. upon the balances during the time they were in his hands. *Bristowe* v. *Needham*, 9 Jur. (N.S.) 1168; 8 L. T. 652; 11 W. R. 926.

Neglect of Duty—Fees—Discharge—Costs.]—When a receiver was discharged, owing to gross dereliction of duty, the order disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of appointing his successor. *St. George's Estate, In re*, 19 L. R., Ir. 566.

—— **Poundage, on what Account Disallowed.**]—Where a receiver neglects to lodge the balance due on foot of his account in the time directed by the 147th General Order, the poundage which he is to be disallowed on passing his next account is to be the poundage on this last, and not on the preceding account, the balance of which he has neglected to lodge. *Maxwell* v. *Boate*, 7 Ir. Eq. R. 281.

Additional Gale of Rent got in by Delay.]—Additional gale of rent got in by a receiver by delaying a short time to pass his accounts. Poundage and costs allowed. *Flood* v. *Aldborough* (*Lord*), 8 Ir. Eq. R. 103.

Allowance of Remuneration by Consent.]—Where a receiver has not accounted within the proper time, his fees may, nevertheless, be allowed to him upon the consent of the parties in the cause, if they be competent to consent, but where some of them are minors, this cannot be done. *Dease* v. *O'Reilly*, 2 Con. & L. 441; 4 Dr. & War. 284.

The masters are not themselves actors in applying the General Order of the 23rd April, 1796, against defaulting receivers; and the court will not open accounts against such receivers for the purpose of depriving them of their poundage, and the costs of passing their accounts, when the parties beneficially interested have not raised any objection to the allowance of such poundage and costs before the master. *Ward* v. *Swift*, 8 Hare, 139.

Attachment—Accounting under.]—A receiver who accounts under an order for an attachment against him, must pay the costs of passing his account, and will only be allowed an abated rate of poundage, at the discretion of the master. *Trapaud* v. *Cormick*, 1 Hog. 245.

3. Other Matters.

Creditor in Possession as Quasi Mortgagee.]—Creditor going into possession as quasi mortgagee, not entitled to receiver's fees. *Trimleston* v. *Hamill*, 1 Ball & B. 384; 12 R. R. 38.

Deduction from Rents and Profits.]—The expenses of a receiver are not to be deducted from rents and profits decreed to the parties from the time of the agreement. *M'Leod* v. *Phelps*, 2 Jur. 962.

Tenant for Life bears Receiver's Poundage.]—Where a receiver had been appointed both of the real and personal estate:—Held, that the tenant for life must bear the receiver's poundage. *Shore* v. *Shore*, 4 Drew. 501; 28 L. J., Ch. 940.

Trustee Acting as Receiver.]—A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property is not under ordinary circumstances entitled to a salary as receiver. *Pilkington* v. *Baker*, *British Mutual Investment Co.* v. *Pilkington*, 24 W. R. 234. *See* col. 58.

Costs of Winding-up and Receiver's Remuneration—Priority.]—*See* Company.

VII. Possession.

1. Right to and Attornment.

When a turning of the Party out of Possession.]—The appointing a receiver is not in all cases a turning the party out of possession where a receiver is appointed of an infant's estate; in such case, the receiver's possession is in the possession of the infant; but on the appointing a receiver in an adversary's suit, as where the plaintiff in ejectment has recovered a verdict, here the receiver's possession seems to be the possession of him that has a right to it. *Sharp* v. *Carter*, 3 P. Wms. 379.

Delivery of Possession to Receiver.]—The course of the court is, that if a receiver is appointed, and the owner of the estate is in possession of part of the premises, application should be made to the court that the owner should deliver possession to the receiver, who cannot distrain on the owner in possession, as

he is not tenant to him. If, therefore, loss arises, it was the party's fault in not applying for that. *Griffith* v. *Griffith*, 2 Ves. 401.

—— **Order of Proceedings.**]—Three defendants were ordered to deliver up to a receiver certain premises, within a week, or in default to stand committed; but no writ of execution was taken out; they refused to deliver up, and a serjeant-at-arms was ordered to go against them. Upon being brought up, two of them expressed contrition, and were ordered to be discharged, upon payment of costs; the third still persisting in his contempt, was committed to the Fleet: the costs not being paid by the other two, they remained in custody of the serjeant; the orders were, upon motion, discharged with costs, and the persons liberated. Upon a motion, subsequently, that the defendants might be ordered to deliver up possession within a week after service of the writ of execution of the order to be made on that application, the court stated the course of proceeding to be, that there must be, first, an order to deliver possession, then a writ of execution of that order must be served on the defendants; and until that is done, no further order can be made, and refused the motion with costs. *Green* v. *Green*, 2 Sim. 394, 430.

Receiver already in Possession of Part.]—A receiver appointed to get in property, part in the possession of another receiver, cannot deprive the latter of the possession without the authority of the court; and where the object of the motion is merely to compel the payment of costs, after the question with respect to the possession is decided, it ought not to be for committal on the ground of disturbance. *Ward* v. *Smith*, 6 Hare, 312; 12 Jur. 173.

Refusal to Deliver or Attorn.]—Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn. It is not necessary, in the first instance, to make such person a party to the suit. *Reid* v. *Middleton*, Turn. & R. 455.

Liberty to Let to Tenant for Life.]—In order to give effect to the claim of the tenant for life, the court, in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts, granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving security for the fulfilment of the objects of the testator's will. *Baylies* v. *Baylies*, 1 Coll. 587.

Occupation Rent.]—A defendant who is the owner and occupier of an estate subject to a charge which the suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to the master to fix an occupation rent. *Everett* v. *Belding*, 22 L. J., Ch. 75; 1 W. R. 44.

Occupation rent prior to Appointment of Receiver.]—The court will not, by an interlocutory order before the hearing, charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent and appointing the receiver. *Lloyd* v. *Mason*, 2 Myl. & C. 487.

Arrears of Rent.]—A tenant who had not attorned to the receiver, ordered to pay him the arrears of rent in fourteen days, and the costs of the application. *Hobson* v. *Sherwood*, 19 Beav. 575.

Attornment—Effect of.]—An attornment to a receiver appointed by the court of chancery does not enure to the benefit of the person who shall ultimately be found to have in him the legal estate. *Evans* v. *Matthias*, 26 L. J., Q. B. 309; 3 Jur. (N.S.) 793.

Fund in Discretion of Trustees—Order against Trustees for Payment.]—An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied. The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorised, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper. The trustees applied for a prohibition:—Held, that as it depended on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition. *Reg.* v. *Lincolnshire County Court Judge*, 57 L. J., Q. B. 136; 20 Q. B. D. 167; 58 L. T. 54; 37 W. R. 174.

Money in hands of.]—Money in the hands of a receiver is not in custodiâ legis in the same way as it is when in the hands of a sequestrator. *Hoare, In re, Hoare* v. *Owen*, 61 L. J., Ch. 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R. 105.

Costs.]—On a motion that tenants may attorn and pay their arrears of rent to a receiver, it is not the course of the court to order the tenants to pay the costs of the motion. *Hobhouse* v. *Hollcombe*, 2 De G. & Sm. 208.

A motion was made that a tenant might attorn to the receiver or stand committed, and notice being only served on the tenant's solicitor at his request, stood over, and he did not subsequently appear, but personal service was effected:—Held, that the receiver was not entitled to his costs. *Williams* v. *Williams*, 11 W. R. 635.

2. Interference With.

Not Permitted.]—A receiver is an officer of the court, and any interference with him or with property under his protection amounts to a contempt of court, and is punishable accordingly. *Helmore* v. *Smith* (No. 2), 56 L. J., Ch. 145; 35 Ch. D. 449; 56 L. T. 72; 35 W. R. 157. And see *Brooks* v. *Greathed*, 1 Jac. & Walk. 178; *Randfield* v. *Randfield*, 1 Dr. & Sm. 310; *Johnes* v. *Claughton*, Jac. 573.

An interference with the receiver in possession, by a person claiming to be entitled to the property, will not be permitted after such person has been warned of the position in which the

property is placed, nor will the intention of taking ulterior proceedings to assert his title to the property prevent him from paying the costs of an application to commit him for contempt. *Fripp* v. *Bridgewater and Taunton Canal Co.*, 3 W. R. 356.

No one may interfere with money or property in the hands of the court without the consent of the court, whether such interference is with the consent of a receiver appointed in the cause or in any other way. *De Winton* v. *Brecon Corporation*, 6 Jur. (N.S.) 1046; 8 W. R. 385.

Where, under the garnishee clauses of the 17 & 18 Vict. c. 125, an order had been obtained at law against a receiver appointed in a cause pending in the court, by his consent for payment to a judgment creditor of the moneys due or accruing due from him as such receiver to the defendants, a corporation, and the receiver had, without the consent of the court, paid over certain moneys which he had received in the cause, and which by an order of the court he was directed to pay to the defendants:—Held, on motion made to that effect, that the persons to whom the same was paid were bound to refund it. *Ib.*

It is no answer to such a motion to say that it is premature, because the receiver not having passed his accounts, it is unascertained whether the court will allow him the payment which he has made. *Ib.*

—— **Though Order Erroneous.**]—The court will not permit its receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted, although the order appointing him may be perfectly erroneous. An application must first be made to the court for leave. *Ames* v. *Birkenhead Docks (Trustees)*, 20 Beav. 332; 24 L. J., Ch. 540; 1 Jur. (N.S.) 529; 3 W. R. 381.

Commitment.]—Where a person takes forcible possession of estates, over which a receiver has been appointed, an order for his commitment will be made without an order nisi being previously obtained. *Broad* v. *Wickham*, 4 Sim. 511. But in Ireland it has been held that a tenant who rescues a distress by a receiver will not be attached, but must be proceeded against at law, or under the statute. *Fitzpatrick* v. *Eyre*, 1 Hog. 171.

Sequestration.]—Under an order of the court, made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice for the benefit of the plaintiff, subject to a due provision for the service of the church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration and proceeded up to publication, but did not take or receive any funds of the living:—Held, that this ought not to have been done without the leave of the court, that it was an interference with the possession of the receiver, and was a contempt. *Hawkins* v. *Gathercole*, 1 Drew. 12; 21 L. J., Ch. 617; 16 Jur. 650. And see *S. C.*, 1 Sim. (N.S.) 63; 20 L. J., Ch. 59; 14 Jur. 1103.

Performance of Religious Service in District Chapel.]—Charity property, over which a receiver had been appointed, included a chapel, where service had for a long time been performed by the nominee of the master of the charity. The churchwarden of the adjoining parish alleged that the chapel was the parish church, and an ecclesiastical benefice distinct from the charity, and, in order to try the right, prevented the master's nominee, who had no license from the bishop, from performing the service. An injunction was granted to restrain him from further interference, with liberty to take legal proceedings to establish his claim. *Att.-Gen.* v. *St. Cross Hospital*, 2 W. R. 542.

Railway Company taking Land under Lands Clauses Consolidation Act.]—A railway company, without the leave of the court, took proceedings under the Lands Clauses Consolidation Act to take possession of lands in the possession of the receiver under the court. On an ex parte motion, they were restrained. *Tink* v. *Rundle*, 10 Beav. 318.

Seizure by Sheriff.]—A seizure of partnership assets in the possession of a receiver appointed by the court, of which the execution creditor had notice:—Held, to be a contempt on the part of the execution creditor and of the sheriff; and the court ordered both respondents to pay the costs of the seizure, and of a motion to commit for such contempt. *Lane* v. *Sterne*, 3 Giff. 629; 9 Jur. (N.S.) 320; 10 W. R. 555.

A sheriff seized the goods of a tenant of lands over which a receiver had been appointed. He retained half a year's rent, and paid over the balance to the judgment creditor. The receiver claimed the rent, and the plaintiff brought an action against the sheriff, who applied to the court for protection as between these adverse claims. The court declined to interfere. *Trye* v. *Trye*, 13 Beav. 422; 20 L. J., Ch. 368; 15 Jur. 809.

Ejectment.]—Where a receiver is in possession, an ejectment cannot be brought without leave of the court. *Angel* v. *Smith*, 9 Ves. 335; 7 R. R. 214.

—— **Defending.**]—Upon motion that receiver may be at liberty to defend an ejectment, the parties interested being adults, and consenting, a reference was made whether it was for their benefit. *Anon.*, 6 Ves. 287.

—— **Landlord's Application for Leave to bring Ejectment—Non-payment of Rent—Jurisdiction to impose Terms.**]—Where a receiver has been appointed over lands held at a rent, the landlord must obtain leave of the court before he can commence an action to recover possession for non-payment of rent; and, in granting such application, the court has jurisdiction to impose terms, such as that the proceedings shall not be commenced for a specified time. In disposing of such applications the court will be slow to interfere with the rights of the landlord, and will only impose conditions when necessary for the benefit of the estate for sale, and not likely to occasion the landlord any appreciable injury. *Battersby's Estate, In re*, 31 L. R., Ir. 73.

—— **Copyholds.**]—In suits by creditors and legatees, a receiver was appointed of the rents and profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the court baron of the manor, proclamations were made for the next tenant to come in and be admitted, and no person

appearing, the bailiff of the manor was ordered to seize the lands quousque. Declaration in ejectment, at the suit of the lord, was afterwards served on the terre-tenant; but, on the motion of the receiver, the lord was restrained by injunction from prosecuting the action. *Evelyn* v. *Lewis*, 3 Hare, 472.

Receiver in Bankruptcy and Bill of Sale Holder.]—When a receiver has been appointed by the court of bankruptcy, it is a contempt of court for the holder of a valid bill of sale of goods of the bankrupt to oust the receiver from possession which he has taken of such goods. *Cochrane, Ex parte, Mead, In re*, 44 L. J., Bk. 87; L. R. 20 Eq. 282; 23 W. R. 726.

A receiver appointed by this court being in possession of property under that order, the sheriff seized the property on a writ of fieri facias, and, upon motion to commit him for contempt, justified his seizure and subsequent conduct by alleging that the order appointing the receiver was an order that ought never to have been made, and that, in fact, it had been obtained by collusion between the plaintiffs and defendants in the suit:—Held, ordering the sheriff to withdraw from possession, and pay the costs, that the court could not, upon such a motion, enter into the question of the propriety or impropriety of the order appointing the receiver, but was bound to vindicate its authority and protect its officer; and that, at the utmost, circumstances could only be looked at in administering the amount of punishment. Upon the submission of the sheriff, he was not committed, and the order was made without prejudice to any application which the execution creditor might be advised to make to be heard pro interesse suo. *Russell* v. *East Anglian Ry.*, 3 Macn. & G. 104; 20 L. J., Ch. 257; 14 Jur. 1033.

Sheriff under 1 & 2 Vict. c. 110, not in Position of Receiver.]—A sheriff, who has levied under a writ of fi. fa. issued by the court of chancery under 1 & 2 Vict. c. 110, is not entitled to an injunction to restrain proceedings against him by strangers to the suit, by analogy to the case of receivers or sequestrators appointed by the court, or to the practice at law under the Interpleader Act, or otherwise. *Rocke* v. *Cooke*, 2 De G. & Sm. 493. Affirmed, 2 Ph. 691.

After an order for, but before the actual appointment of, a receiver in a suit for dissolution of partnership, the sheriff had taken possession of part of the partnership property under a fi. fa., and afterwards refused to quit possession when the receiver was appointed; a motion to commit the sheriff for contempt was refused with costs. *Defries* v. *Creed*, 34 L. J., Ch. 607; 11 Jur. (N.S.) 360; 12 L. T. 262; 13 W. R. 632.

Person Injured by Appointment—Application to Court.]—A third person claiming an interest in lands over which a receiver has been appointed, should, if he is injured by the appointment, apply to the court; not to interfere with the tenants. *Wardle* v. *Lloyd*, 2 Moll. 388.

It is not according to the course of the court to refuse liberty to try a right which is claimed against its receiver, unless it is clear that there is no foundation for the claim. *Randfield* v. *Randfield*, 3 De G. F. & J. 776; 31 L. J., Ch. 113; 8 Jur. (N.S.) 161; 5 L. T. 698. *And see* col. 67.

3. Distress by Third Parties.

Landlord.]—The only person who may interfere with the possession of a receiver is a landlord distraining for a year's rent. Any other person who claims a better title than the receiver ought to apply to the court for leave to enforce his rights. *Cochrane, Ex parte, Mead, In re*, 44 L. J., Bk. 87; L. R. 20 Eq. 282; 23 W. R. 726.

A receiver, having been appointed to realise a testator's estate, advertised the furniture for sale. The day before the sale the landlord gave him notice of his claim for rent, but took no further steps:—Held, that the landlord had no lien on the proceeds of the sale in priority to the other creditors. *Sutton, In re, Sutton* v. *Rees*, 1 N. R. 464; 9 Jur. (N.S.) 456; 8 L. T. 343; 11 W. R. 413.

The appointment of a receiver does not affect the rights of a landlord; but he cannot exercise them without first obtaining leave of the court. *Ib.*

—— **Receiver appointed in Bankruptcy.**]—A landlord distrained for one year's arrear of rent on goods of a debtor in the hands of a receiver appointed by the court of bankruptcy. On an application by the receiver to the county court judge for an injunction, the landlord was restrained from proceeding with the distress, and was also committed for contempt of court. On appeal:—Held, that the landlord could distrain as against the receiver without the leave of the court; and further, that the position of a receiver in bankruptcy is not the same as that of a receiver in chancery. *Till, Ex parte, Mayhew, In re*, 42 L. J., Bk. 84; L. R. 16 Eq. 97; 21 W. R. 574.

—— **Leave of Court to Distrain.**]—When property over which a person claims a right to distrain is in the hands of a receiver the court of chancery will give leave to distrain, unless it is clear that the property is not within the power of distress. *Eyton* v. *Denbigh, Ruthin and Corwen Ry.*, 38 L. J., Ch. 74; 16 W. R. 928.

Annuities Secured on Real Estate.]—In a suit relating to two annuities secured on real estate, and to which the grantor was not a party, a receiver was appointed "of the incomes of the outstanding trust property" in the pleadings mentioned. The receiver entered and continued in possession of the real estate for six years. The court refused to restrain the grantor by injunction from distraining on the tenants. An order for a receiver ought to state distinctly on the face of it over what property the receiver is appointed. *Crow* v. *Wood*, 13 Beav. 271.

Rents of Land subject to Rent-charge.]—A rent-charge of 100*l.* was granted out of certain lands, part of which was let to two tenants, whose rents amounted to 15*l.*, and who by the same deed attorned to the grantee. A receiver having been appointed over the rent-charge on petition, under the Judgment Acts, the grantor distrained the tenants for 5*l.*, the balance of their rent over the rent-charge:—Held, that the court, by appointing the receiver, had attached the whole rent payable by the tenants, and an attachment was awarded in the petition matter. *Hayden* v. *Shearman*, 2 Ir. Ch. R. 137.

4. Other Rights of Third Parties.

Judgment Creditor—Goods—Leave to Levy.]—Where an order of the court has, by mistake, put a receiver in possession of goods, the proper course for a judgment creditor, seeking to levy execution against them, is to move to discharge the order, or to apply to be examined pro interesse suo. *Fowler* v. *Haynes*, 2 N. R. 156.

Judgments—Liability of Land in Possession of Receiver.]—Lands are liable to judgments, notwithstanding the court of chancery has appointed a receiver to receive the rents and keep down the incumbrances, and to pay the surplus to the owner. *Lewis* v. *Zouch* (*Lord*), 2 Sim. 389.

Costs—Leave to Levy Execution.]—A. B. had obtained an order in the exchequer for payment of costs against a party to a suit in this court, who was tenant for life of certain property over which a receiver had been appointed, with directions to pay her the rents. The court gave leave to A. B., notwithstanding the appointment of receiver, to sue out and execute such writs as he might be advised. *Gooch* v. *Haworth*, 3 Beav. 428.

Receiver Delegating to Solicitor—Reimbursement.]—A. was appointed receiver, but the solicitor in the cause alone acted, and paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into court; and after payment of his claim, there remained a surplus, which was paid to the tenant for life:—Held, that A. could not, on petition, obtain repayment by the tenant for life, or out of the estates. *Gurden* v. *Badcock*, 6 Beav. 157; 12 L. J., Ch. 62.

Order on Receiver—Petition—Bill.]—A., being entitled, under a decree, to an annuity, which she was to receive from the receiver in the cause, borrowed 100*l.* from B., and signed a memorandum of agreement to the effect that her said annuity should be a security for that sum and interest, and also gave an order upon the receiver for payment to B. of 100*l.* Upon B. presenting the order to the receiver, the receiver stated that he would not pay it, because A. had desired him to pay to no person but her agent. Upon the petition of B., praying an order upon the receiver for payment:—Held, that as A. appeared and opposed the petition, the court had no jurisdiction to make the order upon petition, but that B. should have come by bill *Wastell* v. *Leslie*, *Carter*, *Ex parte*, 11 Jur. 29.

First Incumbrancer—Leave to Enforce Security.]—The priorities of incumbrancers upon an estate were declared, and a receiver appointed, to which a first incumbrancer was no party; and he subsequently filed a bill against them and the receiver, to establish his priority, praying that his suit, "if necessary, might be taken as supplemental," and he moved in that second suit for an injunction to restrain the receiver from making further payments:—Held, irregular, and that his course was to have applied in the first suit for leave to enforce his security. *Smith* v. *Effingham* (*Earl*), 2 Beav. 232.

Right of Way—Obstruction—Leave to Abate.]—It is not the course of the court to refuse liberty to try a right claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim. *Lane* v. *Capsey*, 61 L. J., Ch. 55; [1891] 3 Ch. 411; 65 L. T. 375; 40 W. R. 87.

Payment of Money.]—A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands. *Brocklebank* v. *East London Ry.*, 48 L. J., Ch. 729; 12 Ch. D. 839; 41 L. T. 205; 28 W. R. 30.

VIII. Rights, Duties, and Management.

1. Generally.

An Officer of the Court.]—A receiver is not an agent for any other person. He is not a trustee. He is an officer of the court, appointed by it, and responsible to it. *Bacup Corporation* v. *Smith*, 59 L. J., Ch. 518; 44 Ch. D. 395; 63 L. T. 195; 38 W. R. 697.

Powers and Authority of.]—A receiver in chancery has a right, without any authority or direction from the court of chancery, to issue a debtor summons to compel payment of a debt due to him in his character of receiver. *Harris*, *Ex parte*, *Lewis*, *In re*, 45 L. J., Bk. 71; 2 Ch. D. 423; 34 L. T. 261; 24 W. R. 851.

Where a receiver in a cause, without obtaining leave from the court, proved against the estate of a bankrupt legatee, who was a debtor to the estate:—Held, that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt whose bankruptcy has been annulled to his legacy. *Armstrong* v. *Armstrong*, L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.

Money in Hands of.]—Money in the hands of a receiver is not in custodiâ legis in the same way as it is when in the hands of a sequestrator. *Hoare*, *In re*, *Hoare* v. *Owen*, 61 L. J., Ch. 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R. 105.

Collection of Rents.]—A receiver ought not to do any acts which may involve the estate in expense without first applying to the court for leave. *Swaby* v. *Dickon*, 5 Sim. 629.

It is the duty of a receiver to collect the rents, but not to assume the management of the cause. *Callaghan* v. *Reardon*, Sau. & Sc. 682.

—— **Assistant or Driver—Reference.**]—It will not be referred, whether for the benefit of the minor, that a driver or assistant to the receiver in enforcing payment of the rents should be employed at the minor's expense. Such assistant ought to be paid by the receiver. *Reddington*, *In re*, 1 Moll. 256.

—— **Plantations—Caretaker.**]—The master has jurisdiction to appoint a rent bailiff to assist the receiver or a caretaker of plantations, if he conceives it for the benefit of the estate. The court will not entertain such a motion. *Newton* v. *Obre*, Sau. & Sc. 137.

Shooting.]—Receiver authorised to let the shooting upon certain terms, pending an injunction, until trial of issues respecting the right of

warren. *Blanchard* v. *Cawthorn*, Coop. temp. Brough. 113.

Timber Blown Down.]—Where timber trees were blown down on an estate over which a receiver had been appointed, the court ordered the receiver to sell them to the best advantage, and to keep a separate account of the produce of the sale, with liberty to the parties to apply at any future time, as they might be advised. *Crofts* v. *Poe*, Jon. & C. 193.

Custody of Court Rolls—Infant Lord.]—The right to the custody of the court rolls of a manor is in the lord, and not in the steward. *Rawes* v. *Rawes*, 7 Sim. 624; 5 L. J., Ch. 114.

In a cause where the infant plaintiffs were lords of a manor, the court, on motion, ordered the court rolls to be delivered up to the receiver in the cause. *Ib.*

Head Rent—Payment of.]—The receiver over a leasehold or other derivative interest or estate, should pay the head rent regularly. If the landlord is obliged to apply for leave to proceed, the court will make the receiver pay the costs of the application if he had funds to pay the rent; or otherwise, give the landlord the costs of his application against the funds in the causes. Semble, that in such a case the landlord might proceed for his rent without asking the leave of the court. *Walsh* v. *Walsh*, 1 Ir. Eq. R. 209.

The primary duty of a receiver over a leasehold is out of the sub-rents to discharge the head rent, and this he is bound to do without an order of the court for that purpose. Accordingly, where a receiver had suffered the lessee to be evicted by ejectment for non-payment of rent, and it appeared that he had received rent from a sub-tenant more than sufficient to pay the head rent, and applied it in payment of other demands, amongst which were the annual premiums upon certain policies of insurance, in which as a creditor of the estate he was interested, and although he was directed to make those payments by an order of the court, he was compelled by the court to pay to the landlord the arrears of head rent. *Balfe* v. *Blake*, 1 Ir. Ch. R. 365.

Assignees of Insolvent—All Debts Paid.]—The representatives of a surviving assignee of an estate that had paid 20*s.* in the pound, all the commissioners being dead, were ordered to execute a power of attorney to a receiver, appointed under a decree of the court, in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified. *Twogood* v. *Hankey*, Buck, 65.

Claim for Arrears of Salary — Discharged Receiver.]—A bill alleged that the defendant had been appointed receiver in a certain suit, and that as such receiver he was bound to pay the plaintiff a certain salary; that the defendant ought to have paid the plaintiff this salary from January, 1834, to January, 1839, but that he had paid the plaintiff nothing in respect of it; and that the defendant had since been discharged from being receiver. The bill prayed for an account of the sum due to the plaintiff from 1834 to 1839, and for payment by the defendant:—Held, that this bill was open to a general demurrer. *Du Pre* v. *Duncombe*, 14 L. J., Ch. 403.

Liability of Inspectors appointing Receiver.]—When a receiver is appointed under an ordinary inspectorship deed, the inspectors, though they appoint and may remove him, are not responsible for his default as if he were their agent. *Hobson* v. *Jones*, 39 L. J., Ch. 245; L. R. 9 Eq. 456; 22 L. T. 143; 18 W. R. 477.

Licence—Renewal of.]—An hotel and restaurant were sold in July, 1891, the particulars stating that a retail licence was attached, that the premises were in possession of the receiver appointed by the court, and that the licence would be handed to the purchaser. Owing to delay, caused by the purchaser, the conveyance was not completed till May, 1892. The licence expired in October, 1891:—Held, that there was no failure of duty on the part of the receiver in not applying for a renewal, and that the purchasers could not sustain a claim for compensation for the loss of the licence. *Hay's Estate, In re*, 31 L. R. Ir. 66.

Carrying on Trade.]—*See* COMPANY (DEBENTURES).

2. CONTRACTS BY.

Receiver and Manager—Debenture-holders, Action—Liability on Contracts.]—Receivers and managers appointed by the court at the instance of the debenture-holders of a limited company to receive and manage the assets and business of the company are officers of the court, and are not, by virtue of their appointment, the agents of the company to make contracts on the company's behalf. Semble, they are not the agents of the debenture-holders. *De Grelle, Houdret & Co.* v. *Bull*, 10 R. 97; 1 Manson, 118.

They may be personally liable on their contracts made as receivers and managers. If they purport to contract on the company's behalf, they may be liable for breach of warranty of authority. *Ib.*

And see *Gosling* v. *Gaskell*, 66 L. J., Q. B. 848; [1897] A. C. 575; 77 L. T. 314; *Burt* v. *Bull*, 64 L. J., Q. B. 232; [1895] 1 Q. B. 276; 71 L. T. 810; 43 W. R. 180; and *Owen* v. *Cronk*, [1895] 1 Q. B. 265. *See also* COMPANY (DEBENTURES) and PRINCIPAL AND AGENT.

3. DISBURSEMENTS AND REPAIRS.

Sums laid out without Order—Reference.]—Formerly a receiver was not entitled to any allowance for sums of money laid out by him on the estate, without a previous order. But according to the present practice, a reference is directed to the master to inquire whether the transaction is for the benefit of the parties interested. *Tempest* v. *Ord*, 2 Mer. 55.

Receiver not permitted to lay out more than a very small sum at his discretion. *Waters* v. *Taylor*, 15 Ves. 26; 13 R. R. 91.

Repairs — Discretion of Receiver.]—Receiver is not to lay out money in repairs at his own discretion; but, under circumstances, an inquiry was directed; and the report stating that expenditure was for lasting benefit of estate, and by the direction of trustees, order for that allowance was made. *Blunt* v. *Clitherow*, 6 Ves. 799.

Receivers and committees not to apply the trust fund in repairs to any considerable extent without previous application. Upon a receiver's application to be allowed for repairs done, an inquiry was directed whether repairs were reasonable. *Att.-Gen.* v. *Vigor*, 11 Ves. 563.

A reference as to whether any sum should be laid out in the repairs of certain premises, held under the court, was refused; because primâ facie a tenant is bound to repair, and the motion was a voluntary application on the part of the receiver in the cause. *Dorset* (*Duke*) v. *Crosbie*, Sau. & Sc. 683.

The direction in an order appointing a receiver that he shall manage as well as set and let the estate, authorises him to propose to the master, from time to time, to make ordinary repairs to the buildings on the estate. *Thornhill* v. *Thornhill*, 14 Sim. 600.

—— **Family Mansion.**]—Repairs of the family mansion, and continuance of the family charities, and accustomed bounty to the poor, are reasonable and proper objects. Lord chancellor expressing no doubt of the authority of the chancellor in the management of minors' fortunes, extending to mere charity and bounty, having regard to the circumstances of the country, and especially in relation to no compulsory provision for the poor. *Reddington, In re*, 1 Moll. 256.

—— **Glebe House.**]—The expenses of repairing the glebe house are the first charge upon profits of the benefice received by the receiver. *Sterling* v. *Wynne*, Hay. & J. 817.

Employing Poor Tenantry in Time of Distress.]—In a time of general scarcity and distress, the receiver of a minor's estate will be authorised to lay out a sum of money in relieving and employing the poor tenantry. *Jackson* v. *Jackson*, 2 Hog. 238.

Poor-rate Judgment.]—A judgment for poor-rate against the immediate lessor, under the 6 & 7 Vict. c. 92, s. 2, does not deprive the poor-law guardians of their remedy against the occupiers, under s. 3 of the same act. Therefore the court directed the receiver to pay a rate struck before his appointment, and the costs of a payment obtained for it against the immediate lessor. *De Montmorency* v. *Pratt*, 12 Ir. Eq. R. 411.

Stamp—Tithe Composition.]—When a tenant held lands under an unstamped accepted proposal, which rendered him liable to the payment of tithe composition, the court on motion directed the receiver over the landlord's estate to stamp the same, and that the expenses thereof should be allowed to him in passing his account. *Langley* v. *Langley*, 1 Dr. & Wal. 252.

Tithe Rent-charge.]—The general order of the court, directing the receiver to pay the tithe rent-charge, amounts to an order to pay in each particular case. *Brown* v. *Brown*, 2 Ir. Eq. R. 409.

Upon the application of a tithe owner, under the 4 Geo. 4, c. 99, s. 38, a receiver in a minor's cause directed to pay over one year's arrear of tithe composition out of the proceeds of a distress for rent made by him upon a tenant who was primarily liable to the payment of the composition; but the tenant ought to have notice of such application. *Hawkes* v. *Smith*, Sau. & Sc. 326.

4. Title to Rents and Debts due.

Rents in Arrear.]—A receiver appointed by the court is entitled to receive rents then in arrear. *Codrington* v. *Johnstone*, 1 Beav. 520; 8 L. J., Ch. 282; 3 Jur. 528.

A tenant who had refused to pay rent to the receiver, on the ground of having received from the defendants notice not to do so, was on motion made upon notice to him ordered to pay the arrears to the receiver, with the costs of the motion. *Hobson* v. *Sherwood*, 19 Beav. 575.

Order to Pay Debt to Receiver—Jurisdiction.]—Quære, when a receiver has been appointed to collect and get in outstanding personal estate, has the court jurisdiction to order a debtor to the estate to pay the sum due by him to the receiver. *Kirk* v. *Houston*, 5 Ir. Eq. R. 498.

The court declined to make such an order, where the debtor had paid the money to the personal representative before he had notice of the order appointing the receiver. *Ib.*

Payment by Tenant—Subsequent Payments—Demand.]—If a tenant has once paid rent to a receiver, a personal demand of rent subsequently accrued due is unnecessary, and a demand by letter, or by a third person, is sufficient. *Brown* v. *O'Connor*, 2 Hog. 77.

Solicitor receiving Rents without authority of Court.]—A solicitor who receives rents in a cause, without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickens* v. *Townshend*, 1 Russ. & M. 361.

Payment into Court to save Receiver's Poundage.]—A receiver being appointed to get in the outstanding estate of a testator, the court gave leave to a party who was willing to pay a sum due to the estate into court to do so, in order to save the poundage, which would have been incurred if it had passed through the hands of the receiver. *Haigh* v. *Grattan*, 1 Beav. 201; 8 L. J., Ch. 249.

Retainer by Executor against Receiver.]—The retainer of his debt by an executor as against a receiver appointed by the court is improper. *Davenport* v. *Moss*, 14 L. T. 133; 14 W. R. 453.

Payment of Debts obtained adversely to Receiver.]—Upon an application of the receiver in a cause supported by an affidavit founded on information and belief only, the court ordered a defendant, who had obtained payment of certain debts adversely to the receiver, within one week to make an affidavit of the amounts as received by him, and to pay the same to the receiver, or in default to be committed. *Parker* v. *Pocock*, 30 L. T. 458.

5. Leases by.

Receiver to Let to best Advantage.]—Motion by a remote remainderman and tenants to restrain receiver from ejecting tenants, refused with costs, their interest not being sufficient.

Receiver is to let the estate to the best advantage, but he cannot raise the rents upon slight grounds, nor turn out tenants, nor let even for one year without application to the master. *Wynne* v. *Newborough* (*Lord*), 1 Ves. J. 164, 165.

Application to Court.]—Receiver here gives security duly to account; not for faithful management. He cannot set and let, nor make expenditures, without application to court; manager in West Indies may. *Morris* v. *Elme*, 1 Ves. J. 139.

Reference to Registrar.] — An application being made by the receiver of real estate, appointed by order of the court, for general directions as to letting and management of the estate of the deceased, and for leave to grant leases for the term of three years, the court ordered the matter to be referred to the registrar for his report. *Neale* v. *Baily*, 23 W. R. 418.

Infant Remainderman.]—No instance of power being given by court to receiver to grant lease which would bind infant remainderman. *Gibbins* v. *Howell*, 3 Madd. 469.

Inquiry as to Length of Term.]—Appointment of a receiver of an estate in India; the receiver to be in England, acting by an agent. Inquiry directed what should be the term, beyond which he should not be permitted to let. —— v. *Lindsay*, 15 Ves. 91.

Twenty-one Years' Lease.]—S. B. being in possession of a manufactory held under a college lease for twenty-one years, with general covenant, dies; and a suit being instituted, a receiver is appointed, who provisionally agrees with I. to let the premises to him for twenty-one years, subject to certain covenants with special exceptions as to repairs and damage by fire. After this agreement the old lease is renewed, and in the renewed lease certain new buildings erected by I., and excepted in his covenant to repair, are inserted as part of the parcels. I., wishing to give up possession, proceeds to remove his new buildings, is enjoined from so doing, and eventually a reference is directed to chambers, and the chief clerk certifies that a lease can be granted to I. On an appeal from such certificate:—Held, that the receiver was not in a condition to grant such lease, and that the certificate was not correct. *Whitehead* v. *Bennett*, 5 W. R. 419.

Letting to Tenant for Life.]—In order to give effect to the claim of the tenant for life, the court, in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts, granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving security for the fulfilment of the objects of testator's will. *Baylies* v. *Baylies*, 1 Coll. 587.

Lease of Farm—Removal of Straw.]—Where the receiver had let to a party, not in the cause, a farm, part of the estates in question, the court, by order in a summary way, restrained him from carrying straw, &c., therefrom. *Walton* v. *Johnson*, 15 Sim. 352; 12 Jur. 299.

Ireland—Premises of Small Value.]—Where the premises are of small value, the receiver will be permitted to let and to distrain from time to time, as may be necessary. *Dean* v. *Donovan*, Hay. & J. 218.

—— **Reletting Recovered Lands.**]—A receiver need not apply to the court for leave to let for six months, subject to redemption, lands which have been recovered in an ejectment for non-payment of rent. *Vincent* v. *Gubbins*, Hayes, 29.

—— **Application by Plaintiff not Receiver.**]—A motion to let lands in the actual occupation of the defendant or respondent in a cause or matter, should be made by the plaintiff or petitioner, and not by the receiver in such cause or matter. If such motion be made by the receiver, and be unopposed, the court will not make any order upon it; and if it be opposed, it will be refused with costs. *Wrixon* v. *Vize*, 5 Ir. Eq. R. 276.

—— **Affidavit in Support.**]—An affidavit made by a receiver in support of an application for liberty to let lands, must show clearly that the lands are not in the possession of under-tenants. An order for letting will not be made upon consent. *Sealy* v. *Munns*, 1 Ir. Eq. R. 332.

—— **Costs.**]—Costs of letting, refused with costs, to a receiver. *Payne* v. *Lamb*, 8 Ir. Eq. R. 517.

—— **New Letting Directed.**] — Where the master in chancery refused to take a bidding, for the inheritor and a party in the cause, at the letting of the lands, on the ground that he had not obtained the previous permission of the court, and declared as tenants, bidders of a less rent; the court, upon obtaining a certificate of their practice from the masters, directed a new letting of the lands. *Sproule* v. *Sproule*, 7 Ir. Eq. R. 633.

—— **Mortgage.**]—Upon a motion for letting in a mortgage cause, if there is a receiver upon answer, the order is absolute in the first instance, but only conditional if the receiver is upon process. *Burris* v. *Perse*, 2 Moll. 327. And see *Seymour* v. *Seymour*, Ll. & G. t. Plunk. 424; and *Mansfield* (*Lord*) v. *Hamilton*, 2 Sch. & Lef. 28.

—— **Mortgaged Lands not Producing Rent.**]—The court is not in the habit of ordering any lands to be let under a mortgage petition, which were not producing rent at the time the receiver was appointed. *Frere* v. *Hibernian Mining Co.*, 2 Hog. 30.

Letting Subject to Interest of Resident Tenants.]—The court will not set up land to be let subject to the interest of the tenants resident thereon. *Anon.*, 2 Jones, 630.

Surrender and Renewals.]—Upon an affidavit of the receiver setting out the facts fully, and notice to all the parties in the cause, and no objection raised: an order will be made for the receiver to accept a surrender, &c., from an insolvent tenant without putting the parties to the expense of a reference. *Davidson* v. *Armstrong*, Sau. & Sc. 135.

An order that certain tenants of a minor should be at liberty to execute a surrender was granted, upon the motion of the receiver made by the direction of the master, and it being plainly for the minor's benefit that a surrender should be accepted, but the concurrence of the

minor's guardian was required. *Davis* v. *Cotter*, Sau. & Sc. 685.

How a receiver should proceed where the lands are held for lives, renewable for ever, and some of the lives have dropped. *Palmer* v. *Newport*, 1 Hog. 133.

The receiver is the proper person to apply to the court for a reference as to renewal fines, and the execution of a renewal by the parties, but it will be made on the application of the tenant, on his offering to pay up the fines. *Morgell* v. *Royce*, 2 Hog. 235.

Upon an affidavit by the receiver stating an application to the head landlord, and disclosing the other necessary facts, the court will, without any reference, make an order for the receiver to obtain a renewal of a lease. *Mulhall* v. *O'Brien*, Sau. & Sc. 150.

6. Distress by.

Receiver may Distrain without Leave.]—A receiver appointed by the court has a power to distrain for rent, and need not apply for a particular order for that purpose, unless there be a doubt who had a legal right to the rent. *Pitt* v. *Snowden*, 3 Atk. 750.

Receiver may distrain for rent due one year without an application to the court. *Brandon* v. *Brandon*, 5 Madd. 473.

As to restraining receiver from distraining, see *Powers, In re, Manisty* v. *Archdale*, 63 L. J. 626; 39 W. R. 165.

Attornment of Tenant.]—Held, that if a tenant attorns to a receiver, the receiver may distrain without an order. *Raincock* v. *Simpson*, Dick. 120.

—— **Mortgage.**]—By a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that, if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers, or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt:—Held, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgaged premises. *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 7 W. R. 532.

Order to Distrain.]—Tenants directed to pay their rents in a given time on the first application, or to stand committed, or the receiver to be at liberty to distrain on one tenant. *Mitchel* v. *Manchester (Duke)*, Dick. 787.

Order on petition of a receiver, answered without an attendance, that he might distrain in the name of the trustees not only for arrears of rent, but as there should be occasion. Sed quære *Shelly* v. *Pelham*, Dick. 120.

Order for receiver to distrain. *Hughes* v. *Hughes*, 3 Bro. C. C. 85; 1 Ves. J. 161.

Liberty to Distrain—Personal Demand by Receiver.]—A distraining order will not be granted unless it appear by affidavit that the receiver personally demanded the rent to be distrained for, from the tenants; but it is not necessary that the affidavit should state in terms, that he personally demanded the rent, if it state facts from whence it appears to the court that the demand was personally made. *Langley* v. *Aylmer*, 3 Ir. Eq. R. 492.

Ireland—Particular Act or Time.]—Liberty for a receiver to distrain, or a creditor to proceed at law, is not confined to any particular act or time. *Anon.*, 1 Hog. 335.

—— **Discretion as to Time.**]—A receiver, who has obtained an order for liberty to distrain, may exercise his own discretion as to the time of enforcing the rent, but he must not act oppressively. *Lucas* v. *Mayne*, 1 Hog. 394.

—— **Land subject to Ejectment.**]—A receiver will be allowed to distrain land under ejectment for non-payment of rent, provided he leaves a sufficient arrear to sustain the ejectment. *Cornwalls, Ex parte*, 1 Hog. 146.

—— **Sale of Premises.**]—When the premises were sold, and the purchaser was about to get into possession, the receiver on swearing that one half-year's rent was due, and that if he did not distrain, the rents would be lost, was allowed to distrain. *Anon.*, 1 Jones, 613.

—— **After Fruitless Attachment.**]—A distraining order will not be granted against tenants after attachments have been acted upon and found fruitless, except upon terms that the costs shall be no charge upon the estate. *Ryder* v. *Dickson*, Hayes, 36.

A receiver will not be allowed to distrain a tenant for rent which he has endeavoured to enforce by attachment; unless the order for the attachment is first set aside. The existence of a general distraining order is good cause against a conditional order for an attachment for non-payment of rent. *Nugent* v. *Nugent*, 1 Hog. 169. And see *Eyre* v. *Eyre*, *Ib.*, 152.

A receiver will not be allowed to proceed by distress and attachment at the same time, for the same gale of rent. *Eyre* v. *Eyre*, 1 Hog. 252.

Wrongful Distress—Action for Trespass—Restraining.]—The receiver in the cause having distrained for rent due by a tenant who held in reality for the defendant, as it was alleged by the defendant, on lands in the possession of the defendant, and not those over which the receiver was appointed, the court restrained an action of trespass brought by the defendant, and granted the usual reference to the master, there being no good reason to suppose that the receiver acted maliciously or malâ fide, or that any substantial damage was sustained by the defendant. *Parr* v. *Bell*, 9 Ir. Eq. R. 55.

Ill-treating Distress—Stay of Proceedings.]—An application on the part of a receiver to stay proceedings in an action brought against his bailiff, for ill-treating a distress, was refused with costs, there being no affidavit or distinct admission by the receiver that he had authorised the bailiff to do the act complained

of. *Birch* v. *Oldis*, Sau. & Sc. 146. And see *Trotter* v. *Ellis*, *Ib.*, 149, n.

Semble, a receiver can authorise a bailiff to make a distress. *Ib.*

Rescuing Distress.]—In Ireland it has been held that a tenant who rescues a distress by a receiver, will not be attached, but must be proceeded against at law, or under the statute. *Fitzpatrick* v. *Eyre*, 1 Hog. 171.

Where parties who rescued a distress made by a receiver were solvent, the court granted a conditional order for an attachment against them, intimating that the receiver should also proceed at quarter sessions. *Mahon* v. *Mahon*, Fl. & K. 18.

Where a respondent interferes with rents over which a receiver has been appointed, the court will, upon notice to the party, grant in the first instance an absolute order for an attachment. *Thomas* v. *Thomas*, Fl. & K. 621.

Where tenants have, without leave of the court, replevied distresses for rent made by the receiver, the court will restrain them from proceeding in the replevin suits, and direct a reference as to the rent due. *Persse*, *In re*, 8 Ir. Eq. R. 111.

The court will not attach tenants who have rescued distresses for rent, but will leave the receiver to his remedy at law. *Ford* v. *Head*, 8 Ir. Eq. R. 371.

7. Application for Directions.

Should be by Plaintiff.]—A receiver ought not to present a petition or originate proceedings in the cause; any necessary application ought to be made by the parties to the suit. There are exceptions to the rule; as where a receiver had incurred costs in the execution of his duties, which the parties had long neglected to provide for, it was held that he was justified in presenting a petition for their payment. *Ireland* v. *Eade*, 7 Beav. 55; 13 L. J., Ch. 129.

Generally, the receiver in a cause ought not to make any application to the court; if he finds himself in circumstances of difficulty he should apply to the plaintiff to make the necessary application, and on his default the receiver may then properly apply to the court. *Parker* v. *Dunn*, 8 Beav. 497.

Reference to Registrar.] — An application being made by the receiver of real estate, appointed by order of the court, for general directions as to letting and management of the estate of the deceased, and for leave to grant leases for the term of three years, the court ordered the matter to be referred to the registrar for his report. *Neale* v. *Baily*, 23 W. R. 418.

A reference as to whether a receiver over impropriate tithes should proceed against the defaulters by bill in equity or otherwise, was granted, upon the motion of the receiver, with the concurrence of the plaintiff. *Callaghan* v. *Reardon*, Sau. & Sc. 682.

Tenant under Court Repudiating Agreement.]—A person having become tenant under court, in trust for another, and repudiating the trust, injunction to put cestui que trust in possession, refused. *Conyers* v. *Crosbie*, 8 Ir. Eq. R. 519.

Tenants under the court refusing to abide by their agreements, leave given to receiver to proceed as he might be advised. *Ib.*, 518.

Proof without Leave.]—Where a receiver in a cause, without obtaining leave from the court, proved against the estate of a bankrupt legatee, who was a debtor to the estate:—Held, that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt whose bankruptcy had been annulled to his legacy. *Armstrong* v. *Armstrong*, L. R. 12 Eq. 614.

8. Legal Proceedings by.

Issue of Debtor's Summons without Leave.]—A receiver in chancery has a right, without any authority or direction from the court of chancery, to issue a debtor's summons to compel payment of a debt due to him in his character of receiver. *Harris*, *Ex parte*, *Lewis*, *In re*, 45 L. J., Bk. 71; 2 Ch. D. 423; 34 L. T. 291; 24 W. R. 851. And see *Swabey* v. *Dickin*, 5 Sim. 629.

A receiver is not entitled to credit in his account for costs incurred in proceeding under an order of reference until he procures the master's report. *Betagh* v. *Concannon*, 2 Hog. 205.

Proceeding Oppressive to Creditors.]—Court will not empower a receiver to sue for debts due to the estate, where the proceedings would be oppressive to creditors, or it is unlikely any advantage would be derived from it. *Dacie* v. *John*, M'Clel. 575.

Receiver-Solicitor—Actions against wishes of Trustee.]—Receiver, who is solicitor, will not be permitted to bring actions against tenants for arrears of rent, with the approbation of the master, in the name of a trustee of the estate, but in opposition to his wishes. Nor in such circumstances will the court refer it to the master to see whether it would be proper for receiver to proceed in his own name. *Della Cainea* v. *Hayward*, M'Clel. & Y. 272.

Receiver-Partner giving Security without Knowledge of Co-receiver.]—H., a partner in a firm of solicitors, received money from R., a client, for the purpose of investment; but the money was not invested. On the death of another partner, his executors brought a partnership action, and H. was appointed one of the receivers. H., without the knowledge of his co-receiver, gave R. a memorandum stating that he held the title-deeds of certain property, on which the firm had an equitable mortgage, on behalf of R. as security for her money, and he subsequently placed the deeds in a box marked with R.'s name. R. afterwards obtained possession of the box and deeds and claimed to retain them. H. was subsequently removed from the receivership and L. appointed in his place. The action was originally brought by the receivers against R. alone, but was amended by adding H. and the executors of the deceased partner as defendants:—Held, that the action was properly constituted by making the new receivers plaintiffs and R. a defendant. *Hills* v. *Reeves*, 31 W. R. 209.

In Ireland—Motion whether Proceedings for Benefit of Parties.]—A motion on the part of the receiver for a reference as to whether it would be for the benefit of the parties, that proceedings should be taken to impeach certain leases, was refused, it being no part of a receiver's

duty to bring forward such a motion. *Clark* v. *Fisher*, Sau. & Sc. 684.

—— **Motion to Set Aside a Letting.**]—A motion to set aside a letting made in a cause or matter, should not be made by the receiver, and the court will refuse such motion by the receiver, with costs. *Richards* v. *Gould*, 7 Ir. Eq. R. 209.

—— **As to Lunatic's Liability to Renew Lease.**]—A receiver having applied to the court for a reference to the master as to the liability of a lunatic to renew the lease of the land over which the receiver was appointed, was ordered to pay the costs of the inquiry, as he had not previously applied to the committee to make the application to the court. *Doolan, In re*, 2 Con. & L. 232; 3 Dr. & War. 442.

—— **Interference in Litigation.**]—Receiver ought not to interfere in any litigation between parties; and if he do so, will not be allowed costs of motion for such purpose. *Comyn* v. *Smith*, 1 Hog. 81.

—— **Defence of Ejectments—Direction of Court.**]—The court will not direct the receiver what course he ought to pursue as to taking defence to ejectments brought against the lands over which he is appointed, but will leave him to act on his own responsibility. *Anon.*, Hayes, 16.

Abandonment of Misconceived Proceedings—Costs.]—Receiver of estate of lunatic proceeding in a wrong form of action, which he was advised to abandon and adopt another form of action in which he succeeded for the lunatic, refused the costs of the abandoned proceeding, although the master reported that he had acted bonâ fide, and ought to be allowed the costs. *Montgomery, In re*, 1 Moll. 419.

Proof in Bankruptcy by.]—Where a receiver in a cause, without obtaining leave from the court, proved against the estate of a bankrupt legatee, who was a debtor to the estate:—Held, that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt whose bankruptcy had been annulled to his legacy. *Armstrong* v. *Armstrong*, L. R. 12 Eq. 614.

Investment of Balance—Motion by Receiver.]—A receiver should not move that his balance may be invested, as such is not properly his motion. As the petitioner under the 11th General Order of February, 1839, may have his balance invested, without applying to the court, the costs of the motion will not be allowed unless the applicant shows satisfactorily why he had not the money invested under the rule. *Cooper* v. *Cooper*, 2 Ir. Eq. R. 155.

Recovering Proceeds of Sale after Notice.]—Where goods of a defaulting tenant had been seized by a third person under a civil bill decree, and were sold, notwithstanding a notice by the receiver of the claim for rent due, the receiver was permitted to take proceedings to recover the produce of the sales, the court considering that an action would lie under 9 Anne, c. 8 (Irish). The receiver was not permitted to oppose the discharge of the tenant as an insolvent in order to induce the insolvent court to compel a surrender of his lease, the court considering that the insolvent court has no jurisdiction to enforce such surrender. *Hawkes* v. *Smith*, Sau. & Sc. 712.

For Waste—Urgency.]—If waste has been committed and the case is pressing, the receiver may file a bill for an injunction without waiting for an order for the purpose, but if time will permit, he should first apply for a reference to inquire what proceedings he ought to take. *Nangle* v. *Fingall (Lord)*, 1 Hog. 142.

—— **Prayer for Relief.**]—A bill filed by a receiver for an injunction, against committing waste, should contain a prayer for relief, if the defendant is solvent. *Cooke* v. *Cooke*, 1 Hog. 182.

—— **One Tenant Quarrying on Private Road.**]—Injunction granted upon the application of the receiver to restrain one tenant of the estate from quarrying on a private road, part of the premises, and which was common to all the tenants. *Dorman* v. *Dorman*, 3 Ir. Eq. R. 385.

—— **Conditional Order on Motion without Bill.**]—The court will, upon motion by the receiver, grant a conditional order to restrain tenants under the court from committing waste without a bill being filed for the purpose. *Cronin* v. *M'Carthy*, Fl. & K. 49.

—— **Quarrying Stone for Public Works.**]—The court will not grant an injunction upon the application of a receiver, to restrain a contractor under the 6 & 7 Will. 4, c. 116, s. 162 (Grand Jury Act), from quarrying stones, for the purposes of public works, on the lands over which the receiver is appointed. *O'Kelly* v. *Gregg*, Jon. & C. 76.

Costs—Action Defended without Leave.]—A receiver having, without the sanction of the court, defended an action arising out of a distress for rent, made by him on a tenant of the estate, the court refused to allow him his costs of the action. *Swaby* v. *Dickon*, 5 Sim. 629.

Where a receiver, having obtained the leave of the court, brought an ejectment, and the defendant filed a bill in equity to restrain the proceedings in the ejectment action:—Held, that the receiver was not entitled to the costs of defending the suit, he not having first obtained the leave of the court to take defence to it. *Conyers* v. *Crosbie*, 6 Ir. Eq. R. 657.

—— **Successful Defence.**]—A receiver who, without the sanction of the court, defends an action brought against him by a party to the cause, is not on that account disentitled to the assistance of the court in recovering from such party the extra costs of the action: although if his defence had failed he would not, under such circumstances, have been entitled to reimbursement. *Bristowe* v. *Needham*, 2 Ph. 190.

—— **Costs Incurred in Execution of Duty.**]—Although a receiver ought never to present a petition nor originate proceedings in his own name, but such application should be by the parties in the cause, yet where he had incurred costs in the execution of his duty, which the parties had long neglected to provide for, his

petition allowed. *Ireland* v. *Eade*, 7 Beav. 55; 13 L. J., Ch. 129. And see *Montgomery, In re*, 1 Moll. 419, and col. 82.

9. SALES BY.

Renewal of Licence — Default by Purchaser.]—An hotel and restaurant were sold in July, 1891, the particulars stating that a retail licence was attached, that the premises were in possession of the receiver appointed by the court, and that the licence would be handed to the purchaser. Owing to delay caused by the purchaser, the conveyance was not completed till May, 1892. The licence expired in October, 1891:—Held, that there was no failure of duty on the part of the receiver in not applying for a renewal, and that the purchasers could not sustain a claim for compensation for the loss of the licence. *Hoy's Estate, In re*, 31 L. R., Ir. 66.

Competition by Receiver.]—On the sale of a business by the court the receiver and manager of it cannot be restrained from carrying on a similar business. *Irish, In re*, 58 L. J., Ch. 279; 40 Ch. D. 49; 60 L. T. 224; 37 W. R. 231.

10. PURCHASES BY.

Contrary to Policy of Court.]—It is contrary to the practice and policy of this court to permit the receiver in the cause to bid at the sale of the lands over which he had been appointed. *Anderson* v. *Anderson*, 9 Ir. Eq. R. 23.

Purchase in Trust.]—A purchase in trust for a receiver, of lands over which he had been appointed receiver, will not be permitted to stand, unless it has been had with the leave of the court. *Alven* v. *Bond*, Fl. & K. 196; 3 Ir. Eq. R. 365.

Reversion in another Right.]—A receiver over the estate of a reversioner is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right. *King* v. *O'Brien*, 15 L. T. 23.

Tenancy of Receiver.]—Neither can a receiver without the special leave of the court, become the tenant of any part of the lands over which he has been appointed. *Ib.*, 224.

Upon consent of the parties in a cause claiming substantial interests in the lands in litigation, the receiver over those lands was permitted to become a tenant of part of them, the adoption of such a course appearing to be for the benefit of the estate. *Stannus* v. *French*, 13 Ir. Eq. R. 161.

11. PAYMENTS BY. TO WHOM.

Year not Elapsed since Last Account.]—A receiver will not be ordered to pay money in his hands to any person who could compel him to account, if a year has not elapsed since he last accounted. *Putland* v. *Graydon*, 1 Hog. 123.

To Judgment Creditor.]—A receiver who had been appointed in an administration action and ordered to pay to a legatee a sum quarterly out of moneys in or coming to his hands, was, on the application of creditors who had in an action in a common-law division obtained a judgment against the legatee, ordered, under rules of court 1875, Ord. XLV., to pay them their debt and costs. *Cowan's Estate, In re, Rapier* v. *Wright*, 49 L. J., Ch. 402; 14 Ch. D. 638; 42 L. T. 866; 28 W. R. 827.

Payee named in Order.]—A receiver is only justified in paying the person named in the order for payment, or on a power of attorney duly executed by him. Express authority for payment in any other mode must be shown by the receiver, on peril of being disallowed credit therefor in vouching his accounts. The solicitor having carriage of the proceedings has not, as such, and in the absence of special authority in that behalf, power to give a valid receipt for moneys ordered to be paid by a receiver to his client. *Browne's Estate, In re*, 19 L. R., Ir. 183—C. A.

Person not Party to Action.]—A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands. *Brocklebank* v. *East London Ry.*, 48 L. J., Ch. 729; 12 Ch. D. 839; 41 L. T. 205; 28 W. R. 30.

To Owner of Estate by Consent of Parties.]—The defendant, the owner of an estate, may, by consent of the parties in the cause, obtain money from the receiver, without any reference being made to the master to inquire whether there are any creditors, not parties, who have a right to it, semble. *Ray* v. *Butler*, 1 Hog. 381.

To Attorney of Inheritor.]—The court will not order a receiver to pay to the attorney of the inheritor the amount of expenses which he had incurred, without the authority of the court, in legal proceedings in respect of the lands. *Dudgeon* v. *Bowen*, Hay. & J. 717.

Foreclosure Suit — Moneys in Receiver's Hands at Conclusion of.]—In a foreclosure suit the court will not stay proceedings on the application of a defendant, except upon the terms of his paying down, or having previously paid or tendered, to the plaintiff his principal and interest, and all the costs of the suit. Other incumbrancers, who are parties to the suit, have not such an interest in it as to enable them successfully to oppose a motion to stay proceedings, because the plaintiff might at any time dismiss the bill against them upon payment of their costs. The court will not make an order to stay proceedings upon payment of principal, interest, and costs on a future specified day, however near, because the right of a mortgagee is to pursue any or all of his remedies without hindrance, until he actually obtains payment of his demand. When a suit is brought to a conclusion upon a motion of this kind, moneys in the hands of a receiver appointed in the suit belong to the person who was in possession of the estate when the receiver was appointed. *Paynter* v. *Carew*, 1 Kay (App.) xxxvi.; 23 L. J., Ch. 596; 18 Jur. 417; 2 Eq. R. 496; 2 W. R. 345.

12. COSTS.

Objections to—Action for.]—Where items have been included in a receiver's bill of costs, which are charges for work done outside the scope of the receivership, objection must be made to their being included in the taxation at the time; and no action will lie for the subsequent recovery of the money due on such items. *Terry* v. *Dubois*, 32 W. R. 415.

Accounts—Of Passing.]—*See* col. 89.

Discharge of.]—*See* col. 92.

Misconduct—In case of.]—*See* col. 93.

IX. RECEIVER AND MANAGER.

Debentureholders' Action, in.] — *See* COMPANY (DEBENTURES).

Partnership Actions, in.]—*See* PARTNERSHIP.

X. ACCOUNTS.

1. LOSS OR MISAPPROPRIATION.

Money due from, a Debt of Record.]—Money not accounted for and due from a receiver under the court, is by his recognisance made a debt of record, although the balance due has not been ascertained. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

—— **Statute of Limitations no Defence.**]—The receiver is a trustee of such money for the persons entitled thereto and cannot as against them avail himself of the Statute of Limitations, although his final accounts have been passed and the recognisances vacated. *Ib.*

Banker's Failure.]—Receiver not liable by the failure of the testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. *Routh* v. *Howell*, 3 Ves. 566.

A. is appointed receiver of an estate, out of which he is to pay B. an annuity quarterly. A. acquaints B. who his banker was, and that the money should be deposited in his hands for his use. B. names another, being a person he used to deal with, and orders him to pay it into his hands, which A. did several times: but the money payable on Michaelmas being paid on July before; on Michaelmas day the banker stopped payment, and became a bankrupt; it was held, that the loss should fall wholly on the receiver; B. having no right to the money before that day. *Shaftesbury (Lady) Case*, Pre. Ch. 558.

—— **Receiver remitting to his own Credit.**]—Receiver, charged with a loss by the failure of the banker, having made the remittances to his own credit and use, and not to a separate account for the trust. *Wren* v. *Kirton*, 11 Ves. 377.

—— **Time not arrived for Passing Account.**]—Where a receiver was in the habit of paying the moneys he received into a banker's hands, and receiving interest on the balances, he was held liable for the loss occasioned by the banker's bankruptcy, although the time for passing his accounts had not arrived at the time of the bankruptcy. *Drever* v. *Mawdesley*, 13 L. J., Ch. 433; 8 Jur. 547.

—— **Arrangement by Receiver to obtain Sureties.**]—A receiver, in order to obtain sureties, enters into an agreement with them, that A., the partner of one of the sureties, shall attend upon the receipt of the rents of the estates, and that they shall be paid into a bank at L., in the name of the sureties; and that all moneys to be applied for the purposes of the receivership, shall be drawn for by cheques prepared and written by A., and signed by the receiver. This agreement having been acted upon, the bank at L. failed, and a loss was sustained. The account was then transferred to another bank, under the same agreement, when another loss ensued by failure of the bankers:—Held, upon petition, that the receiver was responsible for the amount of losses, &c. *White* v. *Baugh*, 2 Bli. (N.S.) 181; 3 Cl. & F. 44.

—— **Loss not owing to Wilful Default.**]—A receiver appointed by the court shall not make good a loss which was not owing to his own default; for where the rents in hand were large, it is a necessary precaution on his part to remit them by bills to London, rather than in specie. Where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he failed soon after, it shall not affect the receiver. But if the money had been lost by his wilful default in placing it in hands notoriously improper, he shall make good the loss. *Knight* v. *Plymouth (Lord)*, 3 Atk. 480; Dick. 120.

Defaulting Receiver—Liability of Share of Estate.]—Although the court will not order payment to a defaulting receiver of his share in an estate under administration until he has made good his default; yet the same principle does not apply as against his assignees to the case of a share devolving on such defaulting receiver in his character of next of kin of a person originally entitled to a share in the same estate, notwithstanding that such share may have been paid into court with the assent of the personal representative of the person so originally entitled to the share, but in the absence and without the assent of the assignees of such defaulting receiver. *Brandon* v. *Brandon*, 1 Dr. & Sm. 16; 8 W. R. 112.

Loss by Neglect.]—A receiver must make good to the estate any rent which has been lost by his neglect. *Skerretts, In re*, 2 Hog. 192.

The receiver in a minor matter paid rent due up to a certain period in respect of lands held from year to year, which had been bequeathed to the minor. The bequest had not been assented to by the executor:—Held, that the minor was liable to the subsequent rent only to the extent of the profits received out of the lands, notwithstanding the payment of the former rent by the receiver. *Fair, In re*, 13 Ir. Eq. R. 278.

Up to what Date.]—A receiver only accounts for the rent which fell due before the gale day immediately preceding the time of his accounting. *Betagh* v. *Concannon*, 2 Hog. 205.

Commencement of Liability.]—A receiver is liable to account as such for all moneys coming to his hands in that capacity at any time, whether before or after the date of the perfecting of his security. A surety who has undertaken to account for what the receiver "should receive and become liable to pay as such receiver," is liable to account for all such moneys as above mentioned. The principle that the appointment of a receiver is merely conditional until his security is perfected, applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received and expended by him as receiver. *Smart* v. *Flood*, 49 L. T. 467. *See* cols. 12, 13.

Liability of Inspectors under Inspectorship Deed.]—When a receiver is appointed under an ordinary inspectorship deed, the inspectors, though they appoint and may remove him, are not responsible for his default, as if he were their agent. *Hobson* v. *Jones*, 39 L. J., Ch. 245; L. R. 9 Eq. 456; 22 L. T. 143; 18 W. R. 477.

Discharge — Surcharge notwithstanding.]—Notwithstanding the discharge of a receiver, the court has jurisdiction to surcharge his accounts. *Edwards, In re*, 31 L. R. Ir. 242.

2. Liability for Interest.

Balances Improperly Retained.]—A receiver who improperly retains a balance in his hands, must pay interest on the amount when he passes his next account. *Harman* v. *Foster*, 1 Hog. 318.

Receiver must pay in his money yearly, and must pay nothing out without an order; he shall pay interest for money kept in his hands, even a quarter of a year after it ought to have been paid in. Inquiry directed as to that, though he had passed his account, and all parties had declared themselves satisfied. *Fletcher* v. *Dodd*, 1 Ves. J. 85.

A receiver who had been discharged, did not pay in his balance on the day fixed by the master. Ordered that he should pay in the same, and also the amount allowed for his salary, with interest. *Harrison* v. *Boydell*, 6 Sim. 211.

A receiver, who neglected to pass his accounts according to an order made in the cause, but brought in on the same day the account for four years, was disallowed his poundage, and charged 5*l.* per cent. upon the balances during the time they were in his hands. *Bristowe* v. *Needham*, 9 Jur. (N.S.) 1168; 8 L. T. 652; 11 W. R. 926.

Receiver not passing his accounts shall always pay interest upon the balances in his hand. —— v. *Jolland*, 8 Ves. 72.

—— **Deprival of Salary.**]—Receiver of the personal estate of the testator, not passing his accounts and paying in the balances, deprived of his salary and charged with interest, not upon each sum from the time it was received, according to the strict rule, applicable to a receiver of annual profits and rents, but as an executor would be charged. *Potts* v. *Leighton*, 15 Ves. 273. *See* col. 59.

Infant's Surplus Rents — Non-investment — Interest at 4 per cent.]—A receiver, during the infancy of the plaintiff, who had no guardian, was directed to place out the surplus of the rents, when the same should amount to a competent sum, on government or other securities; having never placed it out at interest according to the decree, the court directed that he should pay interest at 4 per cent. from the time of the decree, till the infant came of age. It is no excuse for the receiver that the master did not give any directions about it, for it was his duty to remind the master to lay out the surplus rents when it amounted to a competent sum. That buildings and farms are in ruinous condition, and tenants often breaking, will not justify a receiver's keeping the balance in his hands, for it is not to be supposed he could exhaust the whole received from the rents of the estate. *Hicks* v. *Hicks*, 3 Atk. 274.

Settlement Two Days after Infant's Coming of Age.]—The receiver's settling the accounts, and delivering the vouchers to the plaintiff when he came of age, and his admitting the balance, and receiving it without objection, had no weight, as this transaction was two days only after he came of age. *Ib.*

Receiver making Interest for His Own Benefit.]—A receiver of a public trust having a salary, making interest of balances in his hands, is accountable to the trustees for interest made ultra, notwithstanding prior accounts settled without demanding it. *Lonsdale (Earl)* v. *Church*, 3 Bro. C. C. 41. See 7 Price, 45. And see *Adams* v. *Gate*, 2 Atk. 106.

A receiver, though he passes his accounts and pays his balance regularly, is not entitled to make interest for his own benefit of moneys which come into his hands in his character of receiver during the intervals between the times of passing his accounts. *Shaw* v. *Rhodes*, 2 Russ. 539.

Wilful Non-compliance with Order to Pay.]—Semble, a receiver who has been ordered to pay a sum of money to a party, and who has that sum in his hands at the time when he is served with the order, but who wilfully and improperly refuses to pay it, will be ordered to pay interest on it from the date of the service of the order on him; and also all costs to which the party has been necessarily put, by reason of his disobedience of the order. *Fetnam* v. *Kirby*, 4 Ir. Eq. R. 320.

3. Liability of Representatives.

Summary Remedy—Jurisdiction.]—The court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets. *Jenkins* v. *Briant*, 7 Sim. 171; 4 L. J., Ch. 2.

The court has no jurisdiction to order the personal representative of a receiver to account for the receiver's receipts without a bill being filed. *Ludgater* v. *Channell*, 15 Sim. 479; 16 L. J., Ch. 248; 11 Jur. 273.

Submission to Account.]—The personal representative of a receiver having submitted to account for the rents received by the receiver in his lifetime, the court has jurisdiction to order him to pay in the sum appearing to be due on foot of the account. Form of the order in such case. *Magan* v. *Fallon*, 5 Ir. Eq. R. 490.

—— **Neglect to Pay in Balance.**]—In 1812 the executors of a receiver applied to pass his accounts and pay in the balance; this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets. *Gurden* v. *Badcock*, 6 Beav. 157; 12 L. J., Ch. 62.

Executors admitting Assets.]—Executors of a receiver admitting assets, bound to answer what was upon a subsequent inquiry found due for interest. *Hovey* v. *Blakeman*, 4 Ves. 606.

Admission of assets to answer rents by the executor of a receiver, makes him liable to interest if made. *Foster* v. *Foster*, 2 Bro. C. C. 616.

Executors not like Receivers.]—Guardians and receivers obliged to account on application by petition or motion, being bound by recognisance to account regularly, or when called on, and are considered as officers of the court, which is not the situation of executors. *Burke, In re*, 1 Ball & B. 74.

Irregularity in Bringing in Account—Day Fixed.]—A receiver had been accustomed to bring in his accounts very irregularly in point of time, and thereby the actual balances in his hands never clearly appeared. He was specially ordered to bring in his accounts before a given day in every year, accompanied with an affidavit showing the actual balance in hand. Inquiries were also directed as to former balances, and he was ordered to pay the costs on the application. *Bertie* v. *Abingdon (Lord)*, 8 Beav. 53.

Application by Third Person.]—Application of a third person that a receiver should pass his accounts, and applicant be at liberty to attend, refused. *Colburn* v. *Cooper*, 8 Ir. Eq. R. 510.

Creditor may have Summons to Account.]—A creditor who has proved his debt under a decree, is entitled to apply to the master for a summons on the receiver to account. *Locke* v. *Ashe*, 1 Hog. 143.

Receiver only Entitled to one Summons.]—A receiver is only entitled to one summons to account. The master's certificate that he did not account pursuant to summons, should not be granted on the day for which the summons issued. *Lawlor* v. *Lowry*, 1 Hog. 140; *McBride* v. *Clake*, 1 Moll. 233.

Order to Pass after Bill Dismissed.]—Order made in a cause after the bill had been dismissed, that the receiver should pass his accounts, and pay the balance to the defendant. *Pitt* v. *Bonner*, 5 Sim. 577.

Reporting Facts Specially.]—In passing a receiver's account the remembrancer cannot report facts specially without the order of the court. *Roberts* v. *Hendricken*, Hay. & J. 396.

Master's Report of Account—Excepting to.]—A master's report of receiver's account does not require confirmation, and cannot be excepted to. But the court will enter into the consideration of objections to the general principle on which the master has proceeded in taking such account, but not of objections to particular items of it. *Shewell* v. *Jones*, 2 Sim. & S. 170; 3 L. J. (O.S.) Ch. 54. And see *S. C.*, 3 Russ. 522, and *Cowper* v. *Cowper (Earl)*, 2 P. W. 729.

Order to Lodge Money pending Passing of Account.]—Pending the passing of a receiver's account, the remembrancer ordered him to lodge 500*l.* to the credit of the cause within a limited time, which he did not do. The account not being yet passed, and it not appearing that such sum was in his hands, the court refused to act upon the order. *Langrish* v. *Cottenham*, 2 Jones, 507.

Receiver Quitting Residence near Estates.]—Receiver quitting his residence near the estates, executors consenting ordered to act, and receiver to pass his accounts. *Dary* v. *Gronow*, 14 L. J., Ch. 134.

Concealment of Marriage—Re-taking Accounts.]—An executrix, the widow of the testator, who died in 1783, was, under his will, entitled, during her widowhood, to 400*l.* a year for the maintenance of herself and children, but only to 60*l.* a year for herself if she married again. She was appointed receiver of her children's fortunes, and in 1791 she married B. but, concealing her marriage, passed her accounts as a widow. On her death in 1794, B. administered to her and the testator, and passed his accounts in continuation of the widow's, without acknowledging their marriage. All the children having attained their majority disputed B.'s accounts, which were then referred to arbitration. Catherine, the eldest child, married before the award was made, and one of the arbitrators was a trustee of her settlement; her marriage was concealed from the court, and B. paid her husband sums which ought to have been paid to her trustee. In 1836 C. and her children filed a bill against B. and the trustee:—Held, that all the accounts should be taken again without regard to the award or to the accounts passed subsequently to the marriage of Catherine. *M'Can* v. *O'Ferrall*, 8 Cl. & F. 30; West, 593.

4. Passing.

As to the form of receiver's accounts and leaving in chambers, see Rules of Supreme Court, 1883, Ord. L. rr. 18—22.

Accounts not Filed—Presumption.]—Where a judgment creditor filed a bill stating that a receiver, who had been appointed in a foreclosure suit instituted by A., had never perfected his recognisance; nor accounted in the office, although he had been thirty years in receipt of the rents; that, having remitted all sums received to A., and having furnished accounts to him, he ought to be treated as his private agent, that A. ought to be treated as mortgagee in possession; and prayed also an account of all sums which had come to the hands of the receiver:—Held, that the lord chief baron's certificate to that effect, which was produced, disproved the allegation that the receiver had not perfected his recognisance, and that an order of the court would be presumed, directing the receiver to remit the rents, &c., to A. Held, also, that the receiver's never having filed accounts was justifiable by the practice of the court, which only required a receiver to account when called on by its order; and that after such a length of time, and under the circumstances of the case, the executrix of the receiver should not be called on to account for the sums received by him, and that A. ought not to be treated as mortgagee in possession. *Armitage* v. *Forbes*, Hayes, 222.

Separate Accounts of Real and Personal Estate.]—A receiver will be ordered to keep separate accounts of the real and personal estates when necessary. *Hill* v. *Hibbit*, 18 L. T. 553.

Mixed Fund—Accounts how taken.]—There being a mixed fund in the hands of the court by its receiver, consisting of pure personalty, rents of real estate, and money produced by sale of real estate, the accounts must be taken upon the footing of the decree in *Coote* v. *Mitlown (Lord)* 1 Jo. & Lat. 501. *Shore* v. *Shore*, 26 L. J., Ch. 386; 5 W. R. 250.

Payment of Balances into Court, As to.]—*See* Supreme Court Funds Rules, 1894, r. 30.

5. REVIEW.

Account Allowed by Guardian of Infant.]—A receiver to the guardian of an infant who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Clavy's Case*, Pre. Ch. 535.

On Application of Infant Coming of Age.]—Receiver's accounts which had been passed, ordered to be reviewed on application of the person, late a minor, who had attained his age. *Wildidge* v. *M'Kane*, 2 Moll. 545.

Settlement by Infant Two Days after Coming of Age.]—Where a receiver settles his accounts, and delivers the vouchers to the infant, only two days after he came of age, it shall have no weight, though the infant admitted the balance, and received it without objection. *Hicks* v. *Hicks*, 3 Atk. 274.

6. COSTS OF PASSING.

Irregularity in Bringing in Accounts.]—A receiver bringing in his accounts irregularly, and the actual balance in his hands never clearly appearing, ordered to bring them in before a given day in every year, with an affidavit showing the actual balance in his hands; an inquiry also directed as to former balances, and that he should pay the costs of the application. *Bertie* v. *Abingdon* (*Lord*), 8 Beav. 53.

Receiver Accounting after Order for Attachment.]—A receiver who accounts under an order for an attachment against him, must pay the costs of passing his accounts; and will only be allowed an abated rate of poundage, at the discretion of the master. *Trapaud* v. *Comick*, 1 Hog. 245.

Same Solicitor appearing for Receiver and Party.]—When a receiver, appointed in a suit, passes his accounts in chambers, and the same solicitor appears both for the receiver and one of the parties to the suit, only one copy of the account can be allowed between them on taxation. *Sharp* v. *Wright*, L. R. 1 Eq. 634; 14 L. T. 246; 14 W. R. 552.

Cost of Scheme of Property for Receiver's Use.]—Held, that an item of 1*l.* 6*s.* 8*d.* for drawing out for the receiver a scheme of the property and the holding of the tenants was properly disallowed, and that it ought not to have been struck out from the bill of costs. Such an item would even be disallowed to a receiver who is remunerated by a percentage. *Catlin, In re*, 18 Beav. 511.

And see ACCOUNTS AND INQUIRIES.

XI. DISCHARGE AND REMOVAL.

1. GENERALLY.

A receiver will not be discharged merely on the application of the party at whose instance he was appointed. *Bainbrigge* v. *Blair*, 3 Beav. 421.

Must be Reasonable Cause for Discharge.]—When a receiver is appointed, and has given security, he must show a reasonable cause to entitle himself to be discharged. *Smith* v. *Vaughan*, Ridgw. 251.

Commission in Bankruptcy.]—A commission of bankruptcy cannot supersede a decree for a receiver, which is discretionary in the court, and as useful a power as any that belongs to it, and it is provisional only, not affecting the rights of the parties. *Skipp* v. *Harwood*, 3 Atk. 564.

Abatement of Suit—Death of Co-plaintiff.]—An abatement by the death of a co-plaintiff is not cause for the removal of a receiver who was appointed on process; but it would be otherwise if the cause had abated by the death of the defendant, against whom the process issued. *Woods* v. *Creaghe*, 1 Hog. 174.

—— **Receiver Wrongfully Appointed.**] — A receiver who had been wrongfully appointed over property belonging to a person not a party to the cause discharged, notwithstanding the abatement of the suit by the death of the sole defendant. *Lavender* v. *Lavender*, Ir. R. 9 Eq. 593.

Annuitant—Payment off.]—Receiver of rents of estates conveyed to secure an annuity, discharged on acceptance of the price of the annuity with interest, deducting the part payments. *Davis* v. *Marlborough* (*Duke*), 2 Swanst. 108.

The order for a receiver obtained by the plaintiff, discharged on payment of the sum due to him, although defendant's prior incumbrancers opposed the discharge. *Ib.*, 168.

—— **Payment off of Arrears.**]—A receiver had been appointed upon a bill by an annuitant on the estate. All arrears having been paid off, under the circumstances, the order appointing the receiver was discharged. *Braham* v. *Strathmore*, 8 Jur. 567.

Annuitant entitled to sue in this court for arrears of his annuity, cannot have the receiver continued when the arrear is paid. *Sankey* v. *O'Maley*, 2 Moll. 491.

One Infant Tenant in Common coming of Age.]—A receiver appointed for the benefit of two infant tenants in common, not discharged on one coming of age. *Smith* v. *Lyster*, 4 Beav. 227; 10 L. J., Ch. 344.

Purchaser put in Possession.]—An injunction to put a purchaser into possession, is in itself a discharge of the order for a receiver, as to the lands mentioned in the injunction. *Ponsonby* v. *Ponsonby*, 1 Hog. 321.

Receiver of Life Estate—Death of Tenant for Life.]—Where a receiver has been appointed over the estate of a tenant for life, the remainderman has a right, immediately on the death of a tenant for life, to go into possession, without making any application to the court. *Stack, In re*, 13 Ir. Ch. R. 213. *Britton* v. *M'Donnell*, 5 Ir. Eq. R. 275.

Judgment Creditor—Life Estate.]—Upon the death of A. C., a debtor, over whose freehold estate a receiver had been appointed on a judgment creditor's petition, under 5 & 6 Will. 4, c. 55, his eldest son, J. C., alleging that by virtue of certain articles prior to the judgment, and subsequent settlement according to the articles, his father was only tenant for life, and that he was entitled as tenant in tail, applied for the

removal of the receiver. The court declined to make any rule upon the motion. Afterwards the judgment creditor, insisting that the estate liable to the judgments was not determined by A. C.'s death, applied, under s. 32 of the act, to continue the proceedings; that motion was refused with costs, having been resisted by J. C., of whose title (before stated) primâ facie evidence was produced, and not rebutted. *Kenny* v. *Clarke*, 5 Ir. Eq. R. 280.

Expiration of Lease—Discharge—Notice.]—Motion to discharge a receiver, the lease having expired, must be on notice. *Johnston* v. *Henderson*, 8 Ir. Eq. R. 521.

Devise Subject to Payment of Debts.]—A father, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts and sums of money as he should owe at the time of his death, whether by way of mortgage, bond, or otherwise, including 8,000*l.* charged upon the estates; and he directed that the rents and profits of the estates should be received by the trustees and be applied in liquidation of the debts until the whole, including the 8,000*l.*, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disencumbered and clear of debts; and that the trustees should invest the moneys which might come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the 8,000*l.*, by sales of parts of the estates under orders of the court, and there was an accumulation fund in court sufficient to pay the 8,000*l.*:—Held, that the receiver must be discharged, and the tenant for life be let into possession of the estates. *Tewart* v. *Lawson*, 43 L. J., Ch. 673; L. R. 18 Eq. 490; 22 W. R. 822.

Administration Actions.]—In administration actions a receiver may be discharged on his passing his accounts, and may be paid his remuneration and costs without waiting to see whether the estate is sufficient to pay all costs. *Batten* v. *Wedgwood Coal and Iron Co.*, 54 L. J., Ch. 686; 28 Ch. D. 317; 52 L. T. 212; 33 W. R. 203.

Surcharge of Accounts Notwithstanding.]—Notwithstanding the discharge of a receiver the court has jurisdiction to surcharge. *Edwards, In re*, 31 L. R. Ir. 242.

Change of Receiver—Bankruptcy of Mortgagor.]—A receiver and manager had been appointed on an ex parte application by the plaintiff in a foreclosure action under a mortgage of brewery premises. The mortgagor, the defendant, afterwards became bankrupt on his own petition. The official receiver opposed a motion by the plaintiff for the continuance of the original receiver and manager, contending that he ought to be substituted:—Held, that an order must be made confirming the previous appointment, and continuing the person then appointed as receiver of the rents and profits of the premises comprised in the mortgage, and as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, and other property comprised in the mortgage, but nothing else. *Deacon* v. *Arden*, 50 L. T. 584.

Substitution of Liquidator on Winding-up of Company.]—*See* COMPANY—DEBENTURES.

2. PRACTICE.

See Seton on Decrees, 5th ed., 685—687.

Petition by Receiver — Irregularity.]—A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the court would make the order on further directions without any such petition. *Stilwell* v. *Mellersh*, 20 L. J., Ch. 356.

—— **Dismissal—Additional Directions.**]—On motion by petition in court below for the discharge of a receiver, the court refused the motion, and dismissed the petition with costs, but ingrafted on the order of dismissal certain directions, asked for by the defendants, and supported by their affidavits, in opposition to the motion:—Held, by the lords of the judicial committee, that such addition to the order was contrary to the practice of the court, and ought not to have been made; and that, upon the facts disclosed, an order for the dismissal of the receiver ought to have been made pursuant to the prayer of the petition. *Palmer* v. *Barrett*, 1 Moore, P. C. 415.

3. COSTS.

Receiver Allowed.]—Receiver allowed costs of his application to be discharged. *Richardson* v. *Ward*, 6 Madd. 266.

Receiver Appearing Unnecessarily.]—Upon a petition to discharge a receiver and pay over the money in court, the receiver, though served, ought not to appear, and his costs were not allowed. *Herman* v. *Dunbar*, 23 Beav. 312.

Receiver behind Back of Prior Creditor—Bill instead of Motion.]—Puisne incumbrancer obtaining an order for a receiver behind the back of a prior creditor, the latter may come by motion to put out the receiver, or to have the rents applied to its prior incumbrance; therefore such prior creditor filing a bill, and making the puisne creditor a defendant, and praying to put him out of possession, the bill was dismissed with costs, as against him, reserving the question how far the plaintiff should have these costs over against the other defendants, or the fund. *Morgan* v. *Smith*, 1 Moll. 541.

Expiration of Estate—Application to remove Receiver.]—Where the estate expires over which a receiver has been appointed, the reversioner or remainderman may enter, notwithstanding the continuance of the receiver, and is not to be considered as committing any contempt by so doing. If, under such circumstances, an application be made to remove a receiver, or for leave to enter into possession, the cost must fall on the applicant; and, on the other hand, if any attempt be made to attach the reversioner or remainderman for interfering with the possession of the receiver, the costs which he may thereby be put to will be awarded to him. *Britton* v. *M'Donnell*, 5 Ir. Eq. R. 275.

Costs of Removal.]—A receiver who had passed his final account, and paid in the balance found against him, and who had been acting for thirty years, discharged without paying the costs of his removal, or of the appointment of a new receiver. *Cox* v. *M'Namara*, 11 Ir. Eq. R. 356.

—— **Receiver Appointed by Mistake.**]—Costs of removal not paid by a receiver appointed under a mistake. *Hunter* v. *Pring*, 8 Ir. Eq. R. 102.

XII. REMEDIES AGAINST.

1. GENERALLY.

See R. S. C., 1883, Ord. L., r. 21.

Money due from, is a Debt of Record.]—Money not accounted for and due from a receiver under the court is, by his recognisance, made a debt of record, although the balance due has not been ascertained. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

—— **Statute of Limitations no Defence.**]—The receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the statute of limitations although his final accounts have been passed and the recognisances vacated. *Ib.*

Committal.]—Receiver, not paying in a balance under an order, may be proceeded against personally by commitment. A previous order, in the alternative, that by a certain day he shall pay or stand committed, is necessary, though he was under an order for payment by a certain day upon his appearance by counsel, praying time. *Davies* v. *Cracroft*, 14 Ves. 143; 9 R. R. 254.

Where a receiver makes default in payment of a balance due from him payment may be enforced by committal. *Bell, In re, Foster* v. *Bell*, L. R. 9 Eq. 172; 21 L. T. 781; 18 W. R. 369.

—— **Filing Account in Office.**]—Filing an account in the office is not cause against a conditional order for an attachment against a receiver for not accounting. *Fetnam* v. *Kirby*, 4 Ir. Eq. R. 320.

Four-Day Order.]—Upon the master's certificate that a receiver is in default, the four-day order upon him is of course, and therefore a motion to discharge such order on the ground of error or irregularity in the certificate, but not directly impeaching the certificate itself, will be refused. *Scott* v. *Platel*, 2 Ph. 229.

A four-day order is the proper remedy against a receiver. *Whitehead* v. *Lynes*, 34 Beav. 161; 34 L. J., Ch. 201; 11 Jur. (N.S.) 74; 13 W. R. 306.

Fi. fa. Wrongly Issued against Receiver—Damages.]—Where a fieri facias had been wrongly issued against a receiver, the court directed an action to be tried to assess the damages sustained by the receiver. *Ib.*

Bankruptcy Notice—Decree on.]—A bankruptcy notice in respect of a partnership debt cannot be served on a receiver and manager appointed in an action for dissolution of the partnership. *Flowers, In re, Ware, Ex parte*, 65 L. J., Q. B. 679; [1897] 1 Q. B. 14; 75 L. T. 306; 45 W. R. 118.

Service of Writ of Execution of Decretal Order.]—A receiver need not be served with a writ of execution of a decretal order, but only with a copy; and if he disobeys, shall be committed. *Macarty* v. *Gibson*, Mos. 40.

Right of Way—Obstruction—Leave to Abate.]—It is not the course of the court to refuse liberty to try a right claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim. *Lane* v. *Capsey*, [1891] 3 Ch. 411; 65 L. T. 375; 40 W. R. 87.

Equitable Execution—Mode of Redress against Receiver.]—If a receiver appointed by way of equitable execution exceeds his powers, the person prejudiced should apply in the action, not commence a fresh action. *Searle* v. *Choat*, 53 L. J., Ch. 506; 25 Ch. D. 723; 50 L. T. 470; 32 W. R. 397.

And see EXECUTION.

Costs — Misconduct.] — A receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect. *Suffield and Watts, In re, Brown, Ex parte*, 29 Q. B. D. 693; 58 L. T. 911; 36 W. R. 303.

2. PAYMENT INTO COURT.

Without Passing through Receiver's Hands.]—Payment of money into court, without passing through receiver's hands. *Weale* v. *Ireland*, 5 Jur. 405.

—— **Saving Poundage.**]—A receiver being appointed to get in the outstanding estate of a testator, the court gave leave to a party who was willing to pay a sum due to the estate into court to do so, in order to save the poundage, which would have been incurred if it had passed through the hands of the receiver. *Haigh* v. *Gratton*, 1 Beav. 201; 8 L. J., Ch. 249.

Purchase Money of Timber.]—The purchase money of timber belonging to a lunatic's estate permitted to be paid to the receiver, in order to be paid by him into court. *Starkie, In re*, 1 Russ. 476.

Without Reference to Possible Right of Set-off.]—If attorney (being concerned as well for mortgagor as mortgagee) has been appointed receiver of rents and profits of mortgaged estates, and on order made for delivery of possession there is found to be a balance remaining in his hands, beyond what is sufficient to satisfy the mortgagee, he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made, on which there may possibly be found due to him a greater sum of money than the balance in his hands. *Lewis* v. *Morgan*, 5 Price, 42; 4 R. R. 860.

3. OTHER MATTERS.

Examination pro interesse suo against Receiver.]—Court will order person to be examined pro interesse suo, as well against receiver as sequestrator. *Gomme* v. *West*, Dick. 472.

Continuation of Receiver.]—A decree that a receiver previously appointed by the court should be continued:—Held, correct under the circumstances. *Bagot* v. *Bagot*, 10 L. J., Ch. 116.

Costs against Receiver at Suit of Executor.]—A plaintiff having obtained orders for costs against the receiver in the cause, died before the costs were taxed or furnished; the suit was revived by a creditor against the executor of the plaintiff:—Held, inasmuch as the receiver was an officer of the court, the executor was entitled to recover costs against him. *Betagh* v. *Concanon, Hughes* v. *Concanon*, Ll. & G. t. Plunk. 355.

E. M.

RECEIVER OF STOLEN PROPERTY.

See CRIMINAL LAW.

RECITALS.

Estates by Implication from.]—*See* WILL.

Notice by.]—*See* NOTICE.

In Deeds, &c.]—*See* DEED AND BOND—VENDOR AND PURCHASER.

RECOGNISANCE.

See CRIMINAL LAW—JUSTICE OF THE PEACE.

RE-CONVERSION.

See CONVERSION AND RE-CONVERSION.

RE-CONVEYANCE.

See MORTGAGE.

RECORDER.

See CORPORATION.

RECOVERIES.

See FINES AND RECOVERIES.

RECOVERY OF LAND.

See EJECTMENT.

RECTIFICATION.

Of Share Register.]—*See* COMPANY.

Of Deeds.]—*See* DEED AND BOND—SETTLEMENT.

RECTOR.

See ECCLESIASTICAL LAW.

REDEMPTION.

Of Annuity.]—*See* ANNUITY.

Of Land Tax.]—*See* REVENUE.

Of Mortgage.]—*See* MORTGAGE.

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REFRESHERS.

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REFRESHMENT HOUSES.

See INTOXICATING LIQUORS.

REGISTRAR.

See BANKRUPTCY—COMPANY—PRACTICE (DISTRICT REGISTRY).

REGISTRATION.

1. REGISTER OF BIRTHS, DEATHS, AND MARRIAGES.

Appointment of Registrar.]—The acting in the office is primâ facie evidence of the appointment as registrar of births and deaths, under 6 & 7 Will. 4, c. 86. *Reg.* v. *Price*, 3 P. & D. 421; 11 A. & E. 727; 9 L. J., M. C. 49; 4 Jur. 291.

The appointment of a person who is registrar of births, deaths, and marriages, as overseer of the poor, is not void, and in order to render it so, the overseer must appeal to the sessions under 43 Eliz. c. 2, s. 6. *Reg.* v. *Chester JJ.*, 4 Jur. 484.

In every case of vacancy of the office of superintendent registrar of births, deaths, and marriages in any union, the power of filling up the vacancy is, by 6 & 7 Will. 4, c. 86, given to the guardians; and the clerk to the guardians has no right to claim the appointment except in the case of the first appointment after the act first came into operation. *Reg.* v. *Acason*, 2 B. & S. 795; 31 L. J., Q. B. 227; 8 Jur. (N.S.) 841; 6 L. T. 535; 10 W. R. 691.

Duties of.]—The superintendent registrar has no power to grant his certificate pursuant to 6 & 7 Will. 4, c. 86, s. 7, in cases where it is proposed that the marriage shall take place out of his district, and without licence. *Brady, Ex parte*, 8 D. P. C. 332; 4 Jur. 269.

The court will not direct a registrar of births and deaths to erase the registry of the birth of a child, though facts are deposed to show that the

child was supposititious, and the entry a fraud, and though the application is made by a party having a pecuniary interest in defeating the fraud. *Stanford, Ex parte*, 1 G. & D. 428; 9 D. P. C. 927; 1 Q. B. 886.

Payment of Fees.]—The guardians of the poor of a parish in which a workhouse (not belonging to such parish) is locally situated, are liable to pay the fees for the registration of births and deaths therein, and may charge such fees to the parish to which such workhouse and its inmates belong; and if such parish refuse to repay, the parish paying is entitled to a peremptory mandamus to compel repayment. *Reg.* v. *St. Luke's, Shoreditch*, 4 W. R. 230.

Evidence of Births, &c.]—*See* EVIDENCE.

Marriages.]—*See* HUSBAND AND WIFE.

2. OTHER CASES.

Of Title Deeds to Land.]—*See* DEED AND BOND.

Of Bills of Sale.]—*See* BILLS OF SALE.

Of Copyright.]—*See* COPYRIGHT.

Of Patents.]—*See* PATENT.

Of Trade Marks.]—*See* TRADE MARK.

Of Voters.]—*See* ELECTION LAW.

Of Ships, and of Agreements for Sale of Ships.]—*See* SHIPPING.

Of Stocks and Shares.]—*See* COMPANY.

Of Judgments.]—*See* JUDGMENT.

Of Land.]—*See* LAND REGISTRY.

Vacating Registration of Lis Pendens.]—*See* LIS PENDENS.

RE-HEARING.

Generally.]—*See* PRACTICE (RE-HEARING).

For Costs.]—*See* COSTS.

Bankruptcy Petition.]—*See* BANKRUPTCY.

REJOINDER.

See PRACTICE.

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See CROWN (LAW OFFICERS).

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RELIGION.

1. *Roman Catholics.*
   - *a.* In General.
     - i. Disabilities, 98.
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   - *b.* Monks, 103.
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See also ECCLESIASTICAL LAW.

1. ROMAN CATHOLICS.

a. In General.

i. *Disabilities.*

Curtesy.]—A papist may be tenant by the curtesy. *Withrington* v. *Banks*, Sel. Ch. Ca. 30. *And see* P. Wms. 49, n.

Power.]—A papist having a power of revocation under a settlement made prior to the Irish Popery Acts executes that power after the acts passed:—Held, that the revocation was good. *French* v. *Caddell*, 3 Bro. P. C. 266.

Will.] — Papists are not prohibited from devising lands to protestant trustee to be sold bonâ fide for payment of debts, &c. *Cusack* v. *Gilbert*, 5 Bro. P. C. 465.

Discovery.]—On an issue directed to try the validity of a will it was a sufficient finding that the testator was a papist, such having been at the time incapacitated from devising. *Farrell* v. *Crosbie*, Wall. Lyn. 162.

Devisee from a papist by reason of the penal law, which would attach upon him from the incapacity in the devisor to devise, is not compelled to discover whether devisor was a papist. *Smith* v. *Read*, 1 Atk. 526.

Plea to bill, to discover whether A. was not a papist upon conveying to defendant, allowed. *Harrison* v. *Southcote*, 1 Atk. 528.

Bill to set aside, for fraud, a decree which had been made in favour of a protestant discoverer, dismissed, and dismissal affirmed on appeal. *Mulcahy* v. *Kennedy*, 1 Ridgw. P. C. 331.

Lease.]—A lease granted to a papist at the full improved yearly value, but to commence at the next succeeding quarter-day, is not such a future or reversionary lease as papists are prohibited from taking. *Power* v. *Windis*, 5 Bro. P. C. 472.

By Irish act of parliament for preventing the growth of popery, papists are disabled from holding leases of lands for any term exceeding thirty-one years, and under a rent of not less than two-thirds of the improved yearly value at the time of making the lease. The court of chancery may upon evidence determine the question of value without sending it to a jury, and may also give full relief to a protestant discoverer under those acts without putting him to his remedy at law. *Cusack* v. *Bulkley*, 5 Bro. P. C. 369.

Lands leased to a papist at less than two-thirds of improved value, or for any term above thirty-one years, are forfeited to the discoverer, being

a protestant. *Blake* v. *Blake*, 5 Bro. P. C. 384.

Where bill is filed by protestant discoverer to have the benefit of a lease granted to a papist, on the ground of the rent reserved being of less than two-thirds of yearly value, the fact ought to be tried by jury, upon trial of proper issue. *Kealey* v. *Dawes*, 5 Bro. P. C. 460.

Trust.]—Devise of land to trustees, in trust, if the elder son of A. turn protestant, then to such eldest son :—Held, a good devise to a papist, but not to a protestant. *Carteret* v. *Carteret*, 2 P. Wms. 132.

Creditor.]—Whether a creditor who is a papist is entitled to be paid his debts out of money arising by sale of the real estate, under the appointment in the will, quære. *Foome* v. *Pinkard*, Amb. 320. *Foone* v. *Blount*, *id.* 767.

Bond.]—If A. by a bond binds himself, his heirs, executors, &c., to a papist, who obtains judgment and makes out an elegit, such papist cannot maintain an ejectment, yet the bond binds the representative or obligor. *Sorresby* v. *Hollins*, 9 Mod. 223.

Confessing Judgment.]—Papist tenant in tail, in the year 1766, confessed judgments to a trustee, in trust, for the use of a settlement made on the marriage of his nephew, and afterwards, in 1770, suffered a recovery :—Held, that the judgments were not a fraud on the then existing disabling statutes; that the recovery (not having any operation to defeat the provisions of those statutes) was valid ; and that the issue of the marriage claiming under the settlement had a right to raise the amount of the judgments out of the lands in the hands of a purchaser with notice. *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 13.

11 & 12 Will 3.]—Where trusts are made to papists they are void, and the legal estate will be void likewise, by 11 & 12 Will. 3. *Ardlington* v. *Cann*, 3 Atk. 155.

A papist by marriage articles, previous to the disabling statute, 11 & 12 Will. 3, covenants to lay out 12,000*l.* on the purchase of land. The money is never laid out, and therefore shall still be considered as money, and go to the personal representative instead of even a protestant heir. *Bowes* v. *Shrewsbury*, 5 Bro. P. C. 148.

A papist, being tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs; this is not a purchase within the statute 11 & 12 Will. 3, c. 4. *Derwentwater* (*Lord*), *Appeal of*, 9 Mod. 172.

By 11 & 12 Will. 3, c. 4, s. 4, a papist was not only disabled from purchasing lands himself, but also from taking either by devise or settlement ; but that statute is now repealed, in these respects, by 18 Geo. 3, c. 60. *Papists* (*case of*), 2 P. Wms. 3.

A papist cannot take a freehold or leasehold estate by will, because taking by will is taking by purchase, and by the express words of the statute 11 & 12 Will. 3, c. 4, a papist is disabled to take by purchase ; also terms for years are expressly mentioned in the statute. (*Davers* v. *Dewes*, 3 P. Wms. 46.) For this reason it has been held that a papist cannot extend land on a judgment, for that would give him an interest in the land, and it is the same where the judgment is given in trust for the papist. *Lowther* v. *Fletcher*, 3 P. Wms. 46 n.

By 11 & 12 Will. 3, c. 4, a papist under eighteen is disabled from taking only till conformity ; but, if more than six months above eighteen, he is disabled for ever. *Vane* v. *Fletcher*, 1 P. Wms. 353.

The protestant next of kin are only entitled to the profits in case of descents, for in case of a purchase or grant by a papist they are void by statute 11 & 12 Will. 3. *Michaux* v. *Grove*, 2 Atk. 210.

A conviction of recusancy cannot be given in evidence against a third person, under 11 & 12 Will. & M., c. 4 (an act against papists). but the facts must be proved. *Hanbury* v. *Bateman*, 2 Atk. 65.

2 Anne.]—T., papist, seised in fee of lands purchased before the statute 2 Anne, c. 6. by articles on the marriage of his son in 1708, covenanted to settle not only those lands, but others acquired since the statute, in strict settlement :—Held, that these articles had no operation ; neither on the lands purchased before the statute, because such a disposition was made void by that statute ; nor on the lands purchased afterwards, because, by the statute, T. was disqualified from holding an estate sufficient to support the covenants. *Moore* v. *Butler*, 2 Sch. & Lef. 249.

Articles executed in 1714, and a settlement in pursuance thereof, in 1720, made between T. and J., his eldest son (both being papists), settling lands acquired since 1708, and resettling the former lands on J. for life, remainder to his then first and other sons for life, remainder to their issue in strict settlement: — Held, also inoperative, except as to making a provision for younger children, and not sufficient to put the son of J. to an election. Held, therefore, that, under a Protestant Discovery Act, decree obtained in 1751 in trust for, and assigned to, J. the younger (the son of J., the settlor), J. the younger was not a trustee for the persons claiming under that settlement, but that the effect of that decree was to subject the premises comprised therein to the mortgage of J. the younger. *Ib.*

A papist seised in fee, previously to her marriage with plaintiff, a papist, in consideration thereof and of his covenanting to make up her dower 800*l.* per annum and provide for younger children, covenanted for her and her heirs to pay 8,000*l.* as her marriage portion, to be applied in procuring assignments of charges on his estate, in trust for the heir male of the marriage ; but, if no issue male, then for the daughters ; if no issue, for plaintiff ; 4,000*l.* was paid ; the marriage took effect, and the wife died without issue ; whereupon her lands came to her sisters, as her heirs-at-law, against whom plaintiff filed his bill for the residue of the 8,000*l.* Lifford, C., held he was entitled to recover in respect of the lands come to the heirs, for they are real assets, and there is nothing in the popery laws (2 Anne, c. 6, and 8 Anne, c. 3) which prevents a papist from binding his heirs to a papist for a fair debt or a fair and valuable consideration, or at all alters the law with respect to lands descending being real assets in the hands of the heir. *Aylmer* v. *Bellew*, Vern. & Scriv. 15.

By an act of parliament made in Ireland, 2 Anne, to prevent the growth of popery, no person professing that religion can be the guardian of the infant ; but such guardianship, where the person entitled to it is a papist,

shall be disposed of by the court of chancery in that kingdom to some near relation of the infant, being a protestant, and one to whom the infant's estate cannot descend; but, if there shall be no such protestant relation, then to some other proper person who will use his utmost care to educate the infant in the protestant religion until the age of twenty-one. *Preston* v. *Ferrard (Lord)*, 4 Bro. P. C. 298.

17 & 18 Geo. 3, c. 49.]—A decree obtained by a protestant discoverer under the popery laws was capable of being a trust for the papist who had been antecedently seised, and the only effect was to make the former estate again discoverable. Such a decree, under the circumstances of this case, was held to be a trust, and a judgment confessed by the papist attached upon the lands by the force of the statute 17 & 18 Geo. 3, c. 49. Inquiry directed whether the papist against whom the decree was obtained had an estate in fee, without sending the question to law. A moiety only can be sold for payment of a judgment debt. *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137.

A papist, by articles on his marriage, in 1764, agreed "to convey to trustees in strict settlement, in case he should at any time thereafter during his life be qualified by law so to do." In 1778 he became qualified, by the statute of 17 & 18 Geo. 3. to carry these articles into execution: — Held, that the lands were not specifically bound by these articles until 1778; and therefore judgments subsequent to 1764, but before 1778, were prior liens; for to hold that the articles of 1764 bound the lands specifically would defeat the intent of the parties, by giving a title to protestant discoverer:—Held, also, that judgment creditors were not bound by the articles of 1864, but that they were bound from the passing of the statute 17 & 18 Geo. 3, c. 49. *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

Relief Act, 1829.]—A Roman Catholic entitled to real estate did not take the oath necessary under the statute to qualify him to hold it, and was not in enjoyment of the lands, nor were proceedings taken to enforce his title until after the passing of the Roman Catholic Relief Act (10 Geo. 4, c. 7):—Held, that s. 23 of that act removed his former disability. *O'Connell* v. *O'Callaghan*, 7 Ir. Eq. R. 596.

The prohibition of monastic bodies in the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7) applies to such bodies as settled in the realm after the passing of the act as well as to those who were then residing in it:—Held, therefore, that a trust for the benefit of a church belonging to the Society of St. Vincent de Paul, who came to Ireland in 1838, having left it in 1690, and who are bound by religious or monastic vows, is void. *Liston* v. *Keegan*, 9 L. R. Ir. 531.

The 10 Geo. 4, c. 7, removed only such disabilities and restrictions as were imposed on Roman Catholics by the general law of the land, and therefore did not operate to remove a prohibition against the alienation of an estate, contained in a private estate act, settling the estate of a Roman Catholic family according to certain limitations, there being no general law in operation at the time of the passing of the estate act to prevent Roman Catholics from aliening. *Shrewsbury (Earl)* v. *Scott*, 6 C. B. (N.S.) 1; 29 L. J., C. P. 34; 6 Jur. (N.S.) 452. Affirmed, 6 C. B. (N.S.) 221; 29 L. J., C. P. 190; 6 Jur. (N.S.) 472—Ex. Ch.

ii. *Conformity.*

Trust.]—Plaintiff, whilst a papist, assigned advowson to defendant for ninety-nine years, and, having conformed, brought his bill for reassignment of the term, suggesting he had only assigned it in trust for himself, to avoid the penalties of the statutes 3 Jac. 1, c. 4, and 1 Will. & M., c. 26. Semble, if the defendant had demurred, such a fraudulent conveyance would at the hearing have been absolute against the grantor. *Cottington* v. *Fletcher*, 2 Atk. 156.

The act of 12 Anne, c. 14, does not, in the case of a papist, make the whole case void, but only the turn upon the avoidance, which is vested in the universities. *Ib.*

Penalty.]—Papists on their conformity are freed from any penalties they might otherwise sustain in respect of their recusancy. *Ib.*

Waste.]—Where the eldest son of a papist had conformed to the Established Church, and thereby rendered his father tenant for life, under the 2 Anne, c. 6, a bill having been filed to secure the benefit of his reversion in fee, and to restrain the father from committing waste, an injunction was granted upon the answer. *Cockburne* v. *Hussey*, Wall. Lyn. 234.

Requisites.]—The conformity of the eldest son for the purpose of making his popish father tenant for life, under the popery laws, was invalid, unless it was had before the bishop of the diocese which the conformist did inhabit. *Cockburne* v. *Hussey*, 2 Ridgw. P. C. 510.

Certificate.]—The bishop's certificate of the conformity of a papist must state, in the words of the statute, that he conformed, &c. A certificate, stating the facts of the papist appearing in church, declaring his renunciation, &c., is not sufficient. Such certificate does not preclude evidence that the alleged conformist continued to be a papist. *Moore* v. *Butler*, 2 Sch. & Lef. 249.

In a certificate of conformity under the statute 2 Anne, c. 6, the precise words of the statute need not be followed, the object of the act being fully satisfied if the fact be sufficiently certified; therefore, where a certificate was questioned because that it did not in precise words state that the party had conformed, it was held that the certificate was sufficient, though the word "conformed" was not in it, since it clearly certified the fact. *Loveland* v. *Lynch*, 2 Dow, 324.

Purchase before Statutory Compliance.]—An Irish papist conforming anywhere out of Ireland cannot purchase lands in that kingdom before he had complied with the several requisites of the Irish acts, 2 Anne. c. 6, and 8 Anne, c. 3. *Carrol* v. *Vicars*, 5 Bro. P. C. 396.

31 Geo. 3, c. 32.]—An attorney, a papist, petitioned for leave to take the oath prescribed by statute 31 Geo. 3, c. 32, s. 22, instead of the oath of supremacy, on being admitted a master extraordinary in chancery; but refused. *Agar, Ex parte*, 3 V. & B. 160.

33 Geo. 3, c. 21.]—A papist, neglecting to take

the oaths prescribed by the statute 17 & 18 Geo. 3, c. 41, within six months, &c., was not protected by that statute from a protestant information, nor enabled to sue; but the consequences of such neglect are removed by statute 33 Geo. 3, c. 21, upon his performing the requisites therein mentioned. *Kennedy* v. *Daly*, 1 Sch. & Lef. 355, 381.

b. Monk.

Status.]—The doctrine of civil death, in consequence of profession as a monk or a nun, is not law. *Blake* v. *Blake*, 4 Ir. Ch. R. 349. S. P., *Metcalfe, In re*, 2 De G. J. & S. 122; 33 L. J., Ch. 308; 10 Jur. (N.S.) 224; 10 L. T. 78; 12 W. R. 538.

c. Nun.

Status.]—A nun is not civiliter mortua, or incapable of holding property. *Metcalfe, In re*, supra.

A professed nun by deed assigned all her present property, and covenanted to assign all her future property, to trustees for the superior priest, for the time being, of the Brompton Oratory. She subsequently became entitled under a will to a sum of money, which was paid into court. She presented a petition for payment out of court to the trustees of the deed:—Held, that the money ought not to be paid out without proof of her free and unbiassed consent, but should be retained in court, and the dividends accumulated. *Ib.*

Dividends of a fund in court ordered to be paid to a tenant for life, a professed nun, on petition, without inquiry into the circumstances under which the petition was presented, the court holding the solicitor who filed it responsible. *Holdsworth's Trusts, In re*, 2 Eq. Rep. 1090; 2 W. R. 692.

The court granted a receiver, on a bill filed to raise the arrears of an annuity granted to a lady who afterwards became a nun, the law as to civil death ceasing at the reformation, and not being revived by the 10 Geo. 4, c. 7. *Evans* v. *Cassidy*, 11 Ir. Eq. R. 243.

Quære, whether nuns who have vowed poverty and obedience are capable of acquiring property. *M'Carthy* v. *M'Carthy*, 9 Ir. Eq. R. 620.

Condition Against becoming.]—Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely; and he gave the residue of his personal estate to his other children. By a codicil he declared that, finding that his daughter intended to become a nun, he revoked the bequest in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun:—Held, that the condition annexed by the codicil was a lawful one, and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, her interest under the bequest ceased on her becoming a nun. *Dickson's Trust, Ex parte*, 1 Sim. (N.S.) 37; 20 L. J., Ch. 33; 15 Jur. 282.

Assignment by.]—An assignment of their distributive shares of their father's assets was obtained from two nuns, in trust for the convent. Declarations of the assignors were proved, showing that the deeds were executed by them against their will, and under the influence and spiritual terror of their vows. The deeds contained a power to put in an answer for them. The assignees filed a bill to recover the shares, making one nun a plaintiff and the other a defendant, neither of whom objected to the deeds in this suit, but the same declarations proved it to be without their concurrence, and the objection, that the deeds were extorted, was made by the other defendant. The plaintiffs declining an issue whether the deeds were freely executed, the bill was dismissed with costs. *M'Carthy* v. *M'Carthy*, 9 Ir. Eq. R. 620. See *Fulham* v. *M'Carthy*, 1 H. L. Cas. 703; 9 Ir. Eq. R. 620; 12 Jur. 757. On appeal, affirming the dismissal of the bill, but on the ground of misjoinder of co-plaintiffs.

Quære, whether an assignment of property by a nun in pursuance of a vow made on entering the convent is valid. *Fulham* v. *M'Carthy*, 1 H. L. Cas. 703; 9 Ir. Eq. R. 620; 12 Jur. 757.

Where A., being about eighteen years of age, and possessed of considerable real and personal property, entered a convent, whether as postulant or pupil was controverted, but upon an agreement on the part of the nuns that she should not be professed under age, or without their apprising her friends previously; and it appeared that she was professed under age, and in the absence of all her friends; and there was no evidence of any notice having been given to any of them, save an allegation in the answer of the defendants that they did communicate the fact to her sister; and afterwards, when she arrived at full age, she assigned nearly all her property to the nuns, for the benefit of the convent; and it appeared that previous to this she had been excluded from the society of her friends, and that the deed for this purpose was prepared by the professional agent of the convent, and that she had no friend of her own present; and having, in some time after, quitted the convent, she filed a bill to set those proceedings aside, for a reconveyance of her real estate, and for an account:—Held, that the transactions in this case fell within the principles of the cases of guardian and ward, which decide that dealings between them ought not to stand. *Whyte* v. *Meade*, 2 Ir. Eq. R. 420.

Convent.]—An English convent may be a devisee or legatee of real or personal estate. *Cocks* v. *Manners*, 40 L. J., Ch. 640; L. R. 12 Eq. 574; 24 L. T. 869; 19 W. R. 1053.

2. Dissenters.

Rights of Dissenting Ministers.]—If a dissenting minister is appointed minister of the chapel by a part of the trustees of it, he cannot maintain an action against all the trustees for his salary; and the fact of all of them having signed a notice to him, demanding the possession of the chapel, will not make any difference. *Cooper* v. *Whitehouse*, 6 Car. & P. 545.

The trustees of a chapel of dissenters, which for want of a pastor had been without a congregation, engaged with a new pastor for a year, at a salary; he gave notice in the papers of opening the chapel, and on the first day of opening gave notice to the congregation there that they should proceed to the election of a pastor after Divine service that day, and accordingly took votes. Upon being dispossessed by the trustees after the year, he applied for a mandamus to be

restored, alleging that he was elected by the congregation for life. The court refused to grant it, on the ground that, supposing there was a competent body to elect, there was not sufficient notice given of the election; and, therefore, they left the party to try his right to an action. *Rex* v. *Dagger-lane Chapel*, 2 Smith, 20.

Where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the court refused a mandamus to restore him, applied for to enable him to justify his conduct, because it did not appear that he had complied with all the requisites necessary to give him a primâ facie title. *Rex* v. *Jotham*, 3 Term Rep. 575; 1 R. R. 770.

Trust Deed—Alteration of Trust.]—Under a deed dated in 1766, certain property was directed to be held in trust to be used as a meeting-house for Protestant dissenters of the Presbyterian or Independent denomination, so long as the laws of Great Britain should tolerate Protestant Dissenters. For eighty years previously to February, 1881, the property had been enjoyed as the chapel of a congregation of Independents. On that date a majority of the members passed a resolution to transfer the chapel and congregation to the Presbyterian Church of England: —Held, that the trust was for the benefit of Presbyterians and Independents—both or either, and for neither denomination to the exclusion of the other. Also, that, as there was such express direction in the trust deed, Lord Lyndhurst's Act (7 & 8 Vict. c. 45), s. 2, had no application on the question of usage:—Held, further, that the proposed transfer to the Presbyterian Church of England was an alteration of the trust, and was a matter which could not be effected except by the unanimous vote of the congregation. *Att.-Gen.* v. *Anderson*, 57 L. J., Ch. 543; 58 L. T. 726; 36 W. R. 714.

Scotch Parish Minister—Competent and Legal Stipend—Common Good—Contract or Trust—Measure of Liability.]—A decree of disjunction and erection was made on 15th July, 1741, by the court of session as the commissioners for the plantation of kirks and valuation of teinds, whereby a specified portion of the town of Greenock was disjoined and made into a new or mid-parish, and it was further decerned "that the bailie, feuars, and inhabitants of the said burgh be bound . . . . to provide the minister of the new church with a competent and legall stipend not under nine hundred and fifty merks with fifty merks for the communion elements." In an action by the minister of the new parish against the provost, magistrates, and town council of Greenock, claiming a fixed yearly stipend of competent and adequate amount, regard being had to the circumstances of the time:—Held, that the decree above mentioned imposed a contractual obligation on the town council, and that they were liable to provide out of the common good a sum not limited to the minimum of nine hundred and fifty merks, but adequate according to the cost of living at the present time, and so from time to time, for the minister of the kirk in question. *Greenock (Provost, &c.)* v. *Peters*, [1893] A. C. 258; 1 R. 210—H. L. (Sc.)

Mandamus—To register Meeting-house.]—A mandamus will lie to register and certify dissenting meeting-houses. *Rex* v. *Derby JJ.*, 4 Burr. 1991; 1 W. Bl. 606.

—— **To admit Teacher.**]—So, also, to trustees of a meeting-house, to admit a dissenting teacher. *Rex* v. *Barker*, 3 Burr. 1265; 1 Wm. Bl. 352.

Toleration.]—As to the toleration act and doctrines of religion condemned by law, see *Att.-Gen.* v. *Pearson*, 3 Mer. 353; 17 R. R. 100.

No new right is given by the toleration act, but only an exemption from the penal laws. *De Costa* v. *De Paz*, 2 Swanst. 490; Dick. 258; Amb. 228; 19 R. R. 104.

The Act of Toleration (1 Will. & M. c. 18) was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England, who act contrary to the rules of discipline of the church, would introduce the utmost confusion. *Trebee* v. *Keith*, 2 Atk. 501.

—— **Extent of Act.**]—The 1 Will. & M. sess. 1, c. 18, s. 4, exempting persons who shall take the oaths and subscribe the declaration there mentioned, from prosecution in the ecclesiastical court for nonconformity to the Church of England, extends not only to lay persons, but to clergymen who, after being ordained, dissent from the church. *Barnes* v. *Shore*, 8 Q. B. 640; 15 L. J., Q. B. 296; 10 Jur. 688; S. P. and *S. C.*, 1 Rob. Ecc. Rep. 382; 11 Jur. 887.

But a person ordained a priest in the Church of England cannot, in this manner or otherwise at his own pleasure, divest himself of his orders, so as to exempt himself from correction by the bishop for breach of ecclesiastical discipline. *Ib.*

Performance, by such priest, of the church service in an unconsecrated chapel, not licensed by the bishop, and against his monition, is such a breach of discipline, and not a mere act of nonconformity protected by 1 Will. & M. sess. 1, c. 18, or by 52 Geo. 3, c. 155. *Ib.*

—— **Lutherans.**]—A congregation of Lutherans, using the German language in their service, are within the protection of the 1 Will. & M. sess. 1, c. 18. *Rex* v. *Hube*, Peake, 132; 5 Term Rep. 542; 2 R. R. 669.

—— **Disturbing Congregations or Ministers.**]—It is no defence to an indictment on that act for disturbing a congregation of protestant dissenters that the violence was committed in the defendant's asserting his right to the clerk's reading desk. *Ib.*

It need not be proved that the minister has taken the toleration oaths. *Ib.*

If several are convicted on 1 Will. & M. sess. 1, c. 18, for disturbing a dissenting congregation, each is liable to the penalty of 20*l.* imposed by the statute. *Ib.*

Methodists and dissenters have a right to the protection of the court, if disturbed in their decent and quiet devotions. *Rex* v. *Wroughton*, 3 Burr. 1683.

3. Quakers.

Marriage.]—There is no doubt of the legality of Quaker marriages. They were meant to be included in the remedy of the stat. 21 & 22 Geo. 3, c. 25, though the words of that act may seem not to apply to them. *Haughton* v. *Haughton*, 1 Moll. 611.

Articles of the Peace.]—A Quaker cannot be admitted to exhibit articles of the peace against her husband upon her affirmation, as it is in nature of a criminal prosecution. *Gumbleton, Ex parte*, 2 Atk. 70; 9 Mod. 232.

4. JEWS.

Status.]—The Jewish religion not legal, but connived at. *De Costa* v. *De Paz*, 2 Swanst. 487 n.; Dick. 258; Amb. 228; 19 R. R. 104.

A Jewish synagogue is not an illegal establishment. *Israel* v. *Simmons*, 2 Stark. 356.

An institution for teaching the Jewish religion is illegal. *Bedford Charity, In re*, 2 Swanst. 522; 19 R. R. 107.

Maintenance.]—In the court's allowance of a maintenance out of a Jew's estate to his daughter turned protestant, it is not material though the daughter be above forty years of age, or married, or though the Jew be dead. *Vincent* v. *Farnandez*, 1 P. Wms. 524.

Legitimacy.]—A father, who was a Jew, by his will gave his daughters benefits contingent upon their marrying according to the tenets of the Jewish religion, and determinable upon their marrying otherwise. By a codicil he gave his residuary estate to the children of his sons and daughters. The father at his death left a son who had eight children, of whom three were born before marriage, and were the children of his wife. He knew of the facts attending the birth of the eight children, all of whom were living at the date of his codicil. By the Jewish law, the subsequent marriage of parents legitimatises children born before marriage:—Held, that the children born before marriage did not take under the gift. *Levy* v. *Solomon*, 37 L. T. 263; 25 W. R. 842.

A. L.

REMAINDERS AND REVERSIONS.

Generally.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS—MERGER—ESTATE.

When Barred.]—*See* FINES AND RECOVERIES.

Reversions as Assets.]—*See* EXECUTOR AND ADMINISTRATOR.

Rights of Assignee of Reversion.]—*See* LANDLORD AND TENANT.

Action by Reversioner for Nuisance.]—*See* NUISANCE.

Cross Remainders.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS.

Rights of Tenant for Life and Remainderman.]—*See* ESTATE.

Remoteness of.]—*See* PERPETUITY.

REMITTER.

See ESTATE.

REMOTENESS.

See PERPETUITY.

REMOVAL.

Of Paupers.]—*See* POOR LAW.

From Offices.]—*See* CROWN OFFICE.

RENT.

See LANDLORD AND TENANT.

RENT-CHARGE.

1. *Creation*, 108.
2. *Cesser*, 111.
3. *Recovery of Arrears*, 111.
4. *Other Matters*, 118.
5. *In Bar of Dower.*—*See* HUSBAND AND WIFE.
6. *Jointure Rent-Charge.*—*See* JOINTURE.
7. *Tithe.*—*See* ECCLESIASTICAL LAW.
8. *Sale of Lands in Consideration of.*—*See* LANDS CLAUSES ACT.

1. CREATION.

Part of a rent may be granted, not a new rent reserved or granted out of the whole. *Stafford* v. *Buckley*, 2 Ves. 177.

A rent out of copyhold aliened by surrender and admittance for a valuable consideration, good in equity. *Spindlar* v. *Wilford*, 5 Vern. 16.

Lands were mortgaged in fee-simple to B., A. being owner in fee of the equity of redemption. By indenture of lease and release, dated the 24th and 25th October, 1838, to which A., B., C. and D. were parties, B. conveyed, and A. granted and confirmed, the lands, to have and to hold to D., his heirs and assigns, to the use of D., his heirs and assigns for ever, subject to a proviso for redemption by A. and his heirs, on payment of 5,000*l.* and interest; and that if default should be made in payment and interest, and after six months notice in writing had been given by D., his heirs and assigns, to A. to pay, and payment not being made, it should be lawful for D., his heirs and assigns, to make sale of the lands. There was a proviso for quiet enjoyment by A. until default. Also, in the event of D., his heirs or assigns, or any other person or persons claiming, or to claim, by, from, under, or in trust for them, under or by virtue of any power therein contained, entering into or otherwise becoming possessed of the lands, it was expressly agreed and declared, between and by the parties to the deed, that immediately after the lands should have been so entered into by D., his heirs or assigns, or any other person claiming as aforesaid, the same should thenceforth for ever be, and the same were thenceforth, subjected and charged with payment to A., his heirs and assigns, of the

annual sum of 40*l.*, and the same should thenceforth be recoverable, by distress or otherwise, upon and out of the lands, in such and the same way as rents of the like amount might be recovered upon a demise for years. B. and A. executed this conveyance; D. did not. Default was made in payment. D. entered into possession for the purpose of executing his power of sale, and by indenture conveyed the lands to E. for 5,500*l.*, subject to the annual sum of 40*l.* E. afterwards entered into possession, and paid the annual sum, and afterwards conveyed the lands in fee-simple to the plaintiff, subject to the payment of the 40*l.* a year, but so far only as the same might be legally chargeable upon or affect the lands. Afterwards the rent became vested in the defendant. The plaintiff omitted to pay the rent, and a distress was made by the defendant upon his goods:—Held, first, that the charge of the rent was not well reserved as a rent, because the reservation was in favour of a person not vested with a legal estate in the lands. *Gilbertson* v. *Richards*. 5 H. & N. 453; 29 L. J., Ex. 213; 6 Jur. (N.S.) 672—Ex. Ch.

Held, secondly, that at common law there was not a good creation of a rent-charge, for want of the execution, by the releasee in fee, of the indenture of 1838. *Ib.*

Held, thirdly, that there was a good creation of a rent-charge by way of use, under the statute. *Ib.*

Held, fourthly, that the declaration of a use, notwithstanding it came after the limitations of the estate to D. and his heirs and assigns, to the use of D., his heirs and assigns, were not objectionable, as being a use upon a use. *Ib.*

Held, fifthly, that, assuming that the rent might arise at any period, however distant, still the limitation was not void, on the ground of its tending to a perpetuity. *Ib.*

By Virtue of Statute of Uses.]—Though the grantee of a rent-charge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent (since until then he has only a possession in law, and not the actual possession required by 2 Will. 4, c. 45, s. 26), it is otherwise where the rent-charge is by a conveyance operating under the Statute of Uses (27 Hen. 8, c. 10, s. 1); for then the person to whose use the rent-charge is so limited is, by virtue of the statute of uses, at once in actual possession, and he may be entitled to be registered if the rent is of sufficient value, though he has not received any part of it. *Heelis* v. *Blain*, 18 C. B. (N.S.) 90; 1 H. & R. 189; 34 L. J., C. P. 88; 11 Jur. (N.S.) 18; 11 L. T. 480; 13 W. R. 262. *See also preceding case.*

Specific Charge.]—A testator seised of P. and other lands, directed all his just debts, funeral expenses, and legacies to be paid by his executors, and devised all his real and freehold estates, save a part devised to his wife, upon trust that his wife and her assigns should, after his decease, receive a rent-charge, with power of distress, and three of his daughters should receive rent-charges, with like remedy by distress and entry as provided with respect to the rent-charge to his wife. The testator then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold, and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees:—Held, that the rent-charges to the daughters were specifically charged on the same lands as the rent-charge to the wife, and had priority over the legacies which were charged by the residuary clause only. *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

Whether Amounting to Covenant.]—By the settlement made upon the marriage of R. with S., P. gave, granted, and confirmed unto S. and her assigns, in case she survived P. and R., a yearly rent-charge to be charged and chargeable upon certain manors of or to which P. or any other person or persons in trust for him was seised or entitled for an estate of inheritance at law or in equity, to hold the said rent-charge, but subject and without prejudice as to such of the said hereditaments as were charged with a mortgage for a certain term made to D. P. also, for himself, his heirs and assigns, covenanted, granted, and agreed with S., her executors, administrators, and assigns, that in case the rent-charge should remain unpaid for certain periods, she should have powers of distress and entry. A term of one hundred years was also created for better securing this rent-charge. By his will, P. gave his real estates, subject to D.'s mortgage and the rent-charge, to S., and the term for securing the same to trustees for a term of five hundred years, upon trust to pay his debts and apply the money so raised in exoneration of his personal estate. S. survived both R. and P., but no part of the rent-charge had ever been received by her. A decree had subsequently to the death of R. and P. been made in a suit, the effect of which was to cut down the interest of P. in the estates charged with the rent-charge to a life interest, and withdraw them from the operation of the settlement. Upon a claim by S. as a creditor for the arrears of her annuity in the administration of P.'s estate:—Held, that the words used in the creation of the rent-charge amounted to a covenant, which S. could enforce against the personal estate of P. *Monypenny* v. *Monypenny*, 3 De G. & J. 572; 28 L. J., Ch. 303; 5 Jur. (N.S.) 253; 7 W. R. 276.

Evidence of.]—Upon the admission of the heir-at-law that the will of the testator, which was lost, was duly executed and attested; and that thereby certain lands were devised to him, subject to a perpetual rent-charge; and upon evidence of the contents of the will by two witnesses who heard it read, but could not state that it was executed and attested as by law required, further than that the person reading it read out the names of the testator and of certain persons, as if they had executed and attested it; and upon proof of the payment of the rent-charge for thirty-five years up to the year before the filing of the bill, the court declared that the lands were well charged with the annuity, and that the heir-at-law, and the persons deriving title with notice under a settlement of the lands executed by him on the marriage of his son, and duly registered, and also the judgment creditor of the heir-at-law, were bound to give effect to the devise of the rent-charge. *Wise* v. *Wise*, 2 Jo. & Lat. 603.

By deed of 1769 A. granted a perpetual yearly rent-charge of 134*l.*, payable out of certain lands held by him for three lives, perpetually renewable. That deed was lost, but it appeared from a memorial thereof that A. had granted to B. and C., for the uses mentioned in the deed, a yearly rent-charge of 134*l.* for ever, issuing out of the

said lands. The rent-charge was paid by the owners of the lands, from 1769 down to 1860, when a petition was presented to the landed estates court for a sale of the rent-charge:—Held, that the memorial, coupled with evidence of the payment of the rent-charge down to 1860, was sufficient evidence of a perpetual subsisting rent-charge, so as to enable the court to sell. *Harding, In re*, 11 Ir. Ch. R. 23.

2. Cesser.

Under a suspension of a rent-charge by act of the parties, the rent ceases pro tempore. *Cook* v. *Fountain*, 3 Swanst. 596.

A rent-charge of 20*l.* granted in consideration of 240*l.* redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money. *Stokes* v. *Verrier*, 3 Swanst. 634.

By Devise.]—A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge. *Dennett* v. *Pass*, 1 Bing. (N.C.) 388; 1 Scott, 218; 4 L. J., C. P. 70.

Where, by the conveyance to a purchaser in fee of freehold property, certain outstanding rent-charges were conveyed to a trustee in trust for the purchaser, his heirs and assigns, the fee being conveyed to the purchaser to uses to bar dower, and afterwards the purchaser specifically devised the property, but without mention of the rent-charges:—Held, that the property was devised free from the rent-charges, and the trustee was ordered to convey them so that they be legally extinguished in the inheritance. *Vallance* v. *Vallance*, 2 N. R. 229.

Presumption.]—By a deed of 1709 the lands of S., together with twelve other denominations, were conveyed to J. B., subject to a rent of 126*l.*, which was to cease upon payment of 1,800*l.* In the will of J. B., dated 1717, and in family settlements executed in 1756 and 1778, no notice was taken of the existence of this rent. In 1841 the lands of S. were sold under a decree in the foreclosure suit. In the rental and abstract the lands were described as fee-simple, and in a declaration made by the defendant, under 4 & 5 Will. 4, c. 62, he stated, that no part of the rent had ever been paid by him or any of his ancestors out of the lands of S. There was no evidence to show that the rent had not been paid out of the other denominations:—Held, that there were not sufficient grounds to presume that the rent was either released or extinguished, and that it was a valid objection to the title. *Warren* v. *Bateman*, Fl. & K. 448.

It is no objection to a title that two fee-farm rents, created by letters patent by James 1, are not shown to have been extinguished, it being proved that no claim had been made by the crown for the rents, from the year 1706, and no proof of any previous claim. *Simpson* v. *Gutteridge*, 1 Madd. 609; 16 R. R. 276.

3. Recovery of Arrears.

Who Entitled.]—A woman entitled to a rent-charge marries, and at the husband's death there are arrears due; they shall go to the wife surviving, notwithstanding she had a settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune. *Salwey* v. *Salwey*, Ambl. 692.

Liability—Issue in Tail.]—A. is tenant in tail, subject to a rent-charge to B. for life; A. dies, the rent-charge being in arrear; the issue in tail not liable, by the stat. of 32 Hen. 8, c. 38, to the arrears incurred in the life of his ancestor. *Fairfax* (*Lord*) v. *Derby* (*Lady*), 5 Co. 118 a; 2 Vern. 612.

—— **Terre-Tenant.**]—Eton college was entitled to 34*s.* per annum, under a royal grant, issuing out of certain lands, but the college did not know the particular lands. Decreed, the executors of the terre-tenant should be answerable for the arrears. *Eton College* v. *Beauchamp*, 1 Ch. Cas. 121.

Where a statement of claim alleged that an owner in fee had granted lands, by indenture of marriage settlement, to a trustee, to the use inter alia that A. (in case she should survive the settlor) should and might from time to time after his decease, take, receive, and enjoy to her own use and benefit, an annual sum or yearly rent-charge of 150*l.*, by way of jointure during her life, to be issuing and payable out of the said lands, and that, subject to the said rent-charge, the lands were limited to the use of trustees for a term of 100 years; and subject thereto, to the use of the grantor in fee; and that it was declared by the indenture that the term of years was vested in the trustees, upon trust, when and so often as the jointure should be in arrear, by mortgage or sale of the lands, to raise and pay the arrears and costs; that the grantor of the rent-charge died, and that the defendant went into possession, under his will, of the lands, and the rents and profits thereof; and that certain arrears of the said rent-charge had accrued due to the grantee in her lifetime, whose executrix the plaintiff was:—Held, on demurrer, that the existence of the term was a bar to the absolute and unlimited personal liability of the defendant to pay the arrears, irrespective of the amount received or receivable by him from the lands, and that the action was not maintainable at law. *Swift* v. *Kelly*, 24 L. R. Ir. 478—C. A.

—— **Owner of Part of Lands charged.**]—The defendant was the owner and occupier of a portion of certain lands in the parish of P., which, by a private act, were charged with the payment to the vicar of an annual sum of 270*l.*, in lieu of tithes. The act provided that, if the annual rents were in arrear, the vicar was to have such and the same powers and remedies as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also, that if no sufficient distress were found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands:—Held, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear; the remedy by real action, which was a higher remedy than the action of debt, having been abolished by 3 & 4 Will. 4, c. 27, s. 36:—Held, further, that the defendant had his remedy in an action against the co-owners for contribu-

tion. *Christie* v. *Barker*, 53 L. J., Q. B. 537—C. A.

—— **Assignment of Lands.**]—An action for debt lies for the recovery of arrears of an annuity charged upon land against the assignee of part of such land; and it makes no difference whether the annuity was created by deed or will. *Booth* v. *Smith*, 51 L. T. 395; 47 J. P. 759.

Where an ecclesiastical augmentation by way of rent-charge which has been granted to a vicar and his successors under 29 Car. 2, c. 8, as extended by the Augmentation of Benefices Act, 1831, is in arrear, the whole amount in arrear is recoverable as a debt for which the assignee of the land so charged is liable, and is not limited to the extent of any profits which he may have received from the land. *Pertwee* v. *Townsend*, 65 L. J., Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.

—— **Enfranchisement of Copyholds.**]—Copyhold lands were compulsorily enfranchised at the instance of the lord in 1880, in consideration of the payment of annual rent-charges. At that date the boundaries of the copyhold lands were, and had been for some time previously, confused and incapable of identification, but no proceedings were taken on the enfranchisement, either by lord or tenant, under s. 24 of the Copyhold Act, 1852, to identify the parcels charged. The rent-charges were paid down to February, 1887, since which time no payment had been made:—Held, that the enfranchisement, while it put an end to the relationship of copyhold tenant and lord, and to all incidents of copyhold tenure in the future, did not relieve the former copyhold tenant from liability for any past breach or neglect of his duty as such; that, accordingly, he remained liable in respect of the confusion of boundaries which had occurred during the subsistence of the copyhold tenure; and that S., the owner of the rent-charges by purchase from the former lord, was entitled to a personal judgment for payment of the rent-charges and arrears, and to an inquiry to ascertain the parcels subject to the rent-charge, and, in the event of the non-ascertainment of such parcels, to substitution of other lands of the defendant equal in value to the enfranchised lands; and that the fact that the enfranchisement was compulsory, and at the instance of the lord, and that the lord had not availed himself of the statutory means of having the parcels identified, was no bar to the granting of such relief. *Searle* v. *Cooke*, 59 L. J., Ch. 259; 43 Ch. D. 519; 62 L. T. 211—C. A.

—— **When an Action for Debt lies.**]—A testator devised lands in fee, after the determination of certain life estates, to A., B. and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to, and to be equally divided among, the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years:—Held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. *Braithwaite* v. *Skinner*, 5 M. & W. 313; 8 L. J., Ex. 240; 3 Jur. 1054.

An action of debt for arrears of a rent-charge upon land in Australia is not maintainable in this country. *Whitaker* v. *Forbes*, 45 L. J., C. P. 140; 1 C. P. D. 51; 33 L. T. 582; 24 W. R. 241—C. A.

Therefore, when the executor of the grantee of a rent-charge on lands situate in Australia, sued in England the devisee of the lands in debt for its non-payment:—Held, that the action was maintainable in that form, but that it was a local action (there being no privity of contract between the parties), and ought to be brought in Australia; and a plea alleging that the lands were situate in Australia is a good plea in answer to a declaration in this country in debt for non-payment of the rent-charge by the devisee to the executor. *Ib.*

Since the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36, an action of debt will lie for the recovery of a rent-charge in fee. *Thomas* v. *Sylvester*, 42 L. J., Q. B. 237; L. R. 8 Q. B. 368; 29 L. T. 290; 21 W. R. 912. S. P., *Christie* v. *Barker*, supra.

—— **Release — Contribution.**]—G. died in 1875, having devised copyhold land to W. G., charged with an annuity to the plaintiff. On the 24th of July, 1876, W. G. contracted to sell part of the land to the defendant, and on the 31st of July, 1876, W. G. surrendered the residue of the land in fee to W., and the plaintiff by deed released the land surrendered to W. from the annuity. In 1883 the plaintiff sued the defendant for arrears of the annuity:—Held, that under s. 10 of Lord St. Leonards' Act, the defendant was liable to pay such a proportion of the rent-charge as was represented by his part of the land with regard to the whole land originally charged. *Booth* v. *Smith*, 54 L. J., Q. B. 119; 14 Q. B. D. 318; 51 L. T. 742; 33 W. R. 142—C. A.

—— **Apportionment.**]—A., on his marriage, settled a rent-charge on his wife for her jointure, and afterwards devises to the wife part of the land charged with the rent-charge: bill is, that the rent-charge might be apportioned. Bill dismissed. *Knight* v. *Calthorpe*, 1 Vern. 347.

Uncertainty as to Lands charged—Action to Ascertain Lands—Costs.]—By three awards of enfranchisement made by the copyhold commissioners in 1880, at the instance of the lord of a manor, of copyholds of which the defendant was tenant, three rent-charges of 3*l.* 15*s.* 4*d.*, 10*l.* 11*s.* 4*d.*, and 2*l.* 8*s.* 9*d.* were created. These rent-charges were subsequently assigned to the plaintiff S., and were duly paid down to February, 1887, but not since. The plaintiff S., under his statutory powers, executed three deeds, by which he purported to demise the lands subject to the rent-charges to his co-plaintiff P. for 500 years, upon trust by mortgage or sale to raise the rent-charges, and all costs of so doing. An action was brought to recover the arrears of the rent-charges, and to have the lands charged therewith ascertained; or, if that was not possible, to have land of equal value set out to secure them; and for execution of the trusts of the three deeds. The defendant admitted that he was in possession of the enfranchised lands, but stated that they were intermixed with other freehold lands of his; that the boundaries were confused before the date of the enfranchisement; that this was done without any neglect or fault on his part; and that he was willing to have them ascertained at the plaintiffs' expense. As to the two smaller rent-charges, it appeared that the lands out of which they issued were not ascertained; but as to the larger rent-

charge, the land was ascertained by the evidence before the court:—Held, that, as to the two smaller rent-charges, there must be an inquiry (to be conducted in chambers, if the parties were unable to agree) what were the lands charged therewith respectively, with a direction that, if they could not be ascertained, land of the defendant of the same extent in each case as the land so charged must be set out under the direction of the judge in chambers:—That, as to the larger rent-charge, there must be a declaration as to what it consisted of, and, further, that, as to the arrears of the rent-charges, there must be an order made for payment. *Searle* v. *Cooke*, 61 L. T. 189; 37 W. R. 730.

Proof on Winding up—Land in Possession of Liquidators.] — An unregistered company were mortgagees in possession of land subject to a rent-charge created by deed. The company was wound up under s. 203 of the Companies Act, 1862, and the liquidators for some time paid the rent-charge. Then, finding that the annual value of the property was not equal to the rent-charge, they obtained leave from the court to get rid of the land, and gave notice to the tenant in occupation of the land and to the owner of the rent-charge that they repudiated the land. The owner of the rent-charge claimed to prove in the winding up for arrears which had accrued since the repudiation:—Held, that the company were only liable so long as they were owners of the land; that the liquidators had sufficiently repudiated the ownership of the land, and that no subsequent claim could be made for the rent-charge. *Thomas* v. *Sylvester* (L. R. 8 Q. B. 368) explained and followed. *Blackburn Benefit Building Society, In re, Graham, Ex parte*, 59 L. J., Ch. 183; 42 Ch. D. 343; 61 L. T. 745; 38 W. R. 178; 2 Meg. 1—C. A.

Contribution.]—Purchaser of one of several parcels, into which land had been divided, shall not be subject to the rent-charge on the whole; other purchasers must contribute; grantor restrained by order. *Anon.*, Cary, 2. S. P., *Dolman* v. *Vavasor*, *id.* 92.

In a like case, where one tenant files a bill against grantee, he must make all who should contribute parties defendant, to show cause why they should not contribute. *Anon.*, Cary, 23. See also *Christie* v. *Barker*, supra.

Taking Possession.]—Devisee of a rent-charge out of lands, with power of distress, dies; his executrix brings a bill for the arrears: decreed, that she may enter, and hold and enjoy till paid the arrears. *Foster* v. *Foster*, 2 Vern. 386; Pre. Ch. 122.

—— **Lien.**]—The plaintiff was entitled to a rent-charge created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, and receive the rents until satisfaction of all arrears of the rent-charge, "together with all such costs, charges, and expenses as should be laid out and expended by him, or occasioned by reason of the non-payment thereof." In 1844, the rent-charge being in arrear, and the property so dilapidated as to be unproductive, the plaintiff entered into possession, and expended money in repairs:—Held, that he had no lien on the land for the moneys so expended, whether the defendant, the owner of a subsequent rent-charge, had notice of such repairs and had acquiesced in the making thereof or not, and that the remedy of the plaintiff, if any, was at law, and depended on the construction of the deed of 1778. *Hooper* v. *Cooke*, 25 L. J., Ch. 467; 2 Jur. (N.S.) 527—L. C.

Distress.]—A rent-charge is a "rent" within the Real Property Limitation Act, 1833, and the owner thereof is barred from the remedy of distress after the right to recover the rent-charge has become extinguished by non-payment during the period limited by the statute. And the statute is not prevented from running by the fact that the land subject to the rent-charge is in the possession of a statutory corporation. *Jones* v. *Withers*, 74 L. T. 572—C. A.

A testator devised his freehold estates to trustees, in trust, to permit his wife to receive the rents for her life, and after her decease, upon trust, to permit his nephew, his heirs and assigns, to hold and enjoy the said estates, and receive the rents and profits, subject to the payment of 20*l.* yearly, and every year for ever, to his niece, her executors, administrators, and assigns, and the testator made chargeable his said freehold estates with the payment of the said sum. The annuitant died, and her devisees contracted to sell the rent-charge, which was stated to have been given to the testator's niece, her heirs, executors, administrators, and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract; and a decree was made for specific performance. *Ramsay* v. *Thorngate*, 16 Sim. 574; 18 L. J., Ch. 238.

Sequestrators.]—Order made for payment of a rent-charge to sequestrators by a party out of whose estate the same was issuing, and which was payable to the person whose estate was sequestered. *Wilson* v. *Metcalfe*, 1 Beav. 270; 8 L. J., Ch. 331; 3 Jur. 601.

Receiver.]—If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refused to pay the rent-charge, a receiver will be appointed. *Pritchard* v. *Fleetwood*, 1 Mer. 54.

Interest.]—It is a general rule that where a party is prevented by court from proceeding to establish his right at law, it is the duty of the court to see no injury arise to him in consequence of its interference; therefore, where an annuitant was restrained by injunction from proceeding at law to recover the arrears of rent-charge, interest was allowed. *O'Donel* v. *Browne*, 1 Ball & B. 262; 12 R. R. 31. S. P., 6 Ves. 93; 5 R. R. 226. *See also* 2 Y. & J. 73; 1 Vern. 74.

Sale of Lands Charged.]—A sale of lands decreed to raise arrears of a rent-charge granted with powers of distress and entry, there being nothing to distrain on, and there being twenty other concurrent rent-charges with like remedies. *White* v. *James*, 26 Beav. 191; 28 L. J., Ch. 179; 4 Jur. (N.S.) 1214; 7 W. R. 35.

When land near Manchester was subject to a chief rent, which, owing to the land being unproductive, had not been paid for more than twenty years, the court, in a suit for that purpose by the persons entitled to the chief rent, ordered the sale of the land for the payment of all the arrears of the rent. *Horton* v. *Hall*, L. R. 17 Eq. 437; 22 W. R. 391.

The grantee of a rent-charge secured by a term for years and a judgment, is not entitled to have the lands sold discharged of a lease made before suit, and after the grant of the rent-charge, where it did not appear that the lands, if sold subject to the lease, would not produce sufficient to satisfy his demand, even though not enough to satisfy the incumbrances subsequent to his demand. *Stamer* v. *Nisbitt*, 3 Jo. & Lat. 447; 9 Ir. Eq. R. 96.

The court has a discretion to order a sale of land for the purpose of providing for arrears of a legal rent-charge issuing out of the rents and profits of such land, whether the corpus is or is not charged with the rent-charge. *Hambro* v. *Hambro*, 63 L. J., Ch. 627; [1894] 2 Ch. 564; 8 R. 413; 70 L. T. 684; 43 W. R. 92.

—— **Parties.**]—Suit by a grantee of a rent-charge, on behalf of himself and twenty others, to raise the arrears by sale, sanctioned. *White* v. *James*, supra.

A rent-charge for a certain period of time, in arrear, charged by an order made by the inclosure commissioners upon the inheritance of glebe lands of a rectory, under the provisions of the General Land Drainage and Improvement Company's Act of 1849 (12 & 13 Vict. c. xci.), was, under the provisions of the same act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the inclosure commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the ecclesiastical commissioners were made defendants:—Held, on demurrer, that they were not necessary parties. *Scottish Widows' Fund* v. *Craig*, 51 L. J., Ch. 363; 20 Ch. D. 208; 30 W. R. 463.

Proceedings in Equity.]—Where the deeds by which a rent-charge was granted were lost, and the rent had been paid twelve years, equity decreed the arrears and future payment to be secured. *Collet* v. *Jaques*, 1 Ch. Cas. 120.

The court will entertain a suit to raise the arrears of a rent-charge, although the plaintiff may appear by his bill to have full legal remedies. *Ahearne* v. *O'Callaghan*, Hay. & J. 339.

The augmentation of vicarage by yearly payments of corn and money out of rectory, is a charge on rectory impropriate, into whose hand soever it shall come. Where vicar brings bill for arrears of certain annual payments issuing out of impropriate rectory, he shall recover against the impropriator, though a considerable time has elapsed between the commencement of arrears and impropriator's possession: but purchaser, with notice of such claim, pending such suit, shall only account for arrears after his possession. *Cooke* v. *Smee*, 2 Bro. P. C. 184.

Arrears of annuity chargeable by deed (a marriage settlement) on land, or a rent-charge:—Held, to be recoverable by bill in equity, filed by personal representatives of grantee against son of grantor, the devisee of estate, although powers of entry and distress, and a right to permanency of rents, &c., in satisfaction of annuity when in arrear, were expressly given and reserved to grantee by the deed; and although the right to those remedies may have devolved on the representative, or he might have other remedies by statute or otherwise. *Cupit* v. *Jackson*, 13 Price, 721; M'Clel. 495; 28 R. R. 735.

A bill in equity does not lie to recover a rent-charge, for which there is a legal remedy, merely because of the difficulty of proceeding at law; the rule being that a party must abide by the legal remedy his deed provides for him unless that is defeated by fraud, or rendered insufficient by some contingency. *Cupit* v. *Jackson* (supra), and other cases on this subject observed on. *Roberts* v. *Hughes*, Beat. 417.

Where an annuity deed contained a covenant to pay a rent-charge, and for a further assurance of it, and the grantor becoming insolvent, questions arose as to the applicability of rents received by his assignees to discharge arrears, and a judgment and execution was had for some past gales on which questions of satisfaction were raised, and the assignees submitted to the appointment of a receiver in a suit founded on the deed, who brought a fund into court:—Held, that these circumstances gave jurisdiction to entertain the suit. *Ib.*

Bill in equity lies for payment of an entire rent out of a manor where there are no demesne lands on which to distrain. But it seems that the lands must be indisputably of greater value than the rent. *Leeds (Duke)* v. *Powell*, 1 Ves. 171.

A bill in equity does not lie to recover the arrears of a rent-charge, unless it be proved that there are circumstances which render the legal remedies useless or very difficult. *Brady* v. *Fitzgerald*, 12 Ir. Eq. R. 273. S. P., *Pennefather* v. *Stephens*, 11 Ir. Eq. R. 61.

The several authorities respecting bills for annuities and rent-charges reviewed and observed on. *Ib.*

—— **Parties.**]—Upon a bill for equitable relief as to a rent-charge, all the persons whose estates are liable must be parties. The rule dispensed with under circumstances, making it impracticable, or highly inconvenient. *Att.-Gen.* v. *Jackson*, 11 Ves. 369.

Lapse of Time and Statute of Limitations.]—*See* LIMITATIONS, STATUTE OF.

4. OTHER MATTERS.

Rent-charge not incident of tenure. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; 24 R. R. 151.

Rent-charge in fee, granted out of gavelkind land, shall descend in gavelkind. *Edwin* v. *Thomas*, 1 Vern. 489.

As to a fine of land, not barring a rent-charge issuing out of the lands. *Whitfield* v. *Fausset*, 1 Ves. 387.

Whether an annuity or rent-charge out of the profits of the New River Company is to bear the full assessment to the land-tax, or is to have the benefit according to the proportion of a reduction, in consequence of an assessment upon the profits of the company at an undervalue, quære. The bill by the annuitant was dismissed, the court refusing to raise an equity as to the profit arising from disobedience to the act. *Adair* v. *New River Co.*, 11 Ves. 429.

Right of Owner of, to Restrain Waste by Owner of Land.]—A plot of land was conveyed to uses to secure a rent-charge, with powers of distress and entry into receipt of the rents and

profits if the rent-charge should fall into arrear, and, subject thereto, to the use of the defendants' predecessors in title. The defendants advertised for sale certain steam-boilers and machinery on the property. The owners of the rent-charge applied for an injunction to restrain the sale. The rent-charge was not in arrear:—Held, that the owner of a rent-charge is not in the position of a mortgagee, and cannot obtain an injunction to restrain waste by the owner of the land out of which the rent-charge issues. *Sandeman* v. *Rushton*, 61 L. J., Ch. 136; 66 L. T. 180.

Ratability of.]—An act for the commutation of tithes in the Isle of Man (1839) provided that there shall be paid annually, in lieu of tithes, a certain aggregate sum, to be apportioned by way of rent-charge amongst those entitled thereto. An act to provide an asylum for lunatics and insane persons, after directing a valuation "at their net annual value, of all lands and all real estate," provided that "as soon as the valuation is complete" the tynwald court shall lay a rate on the proprietors of all lands and real estate according to valuation:—Held, that a rent-charge under the act of 1839 was not liable to be included in such valuation, or ratable under the act of 1860. *Ingram* v. *Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

And see RATES AND RATING.

Right of Voting.]—*See* ELECTION LAW.

J. M.

RENTS AND PROFITS.

Excess of Accumulations.]—*See* ACCUMULATION.

Apportionment.]—*See* APPORTIONMENT.

Income of Property pending Conversion.]—*See* CONVERSION—ESTATE.

Charges on and Directions to raise Money out of.]—*See* EXECUTOR AND ADMINISTRATOR—PORTION—POWER—WILL.

Of Tenant for Life.]—*See* ESTATE.

On Sales of Land.]—*See* VENDOR AND PURCHASER.

Under Shifting Clauses.]—*See* VESTED, CONTINGENT AND FUTURE INTERESTS.

In Cases of Posthumous Children.]—*See* POSTHUMOUS CHILDREN.

REPAIRS.

By Lessee.]—*See* LANDLORD AND TENANT.

Duty of Tenant for Life.]—*See* ESTATE.

REPLEVIN.

County Courts Act, 1888, ss. 133–137.

1. *When Maintainable*, 120.
2. *Practice in Superior Court*, 122.
3. *Practice in County Court.*—*See* COUNTY COURT.
4. *Replevin Bond.*—*See* COUNTY COURT.

1. WHEN MAINTAINABLE.

For Goods Wrongfully Taken.]—Replevin lies in all cases where the goods of a party have been wrongfully taken, and he is desirous of getting them again; and, consequently, it may be brought to recover goods seized in execution, or under a distress warrant issued by a justice of the peace in a case where he has no jurisdiction. *George* v. *Chambers*, 2 D. (N.S.) 783; 11 M. & W. 149; 12 L. J., M. C. 94; 7 Jur. 836.

But it is not maintainable unless there has been a taking of the goods out of the possession of the owner. *Mennie* v. *Blake*, 6 El. & Bl. 842; 25 L. J., Q. B. 399; 2 Jur. (N.S.) 953; 4 W. R. 739.

F., being in possession of the plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to the defendant with intent to give him a lien against the plaintiff; and the defendant peaceably and bonâ fide took possession with this intention, but had no lien, and had no right to detain the goods, as against the plaintiff. The plaintiff demanded the goods, and, being refused, brought replevin:—Held, that there had been no taking changing the possession; and that though the plaintiff could have recovered in trover, or detinue, replevin did not lie. *Ib.*

Writ of replevin does not lie, unless there has been a taking of the goods out of the possession of the person who sues it forth. *Chamberlain, Ex parte*, 1 Sch. & Lef. 320.

But it lies upon any taking, and not merely upon a distress. *Ib.*

To warrant a party in issuing a writ of replevin, he should have been in clear and unequivocal possession of the thing replevied, at the time of the alleged taking. *Comerford* v. *Blake*, 2 Ir. Eq. R. 176.

Replevin lies only where goods are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract. *Galloway* v. *Bird*, 12 Moore, 547; 4 Bing. 299; 5 L. J. (O.S.) C. P. 180.

It lies in every case of an alleged wrongful taking of goods. *Allen* v. *Sharp*, 2 Ex. 352; 17 L. J., Ex. 209.

So where goods have been unlawfully taken, though not as a distress, and therefore when H. and B. were sued in replevin for taking a horse under a claim of property by A., who alleged that the horse had been stolen from him, and B. had acted in the transaction only as a constable:—Held, that the action was maintainable. *Mellor* v. *Leather*, 1 El. & Bl. 619; 22 L. J., M. C. 76; 17 Jur. 709.

A writ of replevin, issued to get back possession of papers taken wrongfully, but not by way of distress. *Anon.*, 1 Moll. 390.

Application to quash a writ of replevin issued to try the right to stop goods in transitu, refused. *Furrell* v. *Beresford*, 1 Ball & B. 328.

On Distress.]—It lay at common law for a

wrongful detention of goods taken under a lawful distress. *Evans* v. *Elliott*, 6 N. & M. 606 ; 5 A. & E. 142 ; 2 H. & W. 231 ; 6 L. J., K. B. 259.

Replevin is maintainable against a person who improperly issues a warrant under which another's goods are distrained. *Jones* v. *Johnson*, 5 Ex. 862 ; 20 L. J., M. C. 11.

The 24 Geo. 2, c. 44, s. 6, as to previous demand of the warrant, and the 2 & 3 Vict. c. 93, s. 8, and the 1 & 2 Will 4, c. 41, s. 19, as to notice of action, do not apply to replevin. *Gay* v. *Matthews*, infra.

Where a magistrate has competent jurisdiction, and adjudges, and, on refusal to pay, issues a warrant of distress, and sale, the goods taken under it are not repleviable. *Wilson* v. *Weller*, 1 Br. & B. 57 ; 3 Moore, 294. And see *Wootton* v. *Harvey*, 5 East, 75 ; and *Rex* v. *Hoseason*, 14 East, 605.

A person having brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the Highways Act (13 Geo. 3, c. 78), s. 47, on the ground of the premises for which he was assessed being situate without the township which was liable to repair the road, the court refused to set aside the proceedings. *Fenton* v. *Boyle*, 2 Bos. & P. (N.R.) 399 ; 1 Taunt. 344.

Replevin may be maintained for goods distrained under a warrant from commissioners authorised by act of parliament to levy rates for specific local purposes, with power of distress. *Att.-Gen.* v. *Brown*, 1 Swanst. 304.

—— **For Rent.**]—If a landlord distrains for more rent than is due, the tenant's course is to tender the amount really due, and if the landlord refuses to accept that sum, to replevy the goods and try the disputed question of amount in replevin. *Glyn* v. *Thomas*, 11 Ex. 870 ; 25 L. J., Ex. 125 ; 2 Jur. (N.S.) 378 ; 4 W. R. 363—Ex. Ch. S. P., *French* v. *Phillips*, 1 H. & N. 564 ; 26 L. J., Ex. 82 ; 2 Jur. (N.S.) 1169 ; 5 W. R. 114—Ex. Ch.

Neither the removal of a distress for rent from the demised premises after five days, nor an appraisement of the distress, takes away the tenant's right to replevy. *Jacob* v. *King*, 5 Taunt. 451 ; 1 Marsh. 135 ; 15 R. R. 550.

If the goods remain unsold, the tenant may replevy after five days. *Anon.*, 1 Chit. 196.

—— **For Poor Rates.**]—When a party is rated in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress for such poor-rate. *Bristol Overseers* v. *Wait*, 3 N. & M. 359 ; 1 A. & E. 264 ; 3 L. J., M. C. 71.

But when a party is liable to be rated, his mode of impeaching the validity of the rate is by appeal, and not by replevin. *Marshall* v. *Pitman*, 2 M. & Scott, 745 ; 9 Bing. 595 ; 2 L. J., M. C. 33.

Replevin lies for goods improperly taken for poor-rates, even though an appeal against the poor-rate has been disallowed by a court of quarter sessions, acting within its jurisdiction. *Rhymney Ry.* v. *Price*, 16 L. T. 394.

In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the treble damages given to the defendant by s. 19 are thrice the amount of the damages found by the jury. *Newman* v. *Barnard*, 3 M. & Scott, 738 ; 10 Bing. 274.

The court refused to stay the proceedings on a judgment of non pros. in such an action, on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Ib.*

Semble, that where anyone is rated for premises in his occupation, and for others which are not, the whole rate is a nullity, and an action of replevin is maintainable. *L. & N. W. Ry.* v. *Buckmaster*, 44 L. J., M. C. 29 ; L. R. 10 Q. B. 70 ; 31 L. T. 835 ; 23 W. R. 160.

It lies in the case of goods taken under a warrant of distress issued by a justice to enforce payment of the costs ordered on an appeal against a poor-rate, under 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27. *Gay* v. *Matthews*, 4 B. & S. 425 ; 33 L. J., M. C. 14 ; 9 Jur. (N.S.) 716 ; 8 L. T. 674 ; 11 W. R. 922—Ex. Ch.

2. Practice in Superior Court.

Declaration.]—In a declaration for taking goods, the description, number, and value of them should be stated with certainty. *Pope* v. *Tilman*, 1 Moore, 386 ; 7 Taunt. 642 ; 18 R. R. 622.

Where a declaration does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry, justifying the taking of the said goods and chattels in the said place, even though the avowry is a bad plea. *Banks* v. *Angell*, 3 N. & P. 94 ; 7 A. & E. 843 ; 7 L. J., Q. B. 109 ; 2 Jur. 657.

A declaration as follows : "A. B. sues C. D. for that the defendant, on land in the occupation of the plaintiff, in the parish, &c., called &c., took the goods of the plaintiff (that is to say), six wheat-ricks, and unjustly detained the same against sureties and pledges until, &c., whereby he has sustained damage, and he claims 100*l.*," is a declaration in replevin. *Gay* v. *Matthews*, 4 B. & S. 425 ; 32 L. J., M. C. 58 ; 9 Jur. (N.S.) 716 ; 8 L. T. 674 ; 11 W. R. 922—Ex. Ch.

In an action for selling goods which had been replevied, the declaration ought to contain an averment that the defendant knew that the goods had been replevied. *Mounsey* v. *Dawson*, 1 N. & P. 763 ; W., W. & D. 283 ; 6 A. & E. 752 ; 6 L. J., K. B. 251.

Pleas—Nil habuit in tenementis and Payment.]—Nil habuit in tenementis is no plea in bar to an avowry under 11 Geo. 2, c. 19, s. 22. *Sullivan* v. *Stradling*, 2 Wils. 208.

A plea to an avowry for a distress for rent in arrear, "that before the lessors had anything in the premises, and before they (claiming title under a pretended agreement between them and A.), demised them to the lessee, A. had mortgaged them in fee to B. ; that the mortgage being forfeited, and notice of the forfeiture being given to the lessee, and he having been required to attorn, did attorn to B., when he distrained for the rent, which the lessee paid him to prevent the goods from being sold under the distress :—Held, that such plea amounted in substance merely to a plea of nil habuit in tenementis. *Alchorne* v. *Gomme*, 9 Moore, 130 ; 2 Bing. 54 ; 2 L. J. (O.S.) C. P. 118.

To an avowry of a distress for rent, the plaintiff pleaded, that before defendant had any interest in the premises they were mortgaged in fee ; that the mortgagor remained in possession, and demised to the defendant ; that the defendant, the mortgage-money being still due, demised to the plaintiff ; that afterwards, the mortgage-money being still due and interest

thereon, and 14*l.* avowed for by the defendant being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him instead of to the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear :—Held, that the plea was good, being a plea of payment, and not of nil habuit in tenemento ; that it was not bad for setting out the circumstances of the payment. *Johnson* v. *Jones*, 1 P. & D. 651 ; 9 A. & E. 809 ; 8 L. J., Q. B. 124.

A plaintiff may, in bar to an avowry for rent, plead a compulsory payment to the ground landlord or other incumbrancer having claims paramount to those of the immediate landlord making the distress. *Jones* v. *Morris*, 3 Ex. 742 ; 18 L. J., Ex. 477.

—— **Non cepit.**]—Non cepit does not put the plaintiff to proof of property. *Dover* v. *Rawlings*, 2 M. & Rob. 544.

Under non cepit, a defendant, under 5 & 6 Will. 4, c. 76, ss. 76, 133, may show that he was a constable appointed for a borough, and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen. *Mellor* v. *Leather*, 1 El. & Bl. 619 ; 22 L. J., M. C. 76 ; 17 Jur. 709.

—— **Non tenuit and Riens in arrere.**]—Eviction by the superior landlord may be given in evidence under non tenuit. *Hopcroft* v. *Keys*, 2 M. & Scott, 760 ; 9 Bing. 613.

Where a statute of limitations extinguishes the right, and does not merely bar the remedy the defence, under such statute, need not be pleaded specially, and therefore, in replevin, evidence of the lapse of twenty years, under 3 & 4 Will. 4, c. 27, ss. 2, 3, 34, since the last payment of rent, may be given under a plea in bar of non tenuit. *De Beauvoir* v. *Owen*, 5 Ex. 166 ; 19 L. J., Ex. 177—Ex. Ch.

Proof of payment of rent to the avowant is primâ facie evidence that he is the owner of the land ; but where the plaintiff did not originally receive the possession of the land from the avowant, it is competent to the plaintiff to rebut the title of the avowant by showing that he paid rent under circumstances which did not entitle the avowant to the rent ; and such evidence may be given on the issue of non tenuit. *Rogers* v. *Pitcher*, 6 Taunt. 202 ; 1 Marsh. 541.

Avowry for a quarter's rent in arrear. The defendant was mortgagor in possession, having mortgaged to H. in 1834. The defendant, in 1838, demised the premises to the plaintiff, at an annual rent, payable quarterly, and in 1840 he gave H. an authority to receive the rent of the premises, described as occupied by the plaintiff, and belonging to the defendant. H. communicated this authority to the plaintiff, and gave him notice not to pay rent to the defendant, but to H. The plaintiff accordingly paid several quarters' rent to H. ; but, shortly before Michaelmas, 1841, when the quarter's rent mentioned in the avowry became due, the defendant gave notice to the plaintiff not to pay it to H., but to the defendant. The plaintiff paid to neither, and the defendant distrained. At that time a small arrear of interest was due from the defendant to H. under the mortgage :—Held, first, that the authority and payments of rent effected no change in the tenancy, and that the issue on non tenuit must be found for the defendant. *Wheeler* v. *Branscombe*, 5 Q. B. 373 ; D. & M. 406 ; 13 L. J., Q. B. 83.

Held, secondly, that the issue on riens in arrere must also be found for the defendant, since, if the facts proved amounted to a defence, they ought to have been made the subject of a special plea. *Ib.*

To an avowry for rent a plea in bar of payment to a ground landlord or other incumbrancer amounts to a plea of riens in arrere, and should be so pleaded. *Jones* v. *Morris*, 3 Ex. 742 ; 18 L. J., Ex. 477.

Under the issue of riens in arrere, the plaintiff cannot controvert the holding as claimed by the defendant in his avowry. *Hill* v. *Wright*, 2 Esp. 669.

—— **Infancy.**]—A plaintiff may plead in bar to an avowry or a cognisance that he did not hold as tenant, and that there was nothing in arrear, with a plea of infancy. *Wilson* v. *Ames*, 1 Marsh. 74 ; 5 Taunt. 340.

—— **Tender of Rent and Expenses.**]—Replevin for taking and detaining cattle. Avowry for rent in arrear. Plea, that, after the taking and before the impounding, the plaintiff tendered the rent and expenses. On special demurrer, for that the plea did not go to the taking, but only to the detaining :—Held, a good plea, the tortious detention being a taking. *Evans* v. *Elliot*, 5 A. & E. 142 ; 6 N. & M. 606 ; 2 H. & W. 231 ; 6 L. J., K. B. 259.

—— **No Reversionary Interest.**]—Avowry for rent in arrear, that the plaintiffs held the premises in which, &c., as tenants to A. Plea, that A. demised the premises to the plaintiffs for all the residue of his interest in the same, and that A. had not any reversionary interest in the same. The defendant replied—a power of distress given to A. by the award of an arbitrator to whom certain disputes, and all matters in difference between him and the plaintiffs, had been referred. The plaintiffs rejoined that it was not referred to the arbitrator, whether A. should have a power of distress :—Held, that the plea was good, and that the replication was bad, in not averring that the arbitrator had authority to confer a power of distress, or that the right to distress was one of the matters in difference. *Pascoe* v. *Pascoe*, 3 Bing. (N.C.) 898 ; 5 Scott, 117 ; 3 Hodges, 188 ; 6 L. J., C. P. 322.

—— **Payment of Money into Court.**]—A plaintiff may pay the rent into court, for which the defendant avows. *Vernon* v. *Wynne*, 1 H. Bl. 24.

A defendant may pay money into court as to a part of a distress, and avow as to the residue. *Lambert* v. *Hepworth*, 2 G. & D. 112 ; 2 Q. B. 729 ; 11 L. J., Q. B. 85.

—— **Other Pleas.**]—In replevin upon a distress for rent, a plea in bar, that the defendant pulled down a summer-house, whereby the plaintiff was deprived of the use thereof, without saying that he was expelled or put out of the same, was held insufficient ; being a mere trespass, but no eviction. *Hunt* v. *Cope*, Cowp. 242.

Replevin for taking the plaintiff's goods and chattels : to wit, a lime-kiln ; avowry for rent ; a plea in bar that the lime-kiln was affixed to the freehold, is bad, because a departure from the declaration. *Niblet* v. *Smith*, 4 Term Rep. 504.

A defendant having made cognisance for rent service as bailiff of A., B. and C., who were lawfully possessed of a manor of which the locus in quo was parcel, and holden at a certain rent; the plaintiff replied, that A., B. and C. were not seised in their demesne as of fee of the manor: Held, bad. *Bulpit* v. *Clarke*, 1 Bos. & P. (N.R.) 56.

In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle were not levant and couchant in the close, in which, &c., is bad, for not showing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress. *Jones* v. *Powell*, 8 D. & R. 416; 5 B. & C. 647; 4 L. J. (O.S.) K. B. 281.

In replevin for taking three steers, the defendant first made cognisance as bailiff of a lord of a manor, that the locus in quo was a common within it, and that the jurors at a court-leet made a regulation or by-law, that no person should keep any steer on the common, after two years old, under the penalty of 20*s.* a head for each of such cattle; and that by another custom, if the sum directed to be paid by way of penalty for a breach of such regulation was refused, a distress might be levied; that as the steers, being more than two years old, were depasturing on the common, he took them in the name of a distress; and, secondly, that he distrained them damage feasant. The plaintiff pleaded to the second cognisance that he was entitled to right of common, as being seised in fee of a messuage; and that he turned the steers in question, being less than two years old, to wit, one year old, on the common to depasture:—Held, that the first cognisance was bad, as it did not state that the distress was taken for the penalty, or that the plaintiff refused to pay the same. *Clears* v. *Stevens*, 2 Moore, 464.

Held, also, that the plea to the second cognisance was bad, as it did not state that the steers were less than two years old when they were distrained. *Ib.*

An avowry was made in respect of a right of common claimed by a corporation, under a grant from De Vesci. The plaintiff pleaded that the corporation had been accustomed to appoint a reasonable number of herds, for superintending the common and beasts on it; and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd to be depastured upon the common:—Held, sufficient after verdict. *Elliott* v. *Hardy*, 3 Bing. 61; 10 Moore, 317; 3 L. J. (O.S.) C. P. 153.

Where the claim of a plaintiff was founded on a custom to demise a right of common appurtenant without deed, and he pleaded a custom to demise the right of common generally, and a demise according to the custom:—Held, that, even supposing such a custom to be good, the plea was bad on the face of it, without alleging a custom to demise without deed, in lieu thereof. *Lathbury* v. *Arnold*, 8 Moore, 72; 1 Bing. 217; 1 L. J. (O.S.) C. P. 71; 24 R. R. 693.

Default in delivering Defence — Action on Replevin Bond—Judgment.]—If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Ord. XXIX. r. 2, and not interlocutory judgment under r. 4 of that order. *Dix* v. *Grvom*, 49 L. J., Ex. 430; 5 Ex. D. 91; 28 W. R. 370.

Avowries and Cognisances — Assignment of Cause.]—A man may profess to distrain for one cause, and may avow for another, if a good one; and where avowries (admitted by a plea in bar to be true) showed that a defendant had a good cause for distraining as he had done, it was immaterial that he had, when distraining, assigned an invalid reason for the distress. *Phillips* v. *Whitsed*, 2 El. & El. 804; 29 L. J., Q. B. 164; 6 Jur. (N.S.) 727; 2 L. T. 278; 8 W. R. 494.

—— **By whom—Executors.**]—Where a distress was made by the command and in the name of a landlord, but he died before the distress was actually made:—Held, that the bailiff might make cognisance as the bailiff of his executrix, under 32 Hen. 8, c. 37, s. 1, who ratified the distress, although before probate. *Whitehead* v. *Taylor*, 2 P. & D. 367; 10 A. & E. 210; 9 L. J., Q. B. 65.

In replevin for taking the plaintiff's goods the defendant made cognisance as bailiff of an executrix, for arrears of rent incurred in the lifetime of the testator:— Held, that such avowry need not set out the title of the testator, nor show that the executrix was entitled to distrain under 32 Hen. 8, c. 37, s. 1; and that, at all events, it could not be objected to after verdict. *Martin* v. *Burton*, 3 Moore, 608; 1 Br. & B. 279.

An avowry by executors of F., that the plaintiff for all the time during which the rent was accruing due, and thence until and at the time when, &c., and until and at the death of F., held the place in which, &c., as tenant to F. in his lifetime, under a demise made to him at a yearly rent, payable quarterly, and because two years' rent due from the plaintiff to F. in his lifetime remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which, &c., from the death of F. till the time when, &c., the executors of F. well avowed the taking:— Held, that such avowry was sufficient within 11 Geo. 2, c. 19, s. 22, and 32 Hen. 8, c. 37, s. 1, and might be supported. *Staniford* v. *Sinclair*, 9 Moore, 376; 2 Bing. 193; 3 L. J. (O.S.) C. P. 247.

—— **Administrators.**]—In replevin for taking the plaintiff's goods, the defendant avowed under 32 Hen. 8, c. 37, as administratrix of A. who was seised in fee; that B. held the premises as tenant to him by virtue of a demise made to him at and under a certain yearly rent; and that because a sum for rent was due to A., at the time of his death, from B., and still in arrear to the defendant, she, as administratrix, well avowed the taking of the goods in the premises, in which, &c., the same being charged with the payment of rent to A., and continuing in possession of the plaintiff as tenant to B.; it appearing that B. was possessed of the premises by virtue of a lease for twenty-one years, it was objected that the defendant was not entitled to distrain under the statute, and that the avowry was bad; but the court held, that as the tenancy did not appear to be for years, and that as it was unnecessary for the defendant to show how the plaintiff became entitled to or held the premises, the avowry was sufficient. *Meriton* v. *Gilbee*, 2 Moore, 48; 8 Taunt. 159.

—— **Joint-Tenants and Tenants in Common.**]—An avowry by one of several co-heirs in gavelkind, in his own right, with a cognisance as bailiff of the other co-heirs, is sufficient, without

averring an authority to distrain from the other co-heirs. *Lee* v. *Shepherd*, 5 Moore, 297; 2 Br. & B. 465; 23 R. R. 516.

One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognisance as bailiff of his companion. *Culley* v. *Spearman*, 2 H. Bl. 386; 3 R. R. 420.

—— **Husband and Wife.**]—A husband may avow in his own name for rent due in right of his wife. *Gravenor* v. *Woodhouse*, 9 Moore, 148; 2 Bing. 71.

An avowry for a rent-charge devised to A., the wife of B., may be made by B. and A. in the right of A. *Wynne* v. *Wynne*, 2 Scott (N.R.) 278; 2 Man. & G. 8; 10 L. J., C. P. 23; 4 Jur. 1114.

So, although the rent-charge issues out of a term of years. *Ib.*

A wife had, at the time of her marriage, the equity of redemption of land, which was then settled to her separate use. She was permitted to enjoy the property; and she and her husband (or he in her name), let it, she receiving the rents until she died. The husband then distrained upon the tenant for rent subsequently accruing:—Held, that it was not lawful for him to do so, and that he was liable in replevin. *Howe* v. *Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325.

—— **Form and Sufficiency of.**]—In an avowry on 21 Hen. 8, c. 19, the defendant must allege in the avowry that he is seised of the lands in which &c. *Banks* v. *Angell*, 3 N. & P. 94; 7 A. & E. 843; 7 L. J. Q. B. 109; 2 Jur. 657.

In an avowry on 11 Geo. 2, c. 19, the defendant must show a privity existing between himself and the tenant on the land; and it is not sufficient to state that certain persons unknown are tenants to the defendant, under a demise by A. to W., the unexpired term of which had vested in these persons unknown. *Ib.*

When a defendant avowed that certain persons, to the tenants unknown, held the close in which &c., as tenants to the defendant, under a demise from A. to W., for a term unexpired; and that the interest of W. in the term had come to the said persons unknown; and that the rent was in arrear to the defendant:—Held, that the avowry was not good under either of the above statutes, or under both of them taken together. *Ib.*

It is not necessary to aver that the rent still remains due. *Clarke* v. *Davies*, 2 Marsh. 386; 7 Taunt. 72.

It is not necessary that an avowry for rent should allege in precise terms that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry, it is sufficient. *Innes* v. *Colquhon*, 5 M. & P. 63; 7 Bing. 265; 9 L. J. (o.s.) C. P. 90.

Although a landlord may avow generally for rent in arrear, yet the terms of the contract under which the tenant holds must be truly stated in the avowry. *Philpott* v. *Dobbinson*, 3 M. & P. 320; 6 Bing. 104; 7 L. J. (o.s.) C. P. 248.

In a cognisance by a bailiff, for double rent, under 11 Geo. 2, c. 19, s. 18, the terms of the tenancy and of the notice to quit should be so shown that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency, in law, of the notice actually given, may appear. *Humberstone* or *Humblestone* v. *Dubois*, 10 M. & W. 765; 2 D. (N.S.) 506; 12 L. J., Ex. 98.

An avowry at common law for rent due before, but distrained for after, the determination of a lease by notice to quit, is not good. *Williams* v. *Stiven*, 9 Q. B. 14; 15 L. J., Q. B. 321; 13 Jur. 804.

In replevin against an assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent. And if he avows under the statute, for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective particles or parts into which the reversion has been divided. *Roberts* v. *Snell*, 1 Man. & G. 577.

An avowry that Henry 8 being seised in fee of a shop, in which, &c., granted it by letters-patent to W. in tail male, at at annual rent. Averments tracing the relation to Charles 2. That Charles 2, by letters-patent, professing to act under 22 Car. 2, c. 6, s. 1, conveyed the rent, "so far as aforesaid reserved," without the reversion in the shop, to trustees and their heirs, for ever, and that they conveyed it to the defendants and their successors for ever, whereupon the defendants became seised as of fee in the rent:—Held, that it was sufficient to aver in the avowry, that the rent reserved became due and in arrear, without an express averment of the continuance of the estate tail. Semble, contra, by the Exchequer Chamber. *Vigors* v. *St. Paul's (Dean)*, 14 Q. B. 909; 18 L. J., Q. B. 97; 13 Jur. 256; in Exchequer Chamber, 14 Q. B. 920; 19 L. J., Q. B. 84; 14 Jur. 1017.

Held, that the avowry was bad, on general demurrer, for not expressly averring attornment by the terre-tenant to the grant by the trustees, or that such grant was made after the 4 Anne, c. 16, and the defect was not supplied by an averment that the rent had been paid, not saying to whom, and not saying that the payment was in the life of the grantor, nor by an averment following the statement of the grant by the trustees, "whereupon and whereby" the grantees became and were seised of the rent, and an averment that the rent was due and in arrear to them. *Ib.*—Ex. Ch.

If a defendant pleaded by way of justification of the taking, that he was possessed of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant on the common, and concluded in bar without praying a return, it seems that such a plea was bad before 15 & 16 Vict. c. 76, s. 67. *Hawkins* v. *Eckles*, 2 Bos. & P. 359.

Semble, that a plaintiff will not be allowed to reply to a cognisance by traversing the facts of the tenancy, and the rent being in arrear, and also the authority to distrain as bailiff. *Trent* v. *Hunt*, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899; 1 W. R. 481.

Where a defendant avowed for rent due and in arrear at Martinmas, "to wit, the 23rd November":—Held, Martinmas must be taken to mean new Martinmas, and the subsequent words, "to wit, the 23rd November," being surplusage,

could not be taken to explain that old Martinmas was intended. *Smith* v. *Walton*, 1 M. & Scott, 380 ; 8 Bing. 235 ; 1 L. J., C. P. 85.

—— **Allegation of Title.**]—In avowries, the commencement of particular estates must be shown ; as that such a one was seised in fee and demised, that the estate out of which it was derived may appear sufficient to support it ; because the seisin in fee may be traversed, and any of the mesne assignments are traversible. *Dally* v. *Silby*, 1 Bro. P. C. 525.

An avowry or a cognizance for rent admits the property of the goods in the plaintiff ; but if the plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action. *Clarke* v. *Davies*, 7 Taunt. 72 ; 2 Marsh. 386.

A defendant avowed for rent in arrear from M., and also claimed the goods as being the property of himself and another as assignees of M., against whom a commission of bankruptcy had issued. A verdict having been taken on the whole record, the court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery* v. *Mucklow*, 4 M. & Scott, 263.

—— **For Rent-charges.**]—There can be no avowry for a rent-charge upon land payable to one who has no reversion. *Pluck* v. *Digges*, 2 Dow & Clark, 180.

In an avowry for taking goods as a distress for arrears of a rent-charge, granted by A., an averment that he was seised in fee at the time of the grant does not necessarily imply that the land was not then under lease. But if a plaintiff in replevin, being no party to the grant, wishes to prove that he is tenant under a demise made before the grant, he must plead that fact specially. *Johnson* v. *Faulkner*, 2 Q. B. 925 ; 2 G. & D. 184 ; 11 L. J., Q. B. 193.

A rent-charge is devised to A., so long as her conduct and behaviour shall be discreet, and meet with the approbation of S. The discreetness of the conduct and behaviour of A., and the approbation of S., are conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent-charge. *Wynne* v. *Wynne*, 2 Scott, (N.R.) 278 ; 2 Man. & G. 8 ; 10 L. J., C. P. 23 ; 4 Jur. 1114.

—— **For Damage feasant.**]—Replevin of cattle taken in A. The defendant avowed the taking in A. under a demise of premises of which B. was parcel, and because the cattle were damage feasant in B. he took them and drove them through A. in his way to the pound :—Held, to be well pleaded. *Abercrombie* v. *Parkhurst*, 2 Bos. & P. 480. See *Hargrave* v. *Shewin*, 9 D. & R. 20 ; 6 B. & C. 34.

An avowry, that the defendants were owners and occupiers of certain messuages, prescribing for common in the locus in quo, and avowing damage feasant, is a prescription. *English* v. *Burnell*, 2 Wils. 258.

To an avowry for damage feasant in a certain close, and a taking of the cattle there and driving them along a road to impound them, plea in bar that the road was not parcel of the close ; the avowry held good, and the plea bad. *Maltravers* v. *Fossett*, 3 Wils. 295.

A., having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones : B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones. A. replied that he was not bound to fence :—Held, that the replication was bad. *Churchill* v. *Evans*, 1 Taunt. 529 ; 10 R. R. 600.

Staying Proceedings.]—The court will not stay proceedings unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin, with costs up to that time. *Hopkins* v. *Shrole*, 1 Bos. & P. 382.

Nor upon payment of costs, on the application of the defendant. *Hodgkinson* v. *Snibson*, 3 Bos. & P. 603.

Proceedings stayed after cognizance and plea in bar, upon payment of costs of the action and distress, by replevying, and delivering up the replevin bond to be cancelled, there being no special damage. *Banks* v. *Brand*, 3 M. & S. 525.

In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the court refused to stay proceedings on a judgment of non pros. on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Newman* v. *Barnard*, 3 M. & Scott, 738 ; 10 Bing. 274.

Application for an injunction to restrain proceedings in replevin, and for liberty to redeem annuity and for a receiver. *Murtagh* v. *Grogan*, 3 Moll. 117.

Court will grant injunction to restrain a landlord from proceeding at law on an assignment of replevin bond against the sureties, if there has been an agreement to refer, and a reference between landlord and tenant, without concurrence of surety, of matters in difference whereby performance of condition of bond (to proceed with effect) has been suspended. *Bowmaker* v *Moore*, 3 Price, 214.

Trial—Right to Begin.]—A defendant made cognizance as bailiff of A. for rent in arrear. The plaintiff pleaded that the distress was not made within twenty years next after the right to distrain accrued. The defendant replied, that the distress was made within twenty years next after the right to distrain accrued :—Held, that the plaintiff should begin, inasmuch as the affirmative was involved in his plea. *Collier* v. *Clerk*, 5 Q. B. 467 ; 9 Jur. 158.

A defendant avowed the taking as a distress for an annuity. The plaintiff pleaded that no memorial of the annuity was enrolled. Replication, that a memorial of the date of the indenture, and of the names of the parties and witnesses, and of the parties by whom the annuity was to be beneficially received, and of the consideration was enrolled. Rejoinder, that the memorial did not truly state the names of the persons by whom the annuity was to be received, and the considerations ; but was untrue in this, that B. was not the only person by whom the annuity was to be beneficially received. Surrejoinder, that the memorial did truly state the name of the persons by whom the annuity was to be beneficially received, and the considerations :—Held, that the defendant must begin. *Hogarth* v. *Penny*, 1 Car. & K. 608 ; 14 M. & W. 494 ; 14 L. J., Ex. 345.

Where a defendant pleads property in a third person, and issue is taken thereon, he is entitled

to begin. *Colstone* v. *Hescolbs*, 1 M. & Rob. 301.

If a defendant avows for rent arrear, and the plaintiff replies riens in arrere, he must begin. *Cooper* v. *Eggington*, 8 Car. & P. 748.

If there is any affirmative issue on the plaintiff, he is entitled to begin. *Curtis* v. *Wheeler*, 4 Car. & P. 196; M. & M. 493. *James* v. *Salter*, 1 M. & Rob. 501.

There was a cognisance for rent in arrear. To this there were two pleas, the one stating that an agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement; which second agreement was the demise in the cognisance mentioned; and this latter agreement had been abandoned by mutual consent before any rent became due. The other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud. Replication to the one, denying the abandonment; and to the other, denying the fraud:—Held, that the plaintiff had the right to begin. *Williams* v. *Thomas*, 4 Car. & P. 234.

Evidence—of Title.]—Letters of a party under whom a plaintiff in replevin does not claim, are inadmissible to affect the title of the latter. *Halford* v. *Dillon*, 4 Moore, 381; 2 Br. & B. 12. And see *Betham* v *Benson*, Gow, 45.

Where a defendant made cognisance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter, ending at Christmas, 1803, the plaintiff held and enjoyed the premises as tenant thereof to A., by virtue of a certain demise, &c.: to which the plaintiff pleaded in bar that he did not hold and enjoy the premises as tenant to A. by virtue of the supposed demise; it is sufficient to entitle the defendant to a verdict on such issue, if he proves that the plaintiff held of A. from the 23rd of December, 1801, and to recover for two years' rent. *Forty* v. *Imber*, 6 East, 434; 2 Smith, 548.

Where A. had paid rent to B., the agent of C. and D., and the property for which the rent was paid was subsequently conveyed to C. and E., and A. still paid the rent to B., but was not informed by the latter of the change, and B. paid over the rent to C. and E.:—Held, that the payment so made was some evidence of the title of C. and E. to the property, and that under such circumstances there was no necessity (in replevin by A. against parties claiming under C. and E.) for the proof of the conveyance to C. and E. *Hitchins* v. *Thomvson*, 5 Ex. 50; 19 L. J., Ex. 146.

—— **Of Amount of Rent due.**]—An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported by a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted "during a part of the term," (ex. gr.) for the last three years, by 11 Geo. 2, c. 19, s. 22. *Roulston* v. *Clarke*, 2 H. Bl. 563.

Avowry for rent due on a demise at 40*l.* per annum. The plaintiff held under a lease, reserving 40*l.* per annum in the body, but before it was executed the following words were added, between which and the body of the lease the signatures were written, "The allowance of the road to the Six Bells' Yard to be made as usual." It had been usual for the lessor to allow the lessee 5*l.* per annum for so much annually paid by the lessee to a third party for the use of such road to the premises:—Held, that this did not reduce the reservation to 35*l.* per annum, so as to entitle the plaintiff to a verdict on non tenuit. *Davies* v. *Stacey*, 12 A. & E. 506; 4 P. & D. 157; 9 L. J., Q. B. 393.

An avowry stated a demise for two years, ending on the 29th September, 1842. On the trial, an attornment in writing, dated the 14th October, 1842, was given in evidence, by which the plaintiff and others attorned tenants to the defendant for such parts of the premises as were in their respective occupation, and agreed to pay the rents set opposite to their respective names. Opposite the defendant's name was written, "Rent 55*l.*, from Michaelmas, 1840":—Held, that the avowry was supported by the evidence. *Gladman* v. *Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

An avowry stated that the plaintiff held premises of the defendant at a certain rent, to wit, the yearly rent of 80*l.*; and because a large sum, to wit, 80*l.* of the rent for a certain time, to wit, one year ending on the 29th September, A.D. 1851, was due and in arrear; and then justified the distress for rent in arrear:—Held, that the date in the avowry was material, and therefore that the avowry was not supported by proof of some rent being due and in arrear for a former year. *Roskruge* v. *Caddy*, 7 Ex. 840; 22 L. J., Ex. 16.

—— **Of Demand.**]—Where to a cognisance for rent the landlord pleaded in bar a tender, and the defendant replied a subsequent demand and refusal to himself:—Held, that the issue was not proved by a demand by his agent. *Pimm* v. *Greville*, 6 Esp. 95.

—— **Of Tender.**]—Avowry for rent for two years and a half. Pleas, tender and non tenuit. On the trial a holding from Michaelmas old style, and a tender after old Michaelmas, being proved:—Held, that proof of a tender by the plaintiff of the amount of rent due in support of the first plea was not evidence for the defendant of the holding, as stated in the avowry, nothing being said by the plaintiff at the time of the tender about the terms of the holding, or the time when the rent had become due. *Knight* v. *M'Douall*, 12 A. & E. 438; 4 P. & D. 168.

—— **What a Variance.**]—A plea to an avowry stated that only 16*l.* was due for the rent, and then pleaded a tender of that sum; the proof was that only 15*l.* 16*s.* was tendered:—Held, a variance, though only the latter sum was proved to be due for rent. *John* v. *Jenkins*, 3 Tyr. 170; 1 C. & M. 227; 2 L. J., Ex. 83.

A defendant avowed for rent in arrear for a dwelling-house with the appurtenances, and it appeared that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants:—Held, to be no variance. *Page* v. *Chuck*, 10 Moore, 264; 3 L. J. (o.s.) C. P. 124.

In replevin for illegally distraining plaintiff's growing corn in four closes, the defendant avowed the distress for rent in arrear, averring that plaintiff held the closes at and under a certain yearly rent; to which the plaintiff pleaded that he did not hold in manner and form as alleged. Upon proof that the plaintiff held the four closes and two others at the rent stated in the avowry:—Held, no variance. *Hargrave* v. *Shewin*, 9 D. & R. 20; 6 B. & C. 34.

If a defendant avows on the contract for 110*l.* rent, and proves a demise at 15*s.* an acre, amounting to 111*l.*, it is a variance. *Brown* v. *Sayce*, 4 Taunt. 320.

Lien on Goods.]—A distrainor has no lien upon goods taken under a distress for rent and replevied, but is left to his legal remedy on the replevin bond. *Bradyll* v. *Ball*, 1 Bro. C. C. 247.

Measure of Damages.]—Certain goods belonging to the plaintiffs having been taken under a distress for alleged arrears of rent, the plaintiffs claimed damages under various heads in an action in the county court. One of these heads of damage was "illegal distress," and another was "annoyance and injury to credit and reputation in trade":—Held, that such damages are recoverable in an action of replevin. *Smith* v. *Enright*, 63 L. J., Q. B. 220; 69 L. T. 724.

New Trial.]—The rule that a new trial will not be granted for either party, when the sum given or recovered is under 20*l.*, does not apply in replevin. *Edgson* v. *Cardwell*, L. R. 8 C. P. 647; 28 L. T. 819.

Verdict.]—On an avowry, or a justification of a taking as a distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment. *Neale* v. *Mackenzie*, 1 Gale, 119; 1 M. & W. 747; 6 L. J., Ex. 263—Ex. Ch.

Judgment—Finality of.]—A judgment "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," is good either as a judgment at common law, though the return is not adjudged irreplevisable, or as a judgment under 21 Hen. 8, c. 19, s. 3, which entitles the defendants to damages and costs. *Gammon* v. *Jones*, 4 Term Rep. 509.

An avowry stated that the plaintiff held and enjoyed the locus in quo as tenant to the defendants under a demise made by them to him, upon and subject to the following rents, provisions, conditions and stipulations, viz. that the plaintiff should not, during the tenancy, sell any hay, produced on the premises, off the premises, under a penalty of 2*s.* 6*d.* per yard of the hay so sold, to be recovered by distress as for rent in arrear, and that the plaintiff, during the tenancy, sold 800 yards of hay, contrary to the terms of the demise, by reason whereof a certain sum, at the rate of 2*s.* 6*d.* per yard, became due and recoverable by distress. Verdict, that the plaintiff held and enjoyed the premises upon the terms alleged, and that the value of the distress was 99*l.* and the arrears were 54*l.* Judgment, under 17 Car. 2. c. 7, s. 2, that the defendant do recover 54*l.* and costs. It was admitted, that if the 2*s.* 6*d.* per yard was a penalty, the judgment given under 17 Car. 2, c. 7, was erroneous; and on error to the exchequer chamber:—Held, that as the legal operation of the demise was to create a penalty recoverable by distress as for rent, but not a rent, the judgment given under a statute of Charles could not stand, the distress not being for a rent. *Pollitt* v. *Forrest*, 11 Q. B. 949, 962; 17 L. J., Q. B. 291; 12 Jur. 560—Ex. Ch.

—— **Moving for.**]—A defendant in replevin was not entitled to move for judgment as in case of a nonsuit. *Shortridge* v. *Hiern*, 5 Term Rep. 400.

—— **Effect of.**]—Judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought. *Gibbs* v. *Cruikshank*, 42 L. J., C. P. 273; L. R. 8 C. P. 454; 28 L. T. 735; 21 W. R. 734.

—— **Writ of Inquiry after.**]—Where judgment is given on demurrer for an avowant, fifteen days' notice of executing the writ of inquiry should be given to the plaintiff, as in the case of nonsuit on the 17 Car. 2, c. 7, s. 2. *Burton* v. *Hickey*, 1 Marsh. 444; 6 Taunt. 57.

Where there was a nonsuit and retorno habendo awarded:—Held, that the avowant might execute a writ of inquiry after a writ of second deliverance. *Cooper* v. *Sherbrooke*, 2 Wils. 116.

A writ of inquiry was granted after a defective verdict in replevin of a distress for a poor-rate. *Dewell* v. *Marshall*, 3 Wils. 442; 2 W. Bl. 921.

Death of Plaintiff before Avowry.]—Where a plaintiff dies after declaration, and before avowry, no retorno habendo can be issued. *Cutfield* v. *Corney*, 2 Wils. 83.

Costs.]—The 5 & 6 Will. 4, c. 76, s. 133, which enacts, that in all actions against any person for anything done in pursuance of the act, if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, does not apply to actions of replevin brought against magistrates to try the validity of a distress for borough rates. *Jones* v. *Johnson*, 2 L. M. & P. 177; 6 Ex. 133; 20 L. J., M. C. 169.

The 6 & 7 Will. 4, c. 71, s. 83, which empowers the owner of a tithe rent-charge to distrain for arrears, and "otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent," does not entitle him to the full costs substituted by 5 & 6 Vict. c. 97, s. 2, for the double costs given by 11 Geo. 2, c. 19, s. 22, in replevin. *Newnham* v. *Bever*, 7 D. & L. 253; 8 C. B. 560.

The 17 Car. 2, c. 7, s. 3, applies to a rent-charge as well as to a rent-service; and the term "full costs" in the statute means ordinary costs, as between party and party. *Jamieson* v. *Trevelyan*, 10 Ex. 748; 3 C. L. R. 702; 24 L. J., Ex. 74; 1 Jur. (N.S.) 334; 3 W. R. 172.

A defendant avowed for a rent-charge under a will, and the record was taken down for trial by both parties. The defendant succeeded, and his damages, &c., were assessed under 21 Hen. 8, c. 19, s. 3:—Held, first, that the defendant was entitled to the costs of his record. *Ib.*

Held, secondly, that he was not entitled to the costs of the distress incurred before plaint. *Ib.*

REPLY.

See PRACTICE.

REPORT OF MASTER.

See PRACTICE.

REPRESENTATIONS.

See FRAUD.

REPUTED OWNERSHIP.

See BANKRUPTCY.

REQUISITIONS.

See VENDOR AND PURCHASER.

RESCUE OF PRISONERS.

See CRIMINAL LAW.

RE-SETTLEMENT.

See COMPROMISE — FRAUD — SETTLEMENT.

RESIDENCE.

Conditions as to.]—*See* CONDITION.

RES JUDICATA.

See ESTOPPEL.

RESPONDENTIA.

See SHIPPING (INSURANCE).

RESTITUTION.

Of Property.]—*See* CRIMINAL LAW.

Of Conjugal Rights.]—*See* HUSBAND AND WIFE.

RESTRAINT OF MARRIAGE.

See CONDITION—WILL.

RESTRAINT OF TRADE.

Contracts as to.]—*See* CONTRACT.

RESTRICTIVE COVENANT.

See COVENANT—LANDLORD AND TENANT — VENDOR AND PURCHASER.

RESULTING TRUST.

See CONVERSION — WILL — TRUST AND TRUSTEE, and Cross References there.

RETAINER.

Of Debt by Executor.]—*See* EXECUTOR AND ADMINISTRATOR.

Of Solicitor by Client.]—*See* SOLICITOR.

RETURNING OFFICER.

See ELECTION LAW.

REVENUE.

[BY JOHN MEWS.]

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A. TAXES AND DUTIES.

I. INCOME AND PROPERTY TAX.

a. *LANDS, TENEMENTS, AND HEREDITAMENTS.*

1. PROPERTY AND PERSONS LIABLE.

Assize Courts—Police Station.]—The justices of a county, in the due exercise of statutory powers, erected assize courts, with the usual rooms and offices, and a county police-station, with the usual offices and accommodation for constables living there and for prisoners. The land on which they were built was conveyed, under 21 & 22 Vict. c. 92, to the clerk of the peace, to hold to him and his successors for ever upon trust, for the construction of a police station, and otherwise for such uses as the county justices should from time to time order. The buildings formed one block, and were used for the administration of justice and for police purposes. Parts of the buildings were also used for holding county and committee meetings, and various other occasional purposes, but no rent or profit was received or made in respect of the buildings or any part of them:—Held, that income tax was not payable in respect of the buildings under scheds. A. or B. of 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34. *Coomber* v. *Berks JJ.*, 53 L. J., Q. B. 239; 9 App. Cas. 61; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421—H. L. (E.)

Police Station—Occupation.]—A police superintendent who is obliged to live in a house within the boundary of the police station but separated from it by a wall; he keeping the keys of it and furnishing it: a deduction being made from his salary for its use; and he being liable to be removed to another station at any time, does not render him liable to income tax in respect of it. *Bent* v. *Roberts*, 47 L. J., Ex. 112; 3 Ex. D. 66; 37 L. T. 673; 26 W. R. 128.

County Lunatic Asylum—Medical Officers' Apartments.]—The justices of a county are properly assessed, under sched. A. of the Income Tax Acts, in respect of such parts of a county lunatic asylum as are occupied as apartments by the medical superintendent, medical officers and steward, and in respect of a separate house occupied by the chaplain of such asylum. *Bray* v. *Lancashire JJ.*, 58 L. J., M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499—C. A. Affirming 59 L. T. 438.

Gasworks.]—The provisions of s. 60, sched. A, r. 3, of 5 & 6 Vict. c. 35, which treat gasworks as property, relate exclusively to gasworks in this country, and do not include or relate to gasworks on the continent, and such last-mentioned works are not foreign possessions within s. 100, sched. D, r. 5. *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. 717.

Slate Quarry.]—Slate was obtained from the side of a hill by underground workings carried on through levels:—Held, that the works were to be assessed as a quarry under r. 1 of No. 3 of sched. A of 5 & 6 Vict. c. 35, s. 60, and not as a mine under rule 2 of that enactment. *Jones* v. *Cwmorthin Slate Co.*, 49 L. J., Ex. 110; 5 Ex. D. 93; 41 L. T. 575; 28 W. R. 237; 44 J. P. 168.

"Rent by the Year"—Brickfield—Lessee.]—On a demise of land for a term of years, with power to the lessee to dig brickearth, and make and sell bricks, paying yearly 17*l.* 10*s.* for surface-rent, and 100*l.* for royalty or brick-rent, clear of all deductions, except landlord's property or income tax, and also paying 2*s.* in respect of every 1,000 bricks above the first million, clear of all deductions, except as aforesaid:—Held, that under the 5 & 6 Vict. c. 35, income tax was payable by the lessor in respect of all three species of rent, and was properly assessable on the lessee, who might deduct the amount from the rent. *Edmonds* v. *Eastwood*, 2 H. & N. 811; 27 L. J., Ex. 209; 6 W. R. 331. See also *Taylor* v. *Evans*, post, col. 155.

Tolls.]—Commissioners empowered by an act of parliament to levy a duty on every ton of coal, culm, &c., landed on the beach at, or brought into and consumed within the town of Brighton, for the purpose of erecting and maintaining groyns against the inroads of the sea, were by a later act authorised to form from these coal dues, and from other rates they were then also empowered to levy, a common fund for the purposes of lighting, watching, &c., as well as for the maintenance of groyns:—Held, that these dues were property or profits within the meaning of the Income Tax Act, and that they were chargeable with income tax accordingly. *Att.-Gen.* v. *Black*, 40 L. J., Ex. 89; L. R. 6 Ex. 78; 24 L. T. 370; 19 W. R. 416. Affirmed, 40 L. J., Ex. 194; L. R. 6 Ex. 308; 25 L. T. 207; 19 W. R. 1114—Ex. Ch.

The profits of the corporation of London derived from renewal fines, markets and metages are subject to income tax; and deductions in respect of expenditure for the maintenance of the corporation establishment cannot be made. *Att.-Gen.* v. *Scott*, 28 L. T. 302; 21 W. R. 265.

Corporation—Surplus Profits—Profits appropriated by Statute.]—A corporation was constituted for the management of the Mersey Docks estate by an act which provided that the moneys to be received by them from their dock dues and

other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works, and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that, except as aforesaid, the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—Held, that under the Income Tax Acts the corporation was liable to income tax in respect of the surplus, though applicable to the above-named purposes only. *Mersey Docks* v. *Lucas*, 53 L. J., Q. B. 4; 8 App. Cas. 891; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212—H. L. (E.)

—— **Burial Board—Application of Surplus Income in aid of Poor-rate—"Profit."**]—A burial board was constituted under 15 & 16 Vict. c. 85, and in pursuance of the act a burial-ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor-rate:—Held, that the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a "profit" within 5 & 6 Vict. c. 35, s. 60. *Paddington Burial Board* v. *Inland Revenue Commissioners*, 53 L. J., Q. B. 224; 13 Q. B. D. 9; 50 L. T. 211; 32 W. R. 551; 48 J. P. 311.

—— **Surplus Revenue — Water Supply.**] — The Glasgow Corporation Water Commissioners are liable to assessment in respect of surplus revenue derived from supplying water beyond the area of compulsory supply, and from the sale of water for purposes of trade. *Glasgow Corporation* v. *Miller*, 50 J. P. 503.

By the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii.), the corporation were empowered to construct waterworks for the supply of water to the borough of Dublin and certain extra-municipal districts, and were authorised to borrow money for the purposes of the act on the rates leviable under it; and empowered to levy certain rates on the owners and occupiers of property within the borough. They were also authorised to contract with owners or occupiers of property in the extra-municipal districts for the supply of water for domestic use, and to charge rate or rent for such supply, to be called a "contract water rate." By the Dublin Waterworks Act, 1870 (33 & 34 Vict. c. 96), it was provided that the income derived from the extra-municipal districts should form, with the city rates, a consolidated fund, available for the payment of principal and interest of loans, and applicable to all the purposes of the act:—Held, that the excess of receipts over expenditure in respect of extra-municipal districts was liable to income tax. *Dublin Corporation* v. *M'Adam*, 20 L. R., Ir. 497.

A waterworks company is liable for profits derived from selling water by meter to barracks within the area of compulsory supply. *Allan* v. *Hamilton Waterworks Commissioners*, 51 J. P. 727.

2. ALLOWANCES.

"Public School."]—By s. 61, rule 6, of 5 & 6 Vict. c. 35, allowances in respect of property tax, levied under Sched. A of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises" belonging thereto, if occupied under certain specified conditions:—Held, that a school founded and carried on by the corporation of London under the provisions of an act of parliament, not for purposes of profit but for the benefit of a large portion of the public, and maintained partly by a charitable endowment, was a "public school" within the meaning of rule 6, notwithstanding the fact that the school was partly maintained by fees charged for instruction. *Blake* v. *London Corporation*, 56 L. J., Q. B. 424; 19 Q. B. D. 79; 36 W. R. 791—C. A. Affirming 51 J. P. 71.

Hospital — Self-supporting Institution.] —An institution for the reception of insane persons was founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there was an annual surplus of profits which was expended in enlarging and improving the institution:—Held, that the institution being wholly self-supporting was not exempt as an "hospital" within the meaning of 5 & 6 Vict. c. 35, s. 61, r. 6. *Needham* v. *Bowers*, 21 Q. B. D. 436; 59 L. T. 404; 37 W. R. 125. See *Cawse* v. *Nottingham Lunatic Asylum*, post, col. 175.

"Charitable Purposes."]—By Schedule A. of the Income Tax Act of 1842 (5 & 6 Vict. c. 35), allowances are to be made in respect of the duties in that schedule on, inter alia, the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees, for charitable purposes, so far as the same are applied to charitable purposes. Certain property in England was conveyed to trustees, in trust to apply the income for the purposes (*a*) of promoting and supporting missions to heathen nations, (*b*) of maintaining and educating children of ministers and of missionaries, (*c*) maintaining and supporting certain establishments for single persons and widows belonging to the Moravian brotherhood:—Held, that the income so applied came within the exemption in favour of charitable purposes in the Income Tax Act, 1842, s. 61. *Income Tax Commissioners* v. *Pemsel*, 61 L. J., Q. B. 265; [1891] A. C. 531; 65 L. T. 621; 55 J. P. 805—H. L. (E.) Affirming 37 W. R. 294—C. A.

Literary or Scientific Institution — Free Library.]—A free library established under the Public Libraries Act, by any corporation or body of commissioners, is not "a building the property of any literary or scientific institution" within r. 4 of s. 61 of 5 & 6 Vict. c. 35, and therefore is not exempt from asssessment to income-tax under Sched. A. *Andrews* v. *Bristol Corporation*, 61 L. J., Q. B. 715; 5 R. 7; 67 L. T. 618; 56 J. P. 615.

A free public library established by and vested in a corporation whose powers and duties have, pursuant to s. 15 of the Public Libraries Act, 1892, been delegated to a committee of the corporation called "The Public Free Libraries Committee," is, although supported by the rates

a "literary institution" within the meaning of the Income Tax Act, 1842, s. 61, No. VI., and the building in which such library is placed is "the property of a literary institution," and as such entitled to the exemption from duty specified in the said section, provided that the other conditions therein mentioned be fulfilled. The word "property" in the section does not necessarily import ownership, but means also appropriation to the purposes of the institution. *Manchester Corporation* v. *McAdam*, 65 L. J., Q. B. 672; [1896] A. C. 500; 75 L. T. 229; 61 J. P. 100—H. L. (E.)

3. MODE OF ASSESSMENT.

When Estimated from Profits since Commencement of Possession.]—See *Ryhope Coal Co.* v. *Foyer*, post, col. 155.

Colliery—Exhaustion of Pits—Deductions from Gross Profits.]—A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income-tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working. See Lord Penzance's opinion as to the method of taxation intended by the legislature to be applicable to mines. *Knowles* v. *McAdam* (3 Ex. D. 23) held wrongly decided. *Coltness Iron Co.* v. *Black*, 51 L. J., Q. B. 626; 6 App. Cas. 315; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20—H. L. (Sc.)

A colliery company bought freehold and leasehold coal mines, and raised some of the coal and sold it. At the end of the first year's working, the mines, by reason of the coal gotten during the year, were worth 10,424*l.* less than the price for which they were bought. The company, being assessed to the income-tax under Schedule D, in respect of the profits of their business as colliery proprietors for that year, claimed to deduct 10,424*l.* for exhausted capital:—Held, first, that by virtue of 29 & 30 Vict. c. 36, s. 8, the mines were assessable under sched. D of 5 & 6 Vict. c. 35, s. 100, and not under Schedule A. *Knowles* v. *McAdam*, 47 L. J., Ex. 139; 3 Ex. D. 23; 37 L. T. 795; 26 W. R. 114.

Held, secondly, that in estimating "the full amount of the balance of the profits or gains" of the business under r. 1 of sched. D, the deduction ought to be made, and that it was not one of the deductions forbidden by r. 3 of Schedule D, or by s. 159. *Ib.*

—— **Contributions to Association for Protection against Strikes.**]—Contributions paid by colliery owners to an association for the purpose of securing an indemnity from loss occasioned by strikes are not moneys "wholly and exclusively laid out or expended for the purposes of trade" within the meaning of r. 1 of the rules applicable to the first two cases of s. 100, sched. D, of the Income Tax Act, 1842, and do not therefore form a proper subject for deduction in estimating the balance of profits of the colliery for income-tax purposes. *Rhymney Iron Co.* v. *Fowler*, 65 L. J., Q. B. 524; [1896] 2 Q. B. 79; 44 W. R. 651.

—— **Dead Rent and Royalties—Agreement to repay Royalties overpaid.**]—By an agreement for a lease of coal mines for a term of years from March, 1874, the lessees agreed to pay a dead rent for the mines, and royalties at specified rates per ton on all coal worked; the dead rent to be recoupable out of royalties during the first sixteen years of the term—the effect being, that the lessor received on account of his share of the profits of the concern not less than a fixed annual sum; so that when his share of the royalties did not amount to the fixed sum he received that sum; but when his share of the royalties exceeded the fixed sum he received that sum only until the lessees had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum. The lessees worked the mines for the first time in October, 1880, having paid the dead rent, less income tax, to the lessor up to that year. Upon an assessment to the income tax, made upon the lessees under schedule D for the year 1881-2, it appeared that the lessor's share of the royalties for that year had exceeded the dead rent by the sum of 1,477*l.*:—Held, that in estimating the profits of the concern for the particular year for the purpose of being assessed under the Income Tax Acts the lessees were not, entitled to deduct the 1,477*l.* from their gross profits. *Broughton Coal Co.* v. *Kirkpatrick*, 54 L. J., Q. B. 268; 14 Q. B. D. 491; 33 W. R. 278; 49 J. P. 119.

Manorial Dues and Royalties—Costs of Collection.]—For the purposes of assessment to the income tax under the acts of 1842 and 1853 the lord of a manor is not entitled to deduct from the amount of manorial dues received the costs of collection. *Norfolk (Duke)* v. *Lamarque*, 59 L. J., Q. B. 119; 24 Q. B. D. 485; 62 L. T. 153; 38 W. R. 382; 54 J. P. 327.

Tithe Commutation Rent-charge—Expenses of Collection.]—In estimating the "annual value" of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rent-charge must be deducted. *Stevens* v. *Bishop*, 57 L. J., Q. B. 283; 20 Q. B. D. 442; 58 L. T. 669; 36 W. R. 421; 52 J. P. 548—C. A.

Cemetery — Corporation — Repayment of Capital.]—A burgh council was required by act of parliament to provide a burial ground. The receipts therefrom exceeded the working expenses, but the council had to repay by instalments the capital borrowed to construct the cemetery, and to pay interest on the undischarged capital:—Held, that income tax was chargeable on the profits after deducting only the working expenses. *Portobello Town Council* v. *Sulley*, 55 J. P. 9.

Deductions for Depreciation of Buildings, Plant, and Machinery.]—A company carrying on business as ironfounders set apart, in accordance with their articles of association, a sum of money from their net profits for depreciation of buildings, fixed plant, and machinery, and claimed in making a return under sched. D of their annual profits or gains to deduct this amount:—Held, that such a deduction was contrary to 5 & 6 Vict. c. 35, s. 100, Case I. r. 3, as the amount set aside was in effect an addition to capital. *Forder* v. *Handyside & Co.*, 45 L. J., Ex. 809; 1 Ex. D. 233; 35 L. T. 62; 24 W. R. 764. *See* 41 & 42 Vict. c. 15, s. 12.

Deduction for Cost of Embankment to Protect Lands against Encroachment of Tidal River.]—By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37, in charging the duty under sched. A in respect of lands, a deduction is to be made for the amount expended by the owner on an average of the twenty-one preceding years in the making or repairing of sea-walls or other embankments "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river." The appellant was assessed to the income tax under sched. A in respect of the annual value of certain lands. These lands had, prior to 1880, been salt marshes adjoining a tidal river, which were liable to be flooded at every tide, and had a small yearly value as pasturage. The appellant began in 1880 to construct an embankment for the purpose of excluding the water from these lands, which was completed in 1885, and the lands were, by the construction of such embankment, converted into valuable inclosed lands, of much greater value than in their previous state as salt marshes:—Held, that the appellant was not entitled to any deduction under s. 37, on the ground that the embankment constructed by him was not "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river," within the meaning of the section, inasmuch as the section did not apply to embankments made for the improvement of the land by altering its condition, but only to embankments made for its protection or preservation in its existing state. *Hesketh* v. *Bray*, 57 L. J., Q. B. 633; 21 Q. B. D. 444; 37 W. R. 22; 53 J. P. 133—C. A. Affirming 58 L. T. 313.

4. RIGHT OF TENANT TO DEDUCT TAX.

Amount.]—A tenant has a right to deduct from his rent the property tax assessed upon and paid by him in respect of his landlord, although the landlord is not, in fact, liable to be assessed, and has before the payment claimed exemption, and that exemption has been subsequently allowed. *Swatman* v. *Ambler*, 8 Ex. 72; 24 L. J., Ex. 185.

A tenant was not entitled to deduct from the rent paid to his landlord more property tax than is assessed on the premises under sched. A of 46 Geo. 3, c. 65, although the property tax assessed under both Sched. A and B did not amount to two shillings in the pound on the rent. *Gabell* v. *Shevell*, 5 Taunt. 81.

Payment by Outgoing Tenant.]—A succeeding tenant who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property tax, also due at Michaelmas:—Held, entitled to deduct the amount, upon the landlord's distraining for half a year's rent at Christmas. *Clennell* v. *Read*, 2 Marsh. 371; 7 Taunt. 50.

Validity of Agreement.]—*See* post, col. 170.

Distress without Deduction—Money had and Received.]—Where a tenant of premises under a lease, and at a rent payable half-yearly, agreed to pay all taxes except the landlord's property tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord also agreed to allow, but afterwards distrained for half a year's rent, and sold to the whole amount, without allowing either for repairs or for property tax, which he knew the tenant had paid to the collector:—Held, that the tenant might recover in respect of the property tax, but not in respect of the repairs, in an action for money had and received against the landlord. *Graham* v. *Tate*, 1 M. & S. 609.

Omission to Deduct.]—Where a tenant pays property tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord. *Cumming* v. *Bedborough*, 15 M. & W. 438.

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid:—Held, that the occupier could not recover from the landlord any part of the property tax so paid. *Denby* v. *Moore*, 1 B. & Ald. 123; 18 R. R. 444. And see *Andrew* v. *Hancock*, 3 Moore, 278; 1 Br. & B. 37; *Fuller* v. *Abbott*, 4 Taunt. 105.

Action for Rent—Pleading.]—In an action for rent, the tenant may plead as to part that he has paid the landlord's property tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax. *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684.

It is not enough to plead that the defendant was on the premises at and a short time before sunset on the rent-day, ready to pay, without averring that he was there long enough before sunset to have counted the money. *Ib.*

—— **Payment under 5 & 6 Vict. c. 35.**]—To an action on a covenant for rent due under a deed of demise, the defendant pleaded as to 2*l.* 0*s.* 10*d.*, that, on the 5th April, 1843, before any part of the rent became due, 2*l.* 0*s.* 10*d.*, being at the rate of 7*d.* for every 20*s.* of the annual value, was duly, and according to the form of the statute, assessed on the premises in respect of the property thereof, for the year ensuing; that, on the 28th August, 1844, the defendant, then being occupier and tenant, paid to C., then being collector, the 2*l.* 0*s.* 10*d.*; and that the defendant had never made any payment on account of the rent since the payment of the 2*l.* 0*s.* 10*d.*:—Held, that the plea sufficiently showed that the assessment was made under 5 & 6 Vict. c 35, and that it answered that part of the demand to which it was pleaded. *Franklin* v. *Carter*, 1 C. B. 750; 3 D. & L. 213; 14 L. J., C. P. 241; 9 Jur. 874.

—— **Paid before Action.**]—Where the tenant has paid the property tax before action, he has a right to deduct it at the trial. *Baker* v. *Davis*, 3 Camp. 474; 14 R. R. 814.

But the property tax will not be deducted at nisi prius from the rent due, where it has not been paid. *Pocock* v. *Eustace*, 2 Camp. 181; 11 R. R. 691.

Proof of Payment.]—To enable a tenant to deduct such tax, he need not produce the assessment, but it is sufficient to produce the payments to the collector. *Philips* v. *Beer* Camp. 266.

The assessment, not the collector's receipt, was the criterion how much the tenant might deduct. *Gabell* v. *Shevell*, 5 Taunt. 81.

5. PROCEDURE.

Allowance—Certificate—Mandamus to Commissioners.]—By 5 & 6 Vict. c. 34, s. 61, No. VI., allowances in respect of the income tax imposed by sched. A are to be granted by the commissioners for special purposes of the income tax on (inter alia) the rents and profits of lands, tenements, hereditaments, heritages, vested in trustees for charitable purposes, as far as the same are applied to charitable purposes. In a case where an allowance which ought to be granted is refused mandamus lies to the commissioners commanding them to grant the allowance, and to give a certificate of the allowance with an order for the payment thereof. *Income Tax Commissioners* v. *Pemsel*, 61 L. J., Q. B. 265; [1891] A. C. 531; 65 L. T. 621; 55 J. P. 805—H. L. (E.)

Case Stated by Commissioners—Points Raised.]—The only question argued before the commissioners and raised by the case stated by them, having been whether certain premises could be assessed, the court declined to decide who were the proper parties to be assessed. *Bray* v. *Lancashire JJ.*, 58 L. J., M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499—C. A.

b. *ANNUAL PROFITS FROM TRADE, &c.*

1. PROPERTY AND PERSONS LIABLE.

Residence in Great Britain.]—A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere. *Att.-Gen.* v. *Coote*, 4 Price, 183; 18 R. R. 692.

—— **What Sufficient.**]—An exemption of persons coming to reside "for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in Great Britain for the period of six successive calendar months," does not include a person taking a house in London and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment, and resides for the remainder of the year there, leaving behind him some one merely to take care of the house. *Ib.*

Trade—What is.]—The ownership of trading vessels let to freight was a trade or concern in the nature of trade, within 48 Geo. 3. The ship's husband or managing part-owner is therefore bound to make a joint return of the aggregate profits of the concern to the property tax. *Att.-Gen.* v. *Borrodaile*, 1 Price, 148. See also *Ryhope Coal Co.* v. *Foyer*, post, col. 155.

—— **Set up and Commenced within Three Years—Succession.**]—See *Ryhope Coal Co.* v. *Foyer*, post, col. 155.

"Vocation"—Betting.]—Persons receiving profits from betting, systematically carried on by them throughout the year, are chargeable with income tax on such profits in respect of a "vocation" under 5 & 6 Vict. c. 35 (the Income Tax Act), sched. D. *Partridge* v. *Mallandaine*, 56 L. J., Q. B. 251; 18 Q. B. D. 276; 56 L. T. 203; 35 W. R. 276.

Hospital—Payments "applied to Charitable Purposes only."]—The managing committee of an hospital, founded by voluntary contribution for the care and treatment of insane persons, made large yearly profits by receiving wealthy patients, who were charged sums greatly exceeding the actual cost of their maintenance and treatment. The committee applied a portion of those profits in aid of the maintenance and treatment of poorer patients, who were themselves unable to pay the actual cost thereof, and the remainder in executing works which were pressed upon the committee by the commissioners in lunacy, and were deemed necessary to bring the hospital into a proper state of efficiency:—Held, that the profits were not, by reason of such application of them to the purposes of the hospital, payments "applied to charitable purposes only" within the meaning of s. 105 of 5 & 6 Vict. c. 35, so as to exempt the institution from payment of income tax under sched. D. *St. Andrew's Hospital* v. *Shearsmith*, 19 Q. B. D. 624; 57 L. T. 413; 35 W. R. 811.

Person Resident in United Kingdom—Trade Abroad—Part of Profits not Remitted.]—A person resident in the United Kingdom and engaged in a trade carried on entirely abroad, is liable to income tax in respect of so much only of the profits of that trade as are received in the United Kingdom. The respondent, who resided solely in England, was a partner in a firm which carried on business in Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England, and on this portion he paid income tax under sched. D. The larger portion of his share was not remitted to him in England, but was placed to his credit in Australia:—Held, that the case fell under the head of "possessions in any of her Majesty's dominions out of Great Britain, or foreign possessions," dealt with by the fifth case of sched. D in 5 & 6 Vict. c. 35, s. 100; and that the respondent's portion of profits not received in the United Kingdom was not liable to income tax. *Colquhoun* v. *Brooks*, 59 L. J., Q. B. 53; 14 App. Cas. 493; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277—H. L. (E.)

An English company formed to acquire certain businesses abroad and to own shares in certain foreign companies is liable to pay income tax, under the fifth clause of 5 & 6 Vict. c. 35, s. 100, in respect of so much only of the profits as were remitted to England, and was not liable to pay income tax upon the profits retained and distributed abroad. *Colquhoun* v. *Brooks* (14 App. Cas. 493) followed. *Bartholomay Brewing Co.* v. *Wyatt*, 62 L. J., Q. B. 525; [1893] 2 Q. B. 499; 5 R. 564; 69 L. T. 561; 42 W. R. 173; 58 J. P. 133.

—— **Trade Carried on Partly in England and Partly Abroad—Profits Earned Abroad, but not Received in England.**]—Every interest in the profits of trade belonging to a person who is, within the meaning of the Income Tax Acts, resident in the United Kingdom, must be charged under the first case of sched. D of the Act of 1842—that is, on the full amount of the balance of the profits or

gains upon an average of three years, if the trade is carried on either wholly or partly within Great Britain or Ireland; and is chargeable under the fifth case—that is, on the full amount of the actual sums annually received in Great Britain, if the trade is exclusively carried on in any of her majesty's dominions, or elsewhere out of the United Kingdom. *San Paulo (Brazilian) Ry.* v. *Carter*, 65 L. J., Q. B. 161; [1896] A. C. 31; 73 L. T. 538; 44 W. R. 336; 60 J. P. 84, 452—H. L. (E.)

The appellants were an English company with a registered office in London, at which the directors met to manage and work a railway, through a superintendent in Brazil appointed by them, and a staff of servants in that country under his immediate supervision. The receipts of the company from which the profits were derived were earned and paid in Brazil. But the directors were vested with the sole right to manage and control every department of the railway:—Held, that the appellants were chargeable under the first case, and not under the fifth. *Colquhoun* v. *Brooks* (59 L. J., Q. B. 53) distinguished. *Ib.*

An insurance company having its head office in England had branch offices in England and in some foreign countries, the business of which was conducted by managers appointed by and acting under the board of directors at the head office. The company sought to have exempted from assessment to income tax (*a*) a sum of 5,502*l.*, being dividends upon various foreign securities, representing part of the profits made abroad, which, instead of being specifically remitted to this country, were reinvested in American securities for the purpose of forming a reserve fund for the business of the company there, as required by the law of the United States; (*b*) a sum of 12,841*l.*, as being profits made at some of the foreign branches, which profits were not specifically brought or remitted to this country, but were retained abroad to effect reserves. The company contended, as to both sums, that, as no part of the same had been actually remitted to or received in this country, they were not liable to assessment:—Held, that both sums were part of the profits and gains of the business, and were liable to assessment as such. *Norwich Union Fire Insurance Co.* v. *Magee*, 73 L. T. 733; 44 W. R. 384.

Person Abroad Exercising Trade in United Kingdom—Agent "having the Receipt of Profits or Gains"—Assessment of Agent in Name of Principal Resident Abroad.]—A foreign merchant employed agents in this country to canvass for orders on which the agents received a commission; the orders were transmitted abroad for the principal to exercise his discretion as to their execution, and the goods were sold as lying in the foreign warehouse, the customer paying the cost of packing and carriage, and taking the risk on himself; the amounts due were usually forwarded direct by the customer to the foreign merchant, but in some cases were received by the agents:—Held (Lord Morris dissenting), that the foreign merchant did not exercise a trade in this country within the meaning of sched. D of the Income Tax Act, 1853, and was not chargeable with income tax; as, though he traded with, he did not trade within, the United Kingdom. *Grainger* v. *Gough*, 65 L. J., Q. B. 410; [1896] A. C. 325; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692—H. L. (E.)

Semble, that in s. 41 of the Income Tax Act, 1842, by which persons resident abroad "shall be chargeable in the name . . . of any factor, agent, or receiver having the receipt of any profits or gains," the words after the word "receiver" apply, not only to that word, but also to the words "factor" and "agent." *Ib.*

Company Residing in England — Trading Abroad — Profits.]—A company registered in England, under the Companies Acts, 1862 and 1867, carried on the business of sulphur miners, manufacturers or merchants, in Italy. It had directors and shareholders both in England and abroad. The company, so far as its affairs in the United Kingdom were concerned, was managed by a board of directors holding meetings at the London registered office of the company. All the operations connected with the manufacture and sale of sulphur were under the practical management of members of the board resident in Italy, and were exclusively carried on in that country, where the profits were earned, but the Italian members were in constant correspondence with their co-directors resident in France and England, who met at the office aforesaid. All the original books of the company and its moneys were kept in Italy, but transcripts of the books and the dividends required for the English shareholders were sent to London. These dividends were the only part of the profits remitted to this country:—Held, that the company was residing within the United Kingdom within 16 & 17 Vict. c. 34, s. 2, sched. D, and liable to pay income tax upon the whole of its profits, and not merely on such portion as was remitted to England for distribution among the English shareholders. *Cesena Sulphur Co.* v. *Nicholson*, 45 L. J., Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.

A company, established and incorporated by act of parliament in England, but carrying on its business entirely abroad, is to be assessed to income tax upon the whole of the annual profits of its business, whether such profits are or not remitted to this country, or are or not distributed as dividends amongst its shareholders resident in England or abroad, or are applied to some other legitimate purposes of the company abroad. *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. 717.

A company was registered in England under the Companies Acts, 1862 and 1867. It had a registered address, directors and shareholders in England, but the whole of its property and the majority of shareholders were in India. The business of the company was the purchase, manufacture, and sale of jute. The materials were bought, wrought, and sold, the books kept, and the gains and profits of the company exclusively made in India under the management of a resident director appointed by and subject to the control of a board of directors in England. Such proportion only of the profits as became payable to the English shareholders was, from time to time, remitted to the directors in England, who thereupon called meetings of those shareholders at the place registered as the address of the company, but which was, in fact, a private office lent for the purpose by one of the directors. At these meetings a dividend was declared that was distributed amongst the shareholders living in England:—Held, that the company was "residing within the United

Kingdom," and therefore, under the provisions of the 5 & 6 Vict. c. 35, s. 1, 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 2, liable to make a return of the whole annual profits of its business, and chargeable to the income tax thereon, and not merely in respect of such part of the profits as was remitted to England. *Calcutta Jute Mills Co.* v. *Nicholson*, 45 L. J., Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.

A corporation is not a partnership, nor are the shareholders in a joint-stock company partners; and a company cannot be divided into two portions, the English and the foreign, and income tax be assessed only upon the profits accruing or belonging to the shareholders residing in England. *Ib.*

The Imperial Ottoman Bank was a corporation created by Turkish law. Its seat was fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the state bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the state a subsidy on account of the public business transacted by it. On its creation it took over and continued to carry on the business of an English bank in London; and since its creation in 1863, the annual meetings of shareholders had always been held, and dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix:—Held, that the bank was not liable to be assessed to income tax in respect of its whole profits as a "person residing within the United Kingdom" under 16 & 17 Vict. c. 34, first clause of sched. D to s. 2, but was liable only in respect of the profits arising from its business carried on in England under clause 2 of the schedule. *Att.-Gen.* v. *Alexander*, 44 L. J., Ex. 3; L. R. 10 Ex. 20; 31 L. T. 694; 23 W. R. 255.

When Trade Exercised within United Kingdom.]—A firm of merchants, resident and carrying on their principal business at New York, had a partner resident in England, for the purpose of buying goods here and shipping them for New York, where a profit was realised and received on the resale of them at an advanced price. None of the profits of the partnership were received in England, and no money was received in England except in remittances to the resident partner from the house in New York:—Held, that the resident partner was not bound to return to the commissioners of the income tax the amount of profits realised by the firm in America by the resale of the goods purchased here; and that the firm, being resident abroad, and not exercising their trade within the United Kingdom, could not be liable to be taxed on those profits. *Sully* v. *Att.-Gen.*, 5 H. & N. 711; 29 L. J., Ex. 464; 6 Jur. (N.S.) 1018; 2 L. T. 439; 8 W. R. 472—Ex. Ch.

The head office of a joint-stock banking company, registered under the Joint Stock Companies Acts, was situate in London, where the directors managed the general business of the company, and where the dividends were paid. The details of the business of the branches established abroad were conducted abroad by the managers of the several branches, but general directions and instructions for management were issued from the head office. The bank paid certain sums to a foreign corporation, which had obtained from a foreign government the right to issue bank notes within the territory of that government, to acquire the concession, and claimed to deduct from their assessable profits a sum set apart as a sinking fund to meet the expenditure. The amount of cash actually remitted to England was reduced by the deduction of the whole sum paid abroad for the concession:—Held, that as the business carried on by the bank was only one business, which was carried on in England, and not two distinct businesses, the profits were to be arrived at by bringing into account the profits on the transactions abroad and in England, setting the expenses abroad and in England against those profits, and determining in England the difference between the two; and the bank was not therefore entitled to the deduction claimed. *London Bank of Mexico* v. *Apthorpe*, 60 L. J., Q. B. 653; [1891] 2 Q. B. 378; 65 L. T. 601; 39 W. R. 564; 56 J. P. 86—C. A.

T. & Co. were a firm of wine merchants, residing and carrying on business at Bordeaux, and T., the senior partner of the firm, usually spent about four months at different times in every year in England, seeing, and taking orders for wine from retail wine merchants and other customers, and living during that time chiefly in London, and when there always at an hotel, and having no other English residence. The appellants employed a firm of London wine merchants as their agents, in whose offices a room, the rent of which was paid by the appellants, was provided for their use, and there they had their own clerk, whose salary was paid by them, and their name was painted up on the premises. The wines ordered were shipped by the appellants from Bordeaux, whence also bills of lading and invoices were forwarded by them, sometimes to the purchasers direct and sometimes to the agents, who collected all the accounts, received payment for all the wines ordered, and transacted all the necessary business not transacted by T. in England. For this the agents were paid, not by salary, but by receiving a commission on all wines sold in England by the appellants or ordered through T., such commission covering all expenses attaching to the appellants' business in England, and including a guarantee of all debts for the appellants' wines sold in England; and they, the agents, had been charged and had paid income tax on the profits made by them by this agency:—Held, that the appellants, though non-resident in this country, "exercised a trade" within the meaning of the 2nd clause of sched. D to s. 2 of 16 & 17 Vict. c. 34, and were rightly chargeable to income tax on the annual profits and gains derived by them therefrom, notwithstanding that the agents had been charged and paid income tax on their profits; and further, that s. 41 of 5 & 6 Vict. c. 35, was passed in aid and not in derogation of the rights of the crown in collecting the revenue, and not in any way to alter the incidence of taxation. *Tischler* v. *Apthorpe*, 52 L. T. 814; 33 W. R. 548; 49 J. P. 372.

The appellants, a firm of wine merchants at Rheims, employed a London firm to obtain orders for their wine in England. The wine was advertised in England, and the London firm issued circulars from time to time with the authority of the appellants detailing the price and terms of sale. The name of the appellants' firm was put

up at the business premises of the London firm, and was published in the London Directory with that address. The appellants had no wine in England, and all orders were forwarded to Rheims, and the wine, invoiced in the appellants' name, was packed and sent direct from thence to the customer at his expense and risk. Payments were either made direct to the appellants or to the London firm, who remitted the amount to the appellants without carrying it to any current account. Any bill drawn for payment of wine was sent to the London firm to obtain the acceptance and to hold for the appellants. Formal receipts were sent by the appellants to purchasers for all payments, whether made direct or through the London firm. The London firm were paid by a commission on all wine sold, and the appellants alone were interested in the gain or loss on the sales:—Held, that the appellants exercised a trade within the United Kingdom within sched. D of 16 & 17 Vict. c. 34, and were assessable to the income tax in respect of the profits arising therefrom. *Werle* v. *Colquhoun*, 57 L. J., Q. B. 323; 20 Q. B. D. 753; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644—C. A.

A foreign firm of wine merchants, whose chief office is in France, and none of whom are resident in England, but who have established a resident agent in London through whom wine is sold to, and money in payment for it received from, English customers, are assessable to the income tax under sched. D in respect of the annual profits or gains arising from a trade exercised within the United Kingdom. *Pommery* v. *Apthorpe*, 56 L. J., Q. B. 155; 56 L. T. 24; 35 W. R. 307.

The appellants, a foreign company, domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the post-office in the United Kingdom. They had also work-rooms with clerks in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the post-office and the cables of the appellants to Denmark, and thence by their wires and the wires of foreign governments to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the post-office, and after deducting their dues, the balance handed to the appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—Held, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, sched. D, and that they were chargeable to income tax on the balance of profits or gains from the receipts in this country from the transmission of messages. *Erichsen* v. *Last*, 51 L. J., Q. B. 86; 8 Q. B. D. 414; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357—C. A.

"Annual Profits and Gains"—Insurance Company—Bonuses.]—A life insurance company issued "participating policies," according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period, and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division:—Held, that the two-thirds returned to the policy-holders were "annual profits or gains" and assessable to income tax. *Last* v. *London Assurance Corporation*, 55 L. J., Q. B. 92; 10 App. Cas. 438; 53 L. T. 634; 34 W. R. 233; 50 J. P. 116—H. L. (E.)

The appellant company carried on the business of a mutual life insurance company. There were no shares or shareholders, and the members of the company were the policy-holders. The premiums paid by them were calculated at a rate which left a surplus after providing for the yearly expenditure, and this surplus was either returned to the assured as bonuses in addition to the sums insured, or was applied in reduction of premiums, or was carried over to the credit of the members of the company:—Held, that this surplus did not constitute profits or gains liable to be assessed to income tax. *New York Life Insurance Co.* v. *Styles*, 59 L. J., Q. B. 291; 14 App. Cas. 381; 61 L. T. 201—H. L. (E.)

—— **Grant by Curates' Augmentation Fund.**]—The council of the curates' augmentation fund made a grant of 50*l.* to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, and such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant:—Held, that the curate was not assessable to the income tax in respect of the sum granted, under the Income Tax Act, 1853, sched. D. *Turner* v. *Cuxson*, 58 L. J., Q. B. 131; 22 Q. B. D. 150; 60 L. T. 332; 37 W. R. 254; 53 J. P. 148.

—— **Sale of Mines—Payment by Instalments.**]—On a sale of a moiety of mines for a fixed sum payable by half-yearly instalments:—Held, that the instalments were not chargeable with income tax under the words "annuities or other annual profits and gains," in sched. D of 16 & 17 Vict. c. 34, or under the words "annual payments, payable as a personal debt or obligation by virtue of any contract," in 5 & 6 Vict. c. 35, s. 102, such instalments being the payments of a debt, and not being profits and gains, and therefore not within the purview of the acts. *Foley* v. *Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100; 5 Jur. (N.S.) 342; 7 W. R. 141.

By deed, A., in consideration of 1,380*l.*, to be paid by instalments, granted and sold to B. a mine of coal for a term of fifty years, and he covenanted with A. to pay him 150*l.* on the execution of the deed, and 150*l.* per year after that time, whether a quantity of coal equal to that amount, at and after the rate of 100*l.* per Lancashire acre, should be got out of the mine in the same year or not; and when in any year so many coals should be got out of the mine as would, at the rate of 100*l.* for every Lancashire acre of coal, amount to more than 150*l.* per year, then that he would pay for every Lancashire acre of coals 100*l.*, and so on in proportion for every greater or less quantity than an acre, until 1,380*l.* should be paid (it being the intent of the parties that A. should not, until that sum was paid, receive less than 150*l.* per year), the same

yearly rents to be paid half-yearly, on the 24th of June and the 24th of December in each year. B., who had never worked the mine, claimed to deduct from a half-yearly instalment a sum paid by him for income tax:—Held, that the instalment of 150*l.* per year was not rent within 5 & 6 Vict. c. 35, s. 60; and that, assuming it to be an annual payment within s. 102, A., and not B., was liable to be assessed to the income tax. *Taylor* v. *Evans*, 1 H. & N. 101; 25 L. J., Ex. 269.

—— **Diminution of Profits from "Specific Cause."**]—A partnership, after working certain coal mines for more than five years, was, on the 21st of December, 1875, incorporated as a limited company, and sold to the company the assets, subject to the liabilities, of the partnership. The partners became holders of all the shares in the limited company according to their interests. After the 3rd of August, 1876, changes took place in the shareholders. The company, being assessed by the income tax commissioners to the income tax under 5 & 6 Vict. c. 35, sched. D, for the year ending the 5th of April, 1877, on an average of the five preceding years, appealed, and contended that they were only liable to pay on a computation for one year on the average of the profits from the 21st of December, 1875, the date of the incorporation. The commissioners stated a case in which they found that "the profits and gains of the appellants' business had fallen short since the 21st of December, 1875, from the following specific causes, viz. the extraordinary depression in the iron and coal trades, whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals." Figures showing that the annual profits had fallen short by one-half were set out:—Held, that sched. A, r. No. IV. c. 6, which prescribes that if it shall appear that the account required by the rules "cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession of interest," did not apply—That the business was a "trade . . . adventure or concern," within sched. D, r. 1, of the rules for ascertaining the duties to be charged in respect thereof, and was not within the terms of the proviso "set up and commenced" within the period of three years—That the company was a new association carrying on an old concern; and had "succeeded" to it within c. 4 of the third set of rules of sched. D, but that, since such succession, the profits had fallen short from a "specific cause" within the exception in that clause—And that the rule of the sixth case in sched. D applied, and under it the computation should be made "on the amount of the full value of the profits and gains received annually," i.e. for the current year. *Ryhope Coal Co.* v. *Foyer*, 7 Q. B. D. 485; 45 L. T. 404; 30 W. R. 87.

Interest Arising from Investments made for Purposes of Business.]—The interest arising from investments made by a life insurance company for the purposes of their business, income tax on which had been deducted at its source, exceeded the amount of the profits of the company for the year of assessment. The company had also during the year received interest on investments from which there had been no deduction for income tax:—Held, that the company were liable to assessment to income tax in respect of such last-mentioned interest. *Clerical, Medical, and General Life Assurance Society* v. *Carter*, 58 L. J., Q. B. 224; 22 Q. B. D. 444; 37 W. R. 346; 53 J. P. 276—C. A. Affirming 59 L. T. 827.

Interest Secured on Rates.]—Certain municipal buildings which are charged with income tax, sched. A, upon their annual value were erected with moneys borrowed on the security of the public rates, and the interest payable on the loans was raised out of the rates:—Held, that the interest was chargeable with income tax, sched. D, under the concluding provision of s. 102 of 5 & 6 Vict. c. 35. *Aberdeen Commissioners* v. *Russell*, 54 J. P. 825.

Interest on Loans — Building Society.]—Interest paid to a building society under cover of weekly or monthly instalments for loans to borrowing members of the society, and secured by way of mortgage on the property of such borrowing members, is chargeable in the hands of the building society to income tax under sched. D of the Income Tax Act, 1853, ss. 2 and 3. *Leeds Permanent Benefit Building Society* v. *Mallandaine*, 66 L. J., Q. B. 813; [1897] 2 Q. B. 402; 77 L. T. 122; 61 J. P. 675—C. A. Affirming 45 W. R. 501.

—— **County Council.**]—The London County Council, under statutory powers, borrowed large sums of money and created stock on which they paid interest to the stockholders, income tax being deducted by the Bank of England on behalf of the inland revenue. The council, also under statutory powers, made loans to certain public bodies from whom interest was received without deduction of income tax. The surveyor of taxes assessed the council under sched. D on such last-mentioned interest. On appeal to the commissioners, and subsequently to the divisional court, but not when before the surveyor, the council contended that if they were so liable they were entitled to certain deductions in respect of income tax paid by them in other transactions:—Held, that the council had been properly assessed, and that they were liable to pay income tax on the sums of interest which they received without deduction of income tax; that this was the only question before the surveyor, and therefore the only question the court had jurisdiction to deal with. *London County Council* v. *Grove*, 45 W. R. 279; 61 J. P. 52—C. A.

Fines on Renewals of Leases—"Applied as Productive Capital"—Temporary Deposit in Bank.]—A temporary deposit in a bank of fines on renewals of leases, on the interest of which income tax is paid, is not an application of such fines "as productive capital on which a profit has arisen otherwise chargeable" within the proviso of head 5, r. ii., sched. A, of s. 60 of the Income Tax Act, 1842. *Mostyn* v. *London*, 64 L. J., Q. B. 106; [1895] 1 Q. B. 170; 15 R. 49; 71 L. T. 760; 43 W. R. 330; 59 J. P. 390.

Annuity Received in England.]—The Bengal civil service annuity fund was composed of

moneys subscribed by the civil servants of the East India Company, and of moneys contributed by the company, and was invested in India, and managed there by a committee. By an arrangement with the East India Company, the annuitants had the option either of receiving their annuities in India from the managers, or of being paid at the East India House in London, the company in the latter case being provided out of the fund with moneys for the purpose of making the payments. A retired civil servant, residing in France, having elected to be paid his annuity in London, received a certificate from the managers in India that he was qualified as an annuitant, and that he was "entitled to demand and receive from the East India Company in London the annuity, by quarterly instalments." The certificate was filed at the East India House, and the annuitant was paid there by a cheque or warrant for each instalment, directed to the cashiers of the Bank of England, and signed by the company:—Held, that the annuitant was not liable, under 5 & 6 Vict. c. 35, to pay income tax in respect of his annuity. *Udny* v. *East India Co.*, 13 C. B. 733; 22 L. J., C. P. 260; 17 Jur. 107.

Dividends Intrusted to Agents for Payment.]—A foreign company carrying on business and earning profits abroad, had an agency in London which conducted a branch and earned profits. The dividends of the company were payable at the option of the shareholders abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under sched. D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in that year. They further made a return, under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends or other annual payments payable out of or in respect of the stock, funds or shares of the company had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—Held, that the London agency were intrusted with the payment of dividends in the United Kingdom, within the meaning of 16 & 17 Vict. c. 34, s. 10, and that they were liable to be assessed on the full amount of the dividends they so paid in the year, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under sched. D, they ought not to be further assessed under 16 & 17 Vict. c. 34, s. 10, and pay income tax in respect of that portion of the dividends which represented profits arising out of the United Kingdom. *Gilbertson* v. *Ferguson*, 7 Q. B. D. 562; 46 L. T. 10—C. A.

2. Mode of Assessment.

Two Businesses—Set-off.]—A seed-merchant taking a farm and working it in connection with his seed business, cannot claim any allowance from the assessment on his profits as seed-merchant in respect of losses on his farm. *Brown* v. *Watt*, 50 J. P. 583.

"Income"—What is.]—The tax imposed by s. 4 of New Brunswick Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss. *Lawless* v. *Sullivan*, 50 L. J., P. C. 33; 6 App. Cas. 373; 44 L. T. 897; 29 W. R. 917—P. C.

Deductions—Payment on Capital Account.]—Where a trading company in purchasing the business of another company agrees to take into its service the manager of the purchased company at a fixed salary, or if they dismiss him to pay him a stipulated sum, and the purchasing company take the manager into their service, but shortly afterwards dismiss him and pay the agreed sum, the money so paid is capital and not income, and forms part of the purchase money of the business acquired, and cannot therefore be deducted from the gross income of the year in which it is paid in calculating the amount assessable to income tax. *Royal Insurance Co.* v. *Watson*, 66 L. J., Q. B. 1; [1897] A. C. 1; 75 L. T. 334; 61 J. P. 404—H. L. (E.)

—— **Expenditure for the Purposes of a Trade.**]—By the first of the rules applicable to the two first cases of sched. D. in s. 100 of the Income Tax Act, 1842, it is provided that, in estimating the balance of the profits or gains of a trade, which under those two cases are liable to income tax, no deduction shall be allowed for any disbursement or expenses, "not being money wholly and exclusively laid out or expended for the purposes of such trade":—Held, that a disbursement not made wholly and exclusively for the purpose of earning a profit in a trade cannot be deducted under this rule. *Watson* v. *Royal Insurance Co.*, 65 L. J., Q. B. 132; [1896] 1 Q. B. 41; 73 L. T. 524; 44 W. R. 89; 59 J. P. 822—C. A. Affirmed on other grounds, supra.

—— **"Cost-book" Mines — Capital Expenditure—Cost of Sinking New Shaft.**] — Commissioners of inland revenue having decided that in the case of cost-book mines, and under the Stannaries Acts, there was no such thing as capital, and that there could be no profit in working such a mine until every expenditure had been met, and that therefore the cost of sinking a new shaft was not capital expenditure, but working expenditure, and could be deducted in assessing the annual profits for income tax purposes:—Held, that the commissioners were wrong in their finding that in such mines there could be no capital; that in this respect there was no difference between a cost-book mine and any other mine, and that the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one and partly the other, was a question of fact to be decided on the circumstances of the case. *Morant* v. *Wheal Grenville Mining Co.*, 71 L. T. 758.

—— **Prospective Losses.**]—In making a return of its profits for assessment to income tax under sched. D of the 5 & 6 Vict. c. 35, a fire insurance company is not permitted by the act to credit itself with, or to claim a deduction for, a portion, calculated by the company at 33 per cent., or one-third of the amount of premiums received during the given year, as the unearned or unexhausted portion of such premiums, although in respect of such portion the company remains liable to losses which may occur in the ensuing year. The fair and proper mode of ascertaining the amount of net profits for the purposes of the act (it being impossible to ascertain it with such strictly mathematical accuracy as to do perfect and absolute justice) is to take on the one side the whole receipts and on the other the whole expenditure and disbursements for the given year, the balance remaining being, for the time at least, net profits on which the tax should be assessed. This being done year by year, there is an absolute balancing of accounts; and if any wrong is done by losses afterwards occurring in respect of premiums on which, as profits, income tax has been assessed and paid, that will be taken into consideration in the ensuing year. *Imperial Fire Insurance Co.* v. *Wilson*, 35 L. T. 271.

—— **Bad Debts.**]—A firm of brewers carried on the business of bankers and money-lenders as an adjunct to their business of brewing, and for the exclusive accommodation and convenience of the customers of their brewery:—Held, that they were entitled to deduct from their taxable profits, for the purposes of income tax, losses sustained in the branch of their brewing business relating to loans and advances. *Reid's Brewery Co.* v. *Male*, 60 L. J., Q. B. 340; [1891] 2 Q. B. 1; 64 L. T. 294; 39 W. R. 459; 55 J. P. 216.

—— **Travelling Expenses.**]—Travelling expenses incurred by a director of a company in going from his residence to the company's offices are not such "expenses of travelling" as can be deducted for the purpose of the income tax. *Revell* v. *Elworthy*, 55 J. P. 392.

—— **Supply of Gas by Corporation—Private Trade.**]—The corporation of Haverfordwest were empowered under a local act, after lighting their town, to supply private customers with gas. From such supply profits were earned, in respect of which the corporation were assessed to income tax:—Held, that, inasmuch as the corporation did not carry on a trade so far as their duty of lighting the public streets was concerned, expenses so incurred were not moneys wholly and exclusively laid out or expended for the purposes of a trade within the meaning of sched. D, r. 1, of 5 & 6 Vict. c. 35, s. 100, so as to entitle the corporation to deduct such expenses from the above-mentioned profits. *Dillon* v. *Haverfordwest Corporation*, 60 L. J., Q. B. 477; [1891] 1 Q. B. 575; 64 L. T. 202; 39 W. R. 478; 55 J. P. 392.

—— **Tolls—Costs of Earning.**]—The profits of the corporation of London derived from renewal fines, markets and metages are subject to income tax; and deductions in respect of expenditure for the maintenance of the corporation establishment cannot be made. The proper principle of deduction in such cases is to take each item of profit separately, and deduct therefrom the cost of earning that item. *Att-Gen.* v. *Scott*, 28 L. T. 302; 21 W. R. 265.

—— **Money Borrowed upon Debentures—Costs of Issue.**]—A company whose business is the borrowing of money on debentures and its investment at higher rates of interest, cannot deduct from its annual profits the costs of issuing such debentures as being expenses within sched. D of the Income Tax Act, 1853. *Texas Land and Mortgage Co.* v. *Holtham*, 63 L. J., Q. B. 496; 10 R. 398; 1 Manson, 429.

An English company carrying on their business in Alexandria where their gains and profits were earned were held to be properly assessed to the income tax in respect of the whole of the profits of the concern, without any deduction on account of the interest on the debenture bonds of the company paid to the holders of such bonds in Alexandria; there being nothing in ss. 102 and 159 of the Income Tax Act (5 & 6 Vict. c. 35), to limit r. 4 in s. 100, which states that "no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains." *Alexandria Water Co.* v. *Musgrave*, 52 L. J., Q. B. 349; 11 Q. B. D. 174; 49 L. T. 287; 32 W. R. 146—C. A.

—— **Loans—Interest Paid.**]—A trading company is properly assessed to income tax in respect of the whole of the profits of the concern, without any deduction on account of interest paid on short loans borrowed by the company to enable it to buy goods at cost instead of credit prices. *Anglo-Continental Guano Works* v. *Bell*, 10 R. 161; 70 L. T. 670; 58 J. P. 383.

—— **Rent—Premium for Lease.**]—In order to ascertain what are the profits and gains of a trade for the purposes of sched. D of the 5 & 6 Vict. c. 35, the annual expenditure—one element of which is the rent—should be deducted from the gross profits and gains. Where a lessee pays a ground-rent of 250*l.* per annum, having already paid 34,000*l.* as a premium for a lease of twenty-two years, he has no right to deduct one twenty-second part of the premium in each year, although the lease sinks in value as every year is cut off from it. The right principle is to deduct nothing in the way of outlays of money in the shape of expenditure of capital for the future benefit of the estate, but only what may be called current expenditure—that is, the average current repairs for a period of three years, or one year as the case may be. *Gillatt* v. *Colquhoun*, 33 W. R. 25.

—— **Brewer—Exhausted Capital.**]—The appellants, a firm of brewers, in order to increase the sale of their beer and so to increase their profits, purchased the leases of public-houses, which they let to tenants, who covenanted to buy of them all the beer to be sold in such houses. The appellants, besides covenanting to pay fixed rents for the terms of years reserved by the leases, were obliged, in some instances, to pay premiums for such leases. They claimed in arriving, for the purpose of the income tax, at the balance of profits and gains of their trade, to be entitled each year to an allowance in respect of a portion of the amount so paid by them as premiums, on the ground that such allowance represented a portion of their capital exhausted

during the year in earning profits :—Held, that the appellants were not entitled to any allowance in respect of the premiums. *Watney* v. *Musgrave*, 49 L. J., Ex. 493 ; 5 Ex. D. 241 ; 42 L. T. 690 ; 28 W. R. 491 ; 44 J. P. 268.

—— **Repairs to "Tied" Houses let to Tenants.**] —The words "premises occupied for the purpose of such trade" in the third rule applying to the first case under schedule D in s. 100 of the Income Tax Act, 1842, mean "premises occupied by the person assessed for the purpose of his trade." *Brickwood* v. *Reynolds*, 67 L. J., Q. B. 26 ; [1898] 1 Q. B. 95 ; 77 L. T. 456 ; 46 W. R. 130—C. A.

A brewery company, upon being assessed under schedule D in s. 2 of the Income Tax Act, 1853, in respect of the profits of their trade, claimed to deduct from the amount of those profits a sum expended by them upon repairs to certain "tied" houses owned by them, and let to tenants upon the terms that the tenants should buy from the company all the ale, beer, &c., sold by them upon their premises. It was found as a fact that the profits of the company were materially increased by the maintenance of these "tied" houses :—Held, that the company were not entitled to the deduction claimed. Held, further, that the sum expended in repairs was expended principally for the purposes of the trade of the company's tenants, and only partly for the purposes of the company's own trade, and was not, therefore, "money wholly or exclusively laid out or expended for the purposes of" the company's trade within the meaning of the first rule of the rules applying both to the first and second cases under the above-named schedule, so as to entitle the company to the deduction claimed. *Ib.*

——**Part of Bank Premises Used as Dwelling-house by Manager.**]—By 5 & 6 Vict. c. 35, s. 100, first rule, first case, the duties under schedule D in respect of any trade are to be charged on a sum not less than the full amount of the balance of the profits of the trade "without other deduction than is hereinafter allowed"; and by the first rule applicable to the first and second cases in reference to such duties, no deduction shall be allowed for "any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," &c., "nor for the rent or value of any dwelling-house, &c., except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned." The respondents, a banking company, carried on their business in buildings which contained accommodation occupied as a dwelling-house by the manager or resident agent :—Held, that the respondents were entitled to deduct from their profits before returning them for assessment under schedule D the annual value of the whole bank premises, including the part occupied by the manager. *Russell* v. *Town and County Bank*, 58 L. J., P. C. 8 ; 13 App. Cas. 418 ; 59 L. T. 481 ; 53 J. P. 244 —H. L. (Sc.)

—— **Life Assurance — Sale of Annuities — Annuities Paid.**]—A life assurance society as part of its business sold or granted annuities in consideration of a lump sum or premium paid down in the case of an immediate annuity, and of a similar payment or of periodical premiums in the case of a deferred or contingent annuity. In making up the balance sheet showing the amount of its profits and gains for the purpose of assessment to income tax, under schedule D, the society deducted from its gross income the sum paid in discharge of its annuity contracts. Upon the assessment for the year 1885–6 (and before the coming into operation of the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3) : —Held, that the society was not liable to be assessed in respect of the amount paid by it for annuities. *Alexandria Water Co.* v. *Musgrave* (11 Q. B. D. 174) distinguished. *Gresham Life Assurance Society* v. *Styles*, 62 L. J., Q. B. 41 ; [1892] A. C. 309 ; 67 L. T. 479 ; 41 W. R. 270 ; 56 J. P. 709—H. L. (E.) *See* 51 & 52 Vict. c. 8, s. 24.

—— **Life Insurance Premium—Foreign Life Insurance Company.**] —No deduction from an assessment to income tax is allowable in respect of premiums on policies of life insurance effected with foreign insurance companies. The abatement provided for by 16 & 17 Vict. c. 34, s. 54, and 16 & 17 Vict. c. 91, s. 1, is only applicable to policies effected with insurance companies in the United Kingdom, which are properly subject to the jurisdiction of the English parliament. *Colquhoun* v. *Heddon*, 59 L. J., Q. B. 465 ; 25 Q. B. D. 129 ; 62 L. T. 853 ; 38 W. R. 545—C. A. Affirming 54 J. P. 392.

—— **Annuity—Portion to be Applied in Payment of Interest — Balance to form Sinking Fund.**]—The appellants were incorporated for the purpose of carrying out an agreement with the government of the Nizam of Hyderabad for the construction of a railway. By the agreement the government agreed for a period of twenty years to pay to the appellants an annuity equal to five per cent. per annum on the issued capital of the company. The company were to apply the annuity in payment of interest at five per cent. per annum on the paid-up share capital, and in payment of debenture interest at four per cent., and the balance in providing a sinking fund for the redemption of the debenture capital. An assessment to income tax under 16 & 17 Vict. c. 34, schedule D, having been made upon the appellants in respect of the whole amount paid to them by the Nizam under the agreement, they claimed to have it reduced by the amount of the balance applied to the sinking fund :—Held, that they were not entitled to such deduction, and that the assessment was correct. *Nizam's State Ry.* v. *Wyatt*, 59 L. J., Q. B. 430 ; 24 Q. B. D. 548 ; 62 L. T. 765.

Abatement of £120—Incomes under £400—Free Occupation of House.]—The appellant was a bank agent, and was bound, as part of his duty, to occupy the bank-house as custodier. He was liable to removal at any time, but was not entitled to vacate the house without leave of the directors, or to sub-let any part of the premises ; and in case he desired to occupy other premises no addition was to be made to his income in respect of any house-rent which he might have to pay. His income, exclusive of any estimate of the value of the part of the bank occupied as residence, was under 400*l.* ; but if the value of the house was added it was more than that sum :—Held, that the appellant was entitled to the abatement of 120*l.* allowed

by statute on incomes of less than 400*l.*, and that the value of the house was not to be taken into account. *Tennant* v. *Smith*, 61 L. J., P. C. 11; [1892] A. C. 150; 66 L. T. 327; 56 J. P. 596—H. L. (Sc.)

What the appellant is to be assessed upon must be assessed under schedule E. The act refers to money payments made to the person who receives them, though if substantial things of money value were capable of being turned into money, they might for that purpose represent money's worth, and be therefore taxable —by the Lord Chancellor. *Ib.*

The appellant's occupation of the house was not "salary or wages, perquisites, or profits" under schedule D. The word "emolument" in schedule D means some more tangible benefit than a servant's residence in his master's house, or a meal or a suit of livery supplied by the master—by Lord Watson. *Ib.*

A person is chargeable for income tax under schedule D as well as under schedule E not on what saves his pocket, but upon what goes into his pocket—by Lord Macnaghten. *Ib.*

3. When Deductible.

Annuity or Rent-charge.]—By an ante-nuptial settlement executed before the passing of the Property Tax Act, lands were appointed to the use that the intended wife might, after the intended husband's death, receive a jointure rent-charge in lieu of dower out of any lands to which the husband was or might become entitled, without any deduction in respect of any tax then already or thereafter to be imposed on the jointure or on the jointress in respect thereof:—Held, that assuming the terms of the deed to amount to an express provision that the jointure should be paid free of income tax (which, semble, they did) still the income tax must be paid by the jointress, s. 103 of 5 & 6 Vict. c. 105 prohibiting any contract to that effect. *Floyer* v. *Bankes*, 32 L. J., Ch. 610; 2 N. R. 7; 8 L. T. 483; 11 W. R. 630.

A testator gave to his wife an annuity or clear yearly rent-charge, clear of all taxes and deductions:—Held, that the annuity was subject to property tax. *Wall* v. *Wall*, 15 Sim. 513; 16 L. J., Ch. 305; 11 Jur. 403.

The arrears of an annuity which accrued due while the income tax was in force, but which were unpaid, in consequence of the rents of the estate on which it was charged being exhausted by prior charges, are payable to the annuitant, without any deduction in respect of the income tax. *Braham* v. *Strathmore*, 5 L. J., Ch. 165.

The gift of an annuity clear of legacy duty, and every other deduction for legacy duty or otherwise, will not authorise the payment of the income tax out of the testator's estate. *Lethbridge* v. *Thurlow*, 15 Beav. 334; 21 L. J., Ch. 538.

A bequest to pay a clear yearly sum free from all deductions and abatements whatsoever does not render the annuity payable free from income tax. *Gleadow* v. *Leetham*, 52 L. J., Ch. 102; 22 Ch. D. 269; 48 L. T. 264; 31 W. R. 269.

If a testator by his will grants a rent-charge to be paid free of income tax, the annuitant is entitled to have the full amount paid without deduction of the tax. *Festing* v. *Taylor*, 3 B. & S. 235; 32 L. J., Q. B. 41; 9 Jur. (N.S.) 44; 7 L. T. 429; 11 W. R. 70—Ex. Ch.

In what cases a deduction for taxes should be made out of an annuity. *Robinson* v. *Stephens*, 2 Salk. 616.

A testator, by his will, gave his real and residuary personal estate to trustees upon trust (inter alia) to pay certain annuities, including one to the plaintiff, "all the said annuities to be paid clear of all deductions whatsoever except income tax"; and, by a codicil, directed "that every legacy and other interest as well derivable under my will or any codicil thereto shall be free of legacy duty and every other deduction":—Held, that the plaintiff's annuity was payable free of income tax. *Buckle, In re, Williams* v. *Marson*, 63 L. J., Ch. 330; [1894] 1 Ch. 286; 7 R. 72; 70 L. T. 115; 42 W. R. 229 —C. A.

When a testator directs an annuity to be paid out of his personal estate "without any deduction whatever," the income tax is payable by the annuitant. *Abadam* v. *Abadam*, 34 Beav. 243; 33 L. J., Ch. 593; 10 Jur. (N.S.) 505; 10 L. T. 53; 12 W. R. 615.

A testator by will, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500*l.*, "free from legacy duty and other deductions":—Held, that the annuity was subject to income tax, to be paid out of the annuity itself. *Sadler* v. *Rickards*, 4 Kay & J. 302; 6 W. R. 532.

A testator gave three annuities; the first "free from income or property tax, or any other deduction," the second "free from all deductions," the third "free from deductions":—Held, that all the annuities were free from income tax. *Turner* v. *Mulmeux*, 1 Johns. & H. 334.

But when a testator directs his trustees out of the rents and profits of his estate to keep insured and to repair all the messuages, buildings and erections upon the hereditaments previously limited, for his wife for life during the continuance of her interest therein, and also during the same period to pay and defray all taxes, parliamentary, parochial and otherwise, affecting the same hereditaments or any of them, the trustees are bound to pay the property and income tax. *Lovat* (*Lord*) v. *Leeds* (*Duchess*), 2 Dr. & Sm. 62; 31 L. J., Ch. 503; 6 L. T. 307; 10 W. R. 397.

A. B., in 1846, gave to his wife annuities or clear yearly sums for her life, "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever," and directed the trustees to appropriate and invest a sufficient part of his personal estate as a fund for the purpose of paying them. The trustees, acting upon the advice of counsel, deducted from all the payments to the widow the income tax:—Held, that the widow was entitled to be paid the annuities in full, free from any deduction; and also entitled to be paid all the sums which had been deducted. *Lovat* v. *Leeds* (*Duchess*) (2 Dr. & Sm. 62) followed. *Bannerman's Estate, In re, Bannerman* v. *Young*, 51 L. J., Ch. 449; 21 Ch. D. 105.

A testator by his will bequeathed his residuary estate to trustees upon trusts for sale and conversion, and out of the income to pay to his wife for life such an annual sum of money as together with the dividends and annual produce of the sum of 10,000*l.*, to which she would be entitled by virtue of the settlement made previous to his marriage with her, should produce to her a clear annual income of 1,500*l.* The will also contained

a declaration that no deduction should be made from any legacies given by the will, or to be given by any codicil thereto, "for the legacy tax or any other matter, cause, or thing whatsoever." Semble, that the income tax was properly deducted. *Pearetli* v. *Marriott*, 52 L. J., Ch. 221; 22 Ch. D. 182; 48 L. T. 170; 31 W. R. 68—C. A.

Interest.]—Interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment" in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is not entitled to deduct income tax from such interest. *Bebb* v. *Bunny* (1 Kay & J. 216) distinguished. *Goslings and Sharpe* v. *Blake*, 58 L. J., Q. B. 446; 23 Q. B. D. 324; 61 L. T. 311; 37 W. R. 774—C. A. Reversing 53 J. P. 87.

When a fund is assigned to trustees to pay a fixed sum annually to creditors pro ratâ, with interest till payment, the assignor is entitled to deduct income tax on the payments in respect of interest. *Crane* v. *Kilpin*, 37 L. J., Ch. 913; L. R. 6 Eq. 334; 18 L. T. 350.

A purchaser, liable to pay interest on his purchase-money, may deduct income tax from such interest. *Bebb* v. *Bunny*, 1 Kay & J. 216; 1 Jur. (N.S.) 203.

The words "yearly interest" in 16 & 17 Vict. c. 34, s. 40, mean not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum, though accruing de die in diem. *Ib.*

But where interest is payable on purchase-money upon a sale by order of the court the purchaser must pay the full purchase-money and interest into court without deduction of income tax. *Holroyd* v. *Wyatt*, 1 De G. & S. 125. S. P., *Humble* v. *Humble*, 12 Beav. 43.

—— **Bills of Exchange.**]—In paying a creditor, who has proved in an administration suit in equity upon a bill of exchange, income tax is deducted from the interest. *Dinning* v. *Henderson*, 3 De G. & S. 702; 19 L. J., Ch. 273; 14 Jur. 1038.

Mortgages.]—Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet in a mortgage transaction the mortgagor is entitled to deduct it. *Mosse* v. *Salt*, 32 Beav. 269; 32 L. J., Ch. 756.

W. borrowed from a building society moneys on mortgage, to be repaid by instalments, covering principal, interest, and charges for working expenses. These repayments were regularly made till W.'s death, in 1881. His executors claimed to deduct income tax from the remaining instalments. The society was subsequently wound up, and the liquidators refused to allow deductions for income tax. The executors, however, did in fact deduct, under protest from the liquidators, income tax in respect of repayments since 1877. No mention of income tax was contained in the rules, and the society had always refused to allow deductions in respect thereof. On summons by the liquidators calling upon the executors to pay the sums deducted for income tax:—Held, that the executors were entitled to deduct income tax in respect of the present repayment, and also from future repayments, but only upon so much as represented interest, but that they could not be allowed to deduct anything for income tax in respect of past repayments. *Middlesborough Building Society, In re, Wythes, Ex parte*, 53 L. T. 492.

Instalments of Purchase-money.]—F. being seised in fee of one moiety of certain mines, sold her share for 45,000*l.*, payable, 3,385*l.* down, and the residue by half-yearly instalments of 768*l.* 11*s.* 8*d.* during a period of thirty years:—Held, that the purchaser was not empowered, by 16 & 17 Vict. c. 34, s. 40, to deduct income tax from the instalments. *Foley* v. *Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100; 5 Jur. (N.S.) 342; 7 W. R. 141.

When Deduction Omitted.]—A debtor, making payments to his creditor from time to time for interest, without deducting property tax, will not be allowed, upon finally settling the debt, to deduct the amount of back payments in respect of such tax from the balance of the debt due at the time of settlement. *Turner, Ex parte*, 11 L. T. 352; 13 W. R. 104.

The trustees of a deed made pursuant to an order of the divorce court for securing payment by the husband of an annuity to the wife, on whose petition the marriage had been dissolved, are entitled to deduct income tax from the instalments of the annuity, but cannot set-off against future instalments or otherwise recover income tax which they have neglected to deduct in the past. *Warren* v. *Warren*, 13 R. 485; 72 L. T. 628; 43 W. R. 490.

Executor of obligor of bond having by mistake paid debt and interest without making deduction for property tax provided for by bond, though six years had elapsed:—Held, entitled to have it refunded. It would have been otherwise in case of the obligor himself having paid it. *Smith* v. *Alsop*, M'Clel. 623; 13 Price, 823.

Where executor paid interest on legacy for seventeen years, without deducting property tax:—Held, he could not afterwards deduct out of future interest due the amount of property tax on preceding payments. *Currie* v. *Goold*, 2 Madd. 163.

A., in satisfaction of a widow's dower, mortgaged lands on condition to be paid 20*l.* per annum. This, being an annual payment secured by land, was held liable to answer taxes in proportion as the land paid; but the court refused to make the annuitant refund in respect to the payments she had received tax free, and for which the party paying had omitted to deduct. *Attwood* v. *Lamprey* cited in. *East* v. *Thornbury*, 3 P. Wms. 127, n.

4. Priority of Crown.

Company—Winding up.]—When a company is being wound up under the provisions of the Companies Act, 1862, the crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding up, in priority to the other creditors. *Henley & Co., In re*, 9 Ch. D. 469; 39 L. T. 53; 26 W. R. 885—C. A. Reversing 48 L. J., Ch. 147.

5. Repayment.

When Deduction Omitted.]—*See* supra.

How obtained—Petition of Right.]—A land

company paid debenture interest in excess of the assessments under schedule A, deducted income tax from the interest, and returned the whole amount deducted for assessment under schedule D:—Held, that a petition of right did not lie to obtain repayment of the sum paid under schedule D. *Holborn Viaduct Land Co.* v. *Reg.*, 52 J. P. 341.

Computation of Profits—Time within which Over-payment must be proved—Jurisdiction of Commissioners.]—By 5 & 6 Vict. c. 35, s. 133, "if within or at the end of the year" of assessment any person charged with income tax under schedule D "shall find and shall prove to the satisfaction of the commissioners by whom the assessment was made that his profits during such year for which the computation was made fell short of the sum so computed," &c., it shall be lawful for the said commissioners to cause the assessment to be amended as the case shall require, and, in case the sum assessed shall have been paid, to certify under their hands to the commissioners for special purposes the amount of the sum overpaid upon such first assessment, and thereupon the last-mentioned commissioners shall issue an order for the repayment of such sum as shall have been so overpaid, &c. An English company, working mines abroad, made, in March, 1887, an application under the above section for certificates in respect of over-payments of income tax assessed on profits for the years ending respectively April 5, 1884, and April 5, 1885, and the commissioners by whom the assessments were made having inquired into the case, gave them certificates under the section. The commissioners for special purposes refused to issue orders for repayment on such certificates on the ground that they were made without jurisdiction, the company not having found and proved "within or at the end of the year," as required by the section, that their profits in the respective years fell short of the sum computed:—Held, that the certificates given were valid; and that mandamus lay to compel the commissioners for special purposes to issue orders for repayment of the amounts certified to be overpaid. The expression "at the end of the year" in the above section does not mean at any time after the end of the year, or, on the other hand, within any limit of time generally applicable, but as soon after the end of the year as, having regard to the circumstances of the particular case, is practicable by the use of due exertions. *Reg.* v. *Income Tax Commissioners*, 57 L. J., Q. B. 513; 21 Q. B. D. 313; 59 L. T. 455; 36 W. R. 776; 53 J. P. 84—C. A.

The commissioners by whom the assessment was made are given, by the section, jurisdiction finally to determine whether the discovery and proofs of the profits having fallen short of the sum computed has been made within the period specified in the section as above interpreted—per Lord Esher, M.R. *Ib.*

The commissioners by whom the assessment was made having granted the certificate under the section, the onus of showing that such discovery and proof were not made within the period above mentioned, and that the certificate was therefore invalid, rested on the commissioners for special purposes, and was not satisfied by the mere fact of the application for the certificate not having been made before the date when it was made in the present case—per Lindley, L.J. *Ib.*

6. APPEAL FROM ASSESSMENT.

Affidavit of Appellant as to Income—Commissioners not accepting.]—Upon an appeal against an assessment to the income tax before the special commissioners, they are not bound to accept the schedule of the particulars of the appellant's property and income, which they have required him to deliver under s. 120 of the Income Tax Act, 1842, as correct, because he offers to verify it upon oath. The exercise of the power given to the commissioners by s. 122, of requiring the schedule to be verified upon oath, is a matter in their own discretion, and not a right of the appellant. *Reg.* v. *Chew*, 14 R. 74; 71 L. T. 541; 59 J. P. 356—C. A.

Costs—Appeal by Crown.]—Where, upon an appeal by the crown against a decision of income tax commissioners, the respondent appears to support the decision, costs may be given against him if the appeal should be allowed *Bowers* v. *Harding*, infra, 60 L. J., Q. B. 474; [1891] 1 Q. B. 560; 64 L. T. 201; 39 W. R. 558; 55 J. P. 376.

c. *PUBLIC OFFICE OR EMPLOYMENT OF PROFIT.*

Occupation of House — Abatement.] — See *Tennant* v. *Smith*, ante, col. 163.

Railway Companies' Servants.]—A railway company is not liable to be assessed under schedule E of the 5 & 6 Vict. c. 35, 16 & 17 Vict. c. 34, and 23 Vict. c. 14, in respect of engine-drivers, porters, and labourers, whether employed by them at annual salaries or at weekly wages amounting to 100*l.* a year; but such servants are assessable under schedule D. *Att.-Gen.* v. *Lancashire and Yorkshire Ry.*, 2 H. & C. 792; 33 L. J., Ex. 163; 10 Jur. (N.S.) 705; 10 L. T. 95; 13 W. R. 8.

Schedule E extends only to offices or employments under corporations, which are of a public nature. *Ib.*

Grant by Curates' Augmentation Fund.]—The council of the Curates' Augmentation Fund made a grant of 50*l.* to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, and such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant:—Held, that the curate was not assessable to the income tax in respect of the sum granted under the Income Tax Act, 1842, schedule E. *Turner* v. *Cuxson*, 58 L. J., Q. B. 131; 22 Q. B. D. 150; 60 L. T. 332; 37 W. R. 254; 53 J. P. 148.

College Bursar—Official not Member of Corporation.]—The statutes of St. John's College, Oxford, provide for the office of bursar, the remuneration to be such as the president and fellows shall decide. The respondent, who was not on the foundation of the college, was appointed bursar at a fixed salary:—Held, that the respondent was an officer of the college at a salary, and that such salary was therefore assessable to income tax under s. 146, schedule E, r. 3 of the Income Tax Act, 1842. *Langston* v. *Glasson*, 60 L. J., Q. B. 356; [1891] 1 Q. B. 567; 65 L. T. 159; 39 W. R. 476; 55 J. P. 567.

Husband and Wife — Joint Salary — Deductions.] — The respondent and his wife were appointed master and mistress of a national school at a joint salary. The respondent claimed an allowance of 30*l.*, upon an assessment under schedule E of the Income Tax Act, 1853, in respect of the board and wages of a domestic servant, whom it was necessary that he should employ in order that the duties of his household might be carried on whilst his wife was engaged at the school:—Held, that the joint salary was derived from a "public office or employment" within the meaning of s. 51 of the Income Tax Act, 1853, but that the respondent was not entitled to the deduction claimed, the board and wages of the servant not being money expended "wholly, exclusively, and necessarily in the performance of the duties of his office"; and, that although the salary was paid to the respondent for the services of himself and his wife, it was properly charged in the name of the respondent alone. *Bowers* v. *Harding*, 60 L. J., Q. B. 474; [1891] 1 Q. B. 560; 64 L. T. 201; 39 W. R. 558; 55 J. P. 376.

d. *PENALTY FOR NOT ALLOWING DEDUCTION.*

By a marriage settlement executed in 1807, lands were conveyed, subject to "an annuity or clear yearly sum of 100*l.* freed and clear, and without any deduction or abatement whatsoever in respect of any taxes or impositions then already or which should thereafter be taxed, charged, assessed or imposed upon the premises or upon the annuity by authority of parliament or otherwise howsoever":—Held, that the parties paying the annuity were entitled to deduct income tax under 5 & 6 Vict. c. 35, ss. 73, 103, and that the annuitant refusing to permit the deduction was liable to the penalty under s. 103. *Att.-Gen.* v. *Shield*, 3 H. & N. 834; 28 L. J., Ex. 49.

On an information against an annuitant for refusing to allow the tenants of premises on which the annuity was charged, the income tax, to be deducted out of their rent:—Held, liable for the acts of the attorney to whom the tenant had been referred; and the question held to be, not whether the deduction was in terms refused, but whether it was in fact allowed. *Reg.* v. *Sheil*, 1 F. & F. 204.

e. *PAYMENT WITHOUT DEDUCTION.*

Rent-charges—Creation by Will.]—The 5 & 6 Vict. c. 35, s. 103, which renders void all contracts to pay rent-charges without allowing the owner of the land to deduct the income tax, does not extend to rent-charges granted by will; and if a testator by his will grants a rent-charge to be paid free of income tax, the annuitant is entitled to have the full amount paid without deduction of the tax. *Festing* v. *Taylor*, 3 B. & S. 235; 32 L. J., Q. B. 41; 9 Jur. (N.S.) 44; 7 L. T. 429; 11 W. R. 70—Ex. Ch.

—— **Creation by Settlement.**]—See *Floyer* v. *Bankes*, ante, col. 163.

Whole Contract not Invalidated.]—A covenant in an annuity deed made prior to 46 Geo. 3, c. 65, s. 115, former Property Tax Act (which statute had a retrospective operation), whereby the grantor of the annuity covenanted to pay the same without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property tax, is void in respect of its obligation on the grantor not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction. *Readshaw* v. *Balders*, 4 Taunt. 57. S. P., *Fuller* v. *Abbott*, 4 Taunt. 105; *Buxton* v. *Monkhouse*, G. Coop. 41.

A. having covenanted in a deed to pay B. 300*l.* at the end of a twelvemonth, and in the meantime and until payment to pay interest for it at 5*l.* per cent., it is no answer to an action for the 300*l.*, and interest accrued thereon, to plead that by the same deed it was covenanted that he should pay the property tax payable for and in respect of the 300*l.*; for the plea does not show that the covenant for the payment of the property tax attached on the interest payable for the 300*l.* principal, and the covenants as there exhibited appeared to be independent, and therefore, though the latter should be void by 46 Geo. 3, c. 65, s. 115, avoiding all contracts, covenants, &c., in full, without allowing the deduction of the tax as directed by the act, yet that would not avoid the other independent covenant in the deed for the payment of the 300*l.* and interest. *Wigg* v. *Shuttleworth*, 13 East, 87. S. P., *Howe* v. *Synge*, 15 East, 440.

—— **Between Landlord and Tenant.**] — An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35. *Lamb* v. *Brewster*, 48 L. J., Q. B. 277, 421; 4 Q. B. D. 220, 607; 40 L. T. 537; 27 W. R. 478—C. A.

A. in 1807 (when 46 Geo. 3, c. 65, was in force) leased premises to B., at a rent of 340*l.*, with a proviso that the rent should be reduced to 330*l.* in the event of "the tax called income tax" becoming repealed, annihilated, or suspended at any time during the continuance of the demise; such reduced rent to continue to be paid only so long as the income tax should remain repealed and not payable:—Held, that the rent which had so become reduced on the expiration of the old income tax, was restored to the original amount on the passing of the 5 & 6 Vict. c. 35, there being nothing in s. 73 to render the covenant illegal. *Colbron* v. *Traverse*, 12 C. B. (N.S.) 181; 31 L. J., C. P. 257; 8 Jur. (N.S.) 1105; 6 L. T. 287; 10 W. R. 603.

A lease rendering rent clear of landlord's property tax is good as a lease rendering the same rent subject to a deduction thereout of the property tax. *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by 46 Geo. 3, c. 65, s. 115, did not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes generally; for such general words were to be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell* v. *King*, 11 East, 165; 10 R. R. 462.

Annuities, &c., when Free from Income Tax.] —*See* supra.

II. INHABITED HOUSE DUTY.

1. *Dwelling-house*, 171.
2. *Houses let in Different Tenements*, 171.
3. *Exemptions*, 173.
4. *Occupation*, 177.

1. DWELLING-HOUSE.

What is.]—Semble, that a building occupied by a bank and a telegraph company in such a way that all the ground floor and basement, except the telegraph company's entrance hall, and the basement under it, were the bank's, and the upper floors the telegraph company's, but there being doors between the telegraph company's entrance hall and the bank's lobby, which were open during banking hours to give a second access to the telegraph company's premises, and a caretaker living on the third floor to protect the entire building, is a dwelling-house within the Inhabited House Duty Acts. *Chartered Mercantile Bank of India, London and China* v. *Wilson*, 47 L. J., Ex. 153; 3 Ex. D. 108; 38 L. T. 254; 26 W. R. 265.

—— **Club and Auctioneer's Office.**]—A building was used part of it as a club and the remainder as an auctioneer's office. It was only occupied during the day, and no person slept there:—Held, that it was not an inhabited dwelling-house so as to be liable to inhabited house duty under 14 & 15 Vict. c. 36. *Riley* v. *Read*, 48 L. J., Ex. 437; 4 Ex. D. 100; 27 W. R. 414.

2. HOUSES LET IN DIFFERENT TENEMENTS.

Part Used for Business and Part occupied by Landlord.]—By 41 Vict. c. 15, s. 13, where any house being one property is divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt, although a servant or other person may dwell in such house or tenement for the protection thereof. A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder, and the rooms on the first floor, were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided there, and the remainder by a caretaker and his wife, who acted as servants to the residents, and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—Held, that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house. *Yorkshire Fire Insurance Co.* v. *Clayton*, 51 L. J., Q. B. 82; 8 Q. B. D. 421; 45 L. T. 697; 30 W. R. 174—C. A.

Tenements Structurally Severed.]—The statute 41 Vict. c. 15, s. 13, sub-s. 1, provides that, where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes stating therein the facts, and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied:—Held, that the provisions of the sub-section only apply in cases where the house is divided into different tenements structurally severed from each other, as, for instance, in the case of flats and sets of chambers. *Chapman* v. *Royal Bank of Scotland*, 50 L. J., Q. B. 670; 7 Q. B. D. 136; 45 L. T. 215; 30 W. R. 81; 46 J. P. 38.

Where a part of the ground floor and a basement of a building was severed from the rest of the building by a party wall, and had its own separate entrance, there being no communication between it and the rest of the building, and the part so separated was used wholly for the purposes of a bank:—Held, that such part of the premises constituted a separate house, and being used solely for business purposes was exempt from inhabited house duty. *Ib.*

Semble, per Hawkins, J.:—That, when a house is substantially within the words of the sub-section above referred to as being a house structurally divided into and let in different tenements, the mere fact that the landlord occupied one of such tenements, forming a small portion of the whole, would not disentitle him to the relief given by the sub-section. *Ib.*

The respondents were the lessees of a house, structurally divided into two portions, one of which they occupied solely for the purposes of their business, and sub-let the remaining portion to a tenant who resided there:—Held, that, whether the section was to be read as referring to a letting by the superior landlord or by the lessees, the exemption therein contained did not apply as the superior landlord had not divided the house and let it in separate tenements, nor was the part retained by the lessees let as a separate tenement, but was retained by them:—Held, therefore, that as the lessees substantially occupied the house, and were not within the exemption contained in the section, they were liable to be rated to inhabited house duty in respect of the whole house. *Hoddinott* v. *Home and Colonial Stores*, 65 L. J., Q. B. 291; [1896] 1 Q. B. 169; 74 L. T. 79; 44 W. R. 285; 60 J. P. 262.

Tenements — Internal Communication.] — A house was occupied on the ground floor as a bank (by the owners) and as stamp and tax offices, on the first floor as writing chambers. There was internal communication throughout these two floors. The second floor was enclosed by a door leading to the staircase connecting the first and second floors, and was occupied as a residence by the bank accountant:—Held, that

the whole premises were liable. *Clerk* v. *British Linen Co.*, 49 J. P. 825.

Two houses with internal communication were let to various occupiers, and used partly as offices and partly as a residence. The street door of one house opened into a vestibule, from which two doors led into the offices; and another door opened into the lobby of the residential portion, and afforded the only means of entrance into the residence:—Held, that the house fell within s. 13, sub-s. 1 of 41 Vict. c. 15. *Corke* v. *Brims*, 48 J. P. 376.

A building was divided into two self-contained tenements, one of which was occupied as offices by a firm whose individual partners owned the building, whilst the other was let to one of the partners, who occupied it as a residence:—Held, that inhabited house duty was chargeable only upon the value of the dwelling-house. *Nisbet* v. *M'Innes*, 48 J. P. 776.

A house was divided into two tenements, which were let to the same tenants under one lease, in which the tenements were separately described:—Held, that s. 13, sub-s. 1 of 41 Vict. c. 15, applied. *Smiles* v. *Crooke*, 50 J. P. 696.

Blocks of Buildings.]—Certain blocks of buildings, each having a street entrance and one internal staircase, were structurally divided into different suites of rooms distinct from each other. A porter living in the basement had the care of the street door, which was locked at night, and he also had access to the rooms. Each suite of rooms had a door opening on to the staircase common to all. Some of the suites of rooms were let to tenants as offices for business purposes. A few were let as residences. Some were untenanted:—Held, that the duty was properly charged upon the blocks as houses, under r. 6 of 48 Geo. 3, c. 55, schedule B, and not upon the separate suites of rooms as distinct properties under r. 14. *Att.-Gen.* v. *Mutual Tontine Westminster Chambers Association*, 45 L. J., Ex. 886; 1 Ex. D. 469; 35 L. T. 224; 24 W. R. 996—C. A.

Each block had not been inserted in the valuation list as one hereditament. But each suite of rooms was charged therein as a separate hereditament:—Held, that for the purpose of the house duty it was not necessary within the Valuation (Metropolis) Act, 1869, s. 76, to make a separate valuation of each block by reason of its not being separately valued in the valuation list, and that the house duty on each block was rightly charged at the aggregate of the sums at which its component tenements were estimated in the valuation list. *Ib.*

3. Exemptions.

Occupation for Purposes of Trade.]—Premises occupied for the purpose of carrying on the business of a telegraph company held to be premises occupied for the purposes of trade within 32 & 33 Vict. c. 14, s. 11, and exempt from inhabited house duty. *Chartered Mercantile Bank of India, London and China* v. *Wilson*, 47 L. J., Ex. 153; 3 Ex. D. 108; 38 L. T. 254; 26 W. R. 235.

The premises known as Weaver's Hall, in the city of London, were occupied by accountants, solicitors and scriveners, merchants, a wine shipper, and a shorthand writer, all of whom used their respective rooms as offices, and by the housekeeper and his family, who resided in the top storey rent free. The premises having been assessed to the inhabited house duty the commissioners discharged the assessment on the ground that the premises were entitled to the exemption granted by 32 & 33 Vict. c. 14, s. 11, since the greater portion of them was occupied for the purposes of trade:—Held, that the premises were not exempt on that ground. *Rusby* v. *Newson*, 44 L. J., Ex. 143; L. R. 10 Ex. 322; 33 L. T. 19; 23 W. R. 632.

Held, also, by Bramwell and Cleasby, BB., that in assessing the premises no abatement could be made, under 32 & 33 Vict. c. 14, s. 11, in respect of those parts which were occupied for the purposes of trade only. *Ib.*

—— **Library—Attendant occupying Sitting-room and Sleeping on Premises.**]—The London Library occupy a house which is used as a library and reading-rooms for the use of members. The income of the library is derived solely from the subscriptions of members, and the library is not conducted with a view to making any profit for the members. The use of a sitting-room and bedroom is given, in addition to his wages, to an attendant who, with his wife, dwells in these rooms, both by day and also by night, for the protection of the premises, and no other person dwells on the premises:—Held, that the library is liable to inhabited house duty, as it does not come within any of the exemptions specified in sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878. *London Library* v. *Carter*, 62 L. T. 466; 38 W. R. 478.

—— **For Professional Purposes.**]—By 57 Geo. 3, c. 25, s. 1, houses occupied for the purposes of trade, and in which no caretaker sleeps at night, are made exempt from assessment to inhabited house duty. By 5 Geo. 4, c. 44, s. 4, this exemption is extended to houses occupied for professional purposes in which no caretaker sleeps at night. By 32 & 33 Vict. c. 14, s. 11, any tenement or part of a tenement occupied as a house for the purposes of trade only is made exempt, even though a servant or other person may dwell therein for the protection thereof:—Held, that the exemption given by 32 & 33 Vict. c. 14, s. 11, does not extend to houses occupied for professional purposes; and that, therefore, a house partly occupied for professional purposes and in which a caretaker sleeps at night, is liable to assessment. *Keene* v. *Dashwood*, 36 L. T. 215.

Charitable Institution—Lunatic Asylum—Doctor's House.]—The medical superintendent of a lunatic asylum was appointed under 16 & 17 Vict. c. 97, s. 55, which enacted that he should be resident in such asylum. He lived in a detached house, separated from the main buildings of the asylum by walls, but within the boundary of the asylum, and having ready access to the main buildings through gates in the walls. The house was specially built and occupied as the residence of the medical superintendent, was suitable for the purpose, and did not contain more accommodation than was reasonably necessary for himself and family. Case 4 of the exemptions in 48 Geo. 3, c. 55, schedule B, exempts from inhabited house duty "any hospital, charity school, or house provided for the reception or relief of poor persons." The main buildings of the asylum were admitted to be within the exemption:—Held, that the medical superintendent's house was a part of the asylum, and therefore

within the exemption. *Jepson* v. *Gribble*, 45 L. J., Ex. 502; 1 Ex. D. 151; 34 L. T. 493; 24 W. R. 460.

—— **Lunatic Asylum—Self-Supporting.**]—A hospital was built by charitable contributions for the reception and relief of lunatics of the poorer classes. The building, real estate, and endowments were vested in trustees, and the institution was managed by a committee of subscribers who gave their services gratuitously. The necessary funds were provided by charitable contributions and endowments, but in addition to these an income was derived from a class of paying patients, whose payments exceeded the cost of their maintenance and produced a profit:—Held, that inasmuch as the institution was not wholly self-supporting, the payments of paying patients did not deprive it of its eleemosynary character, and that it was, therefore, exempt from property tax under 5 & 6 Vict. c. 35, s. 61, r. 6, and also from inhabited house duty under 48 Geo. 3, c. 55, schedule B, case 4. *Cawse* v. *Nottingham Lunatic Asylum*, 60 L. J., Q. B. 485; [1891] 1 Q. B. 585; 65 L. T. 155; 39 W. R. 461; 55 J. P. 582.

An institution for the reception of insane persons was founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there was an annual surplus of profits, which was expended in enlarging and improving the institution:—Held, that the institution being wholly self-supporting was not exempt as an "hospital" within the meaning of 48 Geo. 3, c. 55, schedule B, case 4, which must be restricted to hospitals maintained wholly or in part by charity. *Needham* v. *Bowers*, 21 Q. B. D. 436; 59 L. T. 404; 37 W. R. 125.

—— **Part of Infirmary.**]—Where a house was situate within the precincts of an infirmary, wherein the medical superintendent is required to reside by minute of the managers and by the exigencies of the hospital, but not by statute:—Held, that the house was a necessary part of the infirmary, and therefore exempt under case 4, schedule B of 48 Geo. 3, c. 55. *Wilson* v. *Fasson*, 48 J. P. 361.

"Hospital or Charity School"—School supported partly by Endowments.]—Where pupils at a college pay 90*l.* per annum in fees (besides certain extras) such college is not a "charity school" within the meaning of the Inland Revenue Act, 1808, schedule B, case 4, and is not entitled to exemption from inhabited house duty, notwithstanding that such college receives annually from endowments between seven and eight thousand pounds. *Southwell* v. *Royal Holloway College*, 64 L. J., Q. B. 791; [1895] 2 Q. B. 487; 15 R. 533; 73 L. T. 183; 44 W. R. 315; 59 J. P. 503.

—— **School with Charitable Foundation—Mainly Self-supporting.**] — By a charter of James I. one Thomas Sutton was empowered to found and establish in "the late dissolved Charterhouse beside Smithfield one hospital house, or place of abiding for the finding, sustentation, and relief" of poor people, and to place in the hospital a master and such numbers of poor people as should from time to time be convenient, and also to found and establish at the same place one free school for the instructing, teaching, maintenance, and education of poor children or scholars. The foundation was confirmed by two statutes of 3 Car. 1, whereby the scholars of the foundation were limited to forty. Subsequently a large number of pupils became attached to the school without participating in any of the advantages of the foundation. In 1867 an act was passed empowering the governors to sell the school buildings in Charterhouse, and to purchase a site elsewhere on which to erect buildings for the purpose of a school. A site was purchased at Godalming, and the school was removed there, the hospital remaining in London. The mode of enjoying the privilege of the foundation was afterwards altered by statute, and a system of scholarships and exhibitions, payable out of the funds of the foundation, established. Large fees for board and tuition were payable in respect of scholars not on the foundation. The governing body of the school having been assessed to inhabited house duty upon the school-house and buildings connected therewith:—Held, that the liability to pay the duty was to be determined by the character of the buildings at the time when they were assessed, that at that time the school was not a "charity school" within the meaning of the exemption, and that the assessment was therefore right. *Charterhouse School* v. *Lamarque*, 59 L. J., Q. B. 495; 25 Q. B. D. 121; 62 L. T. 907; 38 W. R. 776; 54 J. P. 790.

Houses Occupied by Servants—Caretaker—Clerk.]—The respondent was a hop-merchant, and was possessed of certain houses having an internal communication throughout, and used for the purposes of his trade. K. lived in the houses in order to take care of them, but he was a clerk in the respondent's employ at a salary of 150*l.* a year, and he resided in the houses together with his wife, children, and servant:—Held, that K. was not "a servant or other person" within the meaning of 32 & 33 Vict. c. 14, s. 11, and that the respondent was not exempt from inhabited house duty in respect of the houses. *Yewens* v. *Noakes*, 50 L. J., Q. B. 132; 6 Q. B. D. 530; 44 L. T. 128; 28 W. R. 562; 45 J. P. 468—C. A. *See now* 44 Vict. c. 12, s. 24.

The appellants, the City Bank, occupied and used as a bank and for the purpose of carrying on their business as bankers therein, the ground floor and basement of a building, which had a separate entrance from the street, and no internal communication with the rest of the building, from which it was structurally separated. The only persons dwelling on the premises at night were two persons, namely, a porter, in the service of the appellants, and a man named Smith, a clerk in their employ, who dwelt therein for the protection of the property. There were also two watchmen employed to patrol the premises at night, but who had no room there. The custody of the keys of the premises was committed by the appellants to Smith, whose duty it was to see that the premises were safely locked up and secured every night, he occupying one small room only, and such residence being merely for the protection of the bank. Upon these facts, the commissioners having held the appellants liable to inhabited house duty upon the above premises, it was, on appeal therefrom:—Held,

that the man Smith, though called a "clerk," dwelt on the premises as a caretaker only, and solely for the purpose of protecting the same, and therefore the case fell within the exemption contained in sub.-s. 2 of s. 13 of 41 & 42 Vict. c. 15; and the appellants were not liable to the duty. *Yewens* v. *Noakes* (supra) discussed and distinguished. *City Bank* v. *Last*, 47 L. T. 254. *See* 44 Vict. c. 12, s. 24.

The appellant, a banker, was the owner of premises which he occupied and used as a bank, and for the purpose of carrying on his business as a banker therein. The premises comprised three coal cellars and a strong room underground, a front and back sitting-room, with a kitchen and scullery on the ground floor, a front sitting-room and two bedrooms on the first floor, and five bedrooms on the second floor. One coal cellar and the strong room, the front and back ground floor room, and the front sitting-room on the first floor, were used by the appellant for the purpose of his bank. The kitchen and scullery, one bedroom on the first floor, and two on the second floor, were occupied by one Somerford, who dwelt therein for the protection of the bank (the rest of the cellars and rooms being unused), and his family, viz., his wife and a son and daughter, both of age, and the son being occupied in the county court office, dwelt there with him, Somerford himself being in the employ of appellant as a clerk at a salary of 100*l.* a year, which included the services of himself and family in taking down and putting up the bank shutters, cleaning the offices, lighting the fires, and answering the door. The commissioners having, upon these facts, confirmed the assessment of the appellant to the inhabited house duty in respect of his occupation of the above-mentioned premises, it was, on appeal therefrom:—Held, that the case came precisely within the judgment of the court of appeal in *Yewens* v. *Noakes* (supra), and that the respondent was liable to the duty to which he had been assessed, and did not come within the exemption in s. 13, sub-s. 2 of 41 Vict. c. 15. *Wootten* v. *Rolfe*, 47 L. T. 252.

The respondents, wholesale clothiers, were possessed of premises the whole of which were used as warehouses and counting-houses, except a sitting-room and bed-room on the top-storey occupied by their cashier, who had a salary of 200*l.* a year, and who slept on the premises solely as caretaker and for their protection, this being considered as part of his duty:—Held, that the income tax commissioners were warranted in finding that the cashier was "a servant or other person" within 41 Vict. c. 15, s. 13, part 2, and that the premises were accordingly exempt from house duty. *Yewens* v. *Noakes* (supra) explained. *Rolfe* v. *Hyde*, 50 L. J., Q. B. 481; 6 Q. B. D. 673; 44 L. T. 775; 45 J. P. 632.

A female caretaker resided on premises, and it was a condition of her employment that her son, who was a clerk, employed elsewhere, should sleep on the premises for their better protection:—Held, that the premises were not exempt from inhabited house duty under 41 Vict. c. 15, s. 13, sub-s. 2. *Wequelin* v. *Wyatt*, 54 L. J., Q. B. 308; 14 Q. B. D. 838; 52 L. T. 807; 33 W. R. 566; 49 J. P. 486.

4. Occupation.

Police Station.]—A superintendent of police lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, and a wall which divided his premises from the remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. He kept the keys of the house, which he had himself furnished, and for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; and he was liable to be removed from station to station at any time:—Held, that he had not such an occupation of the house as to render him liable to inhabited house duty in respect of it. *Bent* v. *Roberts*, 47 L. J., Ex. 112; 3 Ex. D. 66; 37 L. T. 673; 26 W. R. 128.

Public School—Masters' Houses.]—The head master of a public school, residing and taking boarders in a dwelling-house provided by a company carrying on the school, is assessable to inhabited house duty in respect of the house, and not the company. *Clifton College* v. *Thompson*, 65 L. J., Q. B. 231; [1896] 1 Q. B. 432; 74 L. T. 168; 44 W. R. 410; 60 J. P. 599.

Masters of a public school, appointed by the governing body, who reside and take boarders in dwelling-houses provided for them, and for which they pay little or no rent, are separately assessable to inhabited house duty in respect of their houses, and the governing body are not assessable. The relationship between the house-masters and the governing body is not that of agents or servants carrying on the business of the school. *Charterhouse School* v. *Gayler*, 65 L. J., Q. B. 233; [1896] 1 Q. B. 437; 74 L. T. 171; 44 W. R. 412; 60 J. P. 326.

Premises occupied with Dwelling-house—Public School.] — The chapel, class-rooms, gymnasium, racquet courts, and other buildings necessary for the purposes of a public school, although contiguous, do not belong to nor are they occupied with the masters' houses so as to fall within rule 2 of schedule B to 48 Geo. 3, c. 55, and are not assessable. *Clifton College* v. *Thompson* and *Charterhouse School* v. *Gayler*, supra.

—— **Training Stables.**]—The appellant, who carried on the business of a horse-trainer, occupied a dwelling-house to which was attached half an acre of ground, which he used as a training and exercising yard for horses. On three sides of the yard were ranges capable of providing accommodation for thirty-nine horses. Over the stables on one side of the yard were four rooms, in which sleeping accommodation was provided for the stable lads employed by the appellant. The head lad slept in the dwelling-house:—Held, that the stables and training yard "belonged to and were occupied with" the dwelling-house within the meaning of 48 Geo. 3, c. 55, schedule B, r, 2, and were properly charged to inhabited house duty; and that as part of the stables were used for providing sleeping accommodation for the stable lads, the premises did not come within the exemption in favour of business premises provided by 41 Vict. c. 15, s. 13, of the Customs and Inland Revenue Act, 1878. *Cheape* v. *Kinmont* (2 Tax Cases

418) approved and followed. *Lambton* v. *Kerr*, 64 L. J., Q. B. 749; [1895] 2 Q. B. 233; 15 R. 475; 43 W. R. 541; 59 J. P. 775.

Lodgings Let for Portion of a Year.]—Houses let as lodgings in places of public resort, and which are so occupied by the various families hiring them for the season (much less than half a year at a time), and are, during the remainder of the year, left wholly unoccupied, are chargeable to the assessed taxes for the entire year. *Sollett & Glass's Case*, 8 Price, 123, n.

A person keeping a house for the purpose of being let as a ready-furnished lodging-house, is chargeable for a whole year's duty, although it is unoccupied and unfurnished for one entire quarter. *Wright's Case*, 8 Price, 125, n.

And persons letting houses furnished, as lodging-houses, for a part of the year, not being at any time occupied for more than six months successively, and paying three-quarters of a year's assessed taxes, are still liable to the charge for the other quarter; and the commissioners have no power to make any abatement in the assessment, although, during the quarter for which such abatement is claimed, the houses had not been opened. *Skinner's Case*, 8 Price, 124, n.

Removal during Year.]—And the owner of a house, occupied by him till the 26th June, is chargeable with the assessed taxes for the remainder of the year; that is, till the succeeding 5th April; although he quitted possession on the 26th June, and ceased to occupy the house afterwards. *Price's Case*, 8 Price, 122, n.

Unoccupied House.]—It seems that houses left unoccupied by the owner during part of the year, where the furniture is not taken away, are liable to the duties for the whole year. *Colyton, In re*, 8 Price, 117.

—— **Notice to Commissioners.**]—The commissioners are not entitled under 43 Geo. 3, c. 161, s. 15, to discharge persons charged for houses under s. 10, on the ground of their not having been occupied during the whole year, unless notice in writing has been given to the assessor of such houses not having been occupied. *Colyton, In re*, 8 Price, 117.

III. LAND TAX.

1. *Property Liable to*, 179.
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1. Property Liable to.

"Hereditaments" — Railway Tunnel.]—A railway company were empowered by their special act in making their line, where it passed under a highway, to appropriate and use the subsoil in lieu of wholly taking the lands and the surface. The company, in pursuance of their powers, made a tunnel for their line under a highway, leaving the roadway on the top of the tunnel, and merely appropriating the subsoil:—Held, that the tunnel was not a mere easement, but that it came within the meaning of the word "hereditaments" in s. 4 of the Land Tax Act (38 Geo. 3, c. 5), and consequently that the railway company were liable to pay land tax in respect thereof. *Chelsea Waterworks* v. *Bowley* (17 Q. B. 358) distinguished. *Metropolitan Ry.* v. *Fowler*, 62 L. J., Q. B. 553; [1893] A. C. 416; 1 R. 264; 69 L. T. 390; 42 W. R. 270; 57 J. P. 756—H. L. (E.)

—— **Waterworks Company — Pipes and Mains.**]—A waterworks company is not liable to pay land tax in respect of the land through or on which, by a parliamentary power, it is entitled to lay and does lay its mains and pipes for the conveyance of water, such a power being only in the nature of an easement, and therefore not making the company "holders of lands or of an hereditament," within the Land Tax Acts. *Chelsea Waterworks* v. *Bowley*, 17 Q. B. 358; 20 L. J., Q. B. 520; 15 Jur. 1129.

—— **Bridge Tolls.**]—By 38 Geo. 3, c. 5, for granting a land tax for 1798, it was enacted that all manors, messuages, lands, tenements, tolls, &c., and all hereditaments of whatever nature or kind soever they be, situate, lying, and being and happening, or arising, should be charged to the land tax. By 38 Geo. 3, c. 60, for making the land tax perpetual, it was enacted that the sums charged by 38 Geo. 3, c. 5, in respect of the manors, lands, tenements, and hereditaments in the act mentioned, should be raised for ever. An act incorporating a bridge company authorised the company to take tolls, and enacted that the shares of the proprietors should be personal estate, and not in the nature of real property:—Held, that the company was liable under 38 Geo. 3, c. 60, to be rated to the land tax in respect of their tolls, as being a tenement and hereditament within the true meaning of that act. *Vauxhall Bridge Co.* v. *Sawyer*, 6 Ex. 504; 20 L. J., Ex. 304.

Bridge tolls, which do not arise from the mere user of land, but are granted to a bridge company, as a franchise, by act of parliament, are an hereditament of themselves, and liable to be assessed as tolls to the land tax, by virtue of 38 Geo. 3, c. 5, s. 4. *Charing Cross Bridge Co.* v. *Mitchell*, 4 El. & Bl. 549; 24 L. J., Q. B. 249; 1 Jur. (N.S.) 608; 3 W. R. 378—Ex. Ch.

The fact that the land tax on the land on which the abuttals are built has been redeemed does not relieve the company from the liability to be assessed for the tolls. *Ib.*

By a bridge act, the bridge and roads "shall not be charged or chargeable with any parochial rates or assessments whatsoever for or in respect of the tolls":—Held, that the exemption was confined to the rates and assessments laid upon the parish for local purposes, and did not extend to the land tax. *Waterloo Bridge Co.* v. *Cull*, 1 El. & El. 213; 28 L. J., Q. B. 70; 5 Jur. (N.S.) 464; 7 W. R. 87. Affirmed, 1 El. & El. 213; 29 L. J., Q. B. 10; 5 Jur. (N.S.) 1288—Ex. Ch.

The land on the north side of the river was redeemed from land tax before it was conveyed to the bridge company:—Held, that such redemption was immaterial, as the tolls were a separate tenement. *Ib.*

By s. 20 of 6 Geo. 3, c. 66, Battersea bridge was exempt from all rates and taxes:—Held, that tolls were likewise exempt. *Triton* v. *Nicholls*, 5 W. R. 24.

Quit-rent.]—An owner of a quit-rent shall pay taxes only in proportion to what the land pays; but where the matter has been examined

by the commissioners of the land tax, the court will not re-examine it. *Brockman* v. *Honeywood*, 1 P. Wms. 328.

Renewable Leaseholds.]—The 38 Geo. 3, c. 60, s. 37, applies to leaseholds renewable by custom. *Neame* v. *Moorsom*, 36 L. J., Ch. 274; L. R. 3 Eq. 91; 12 Jur. (N.S.) 913; 15 W. R. 51.

Royal Exchange.]—The corporation of the Royal Exchange Assurance Company in London is liable to be assessed to the land tax, in its corporate capacity as a corporation. *Exchange Assurance Co.* v. *Vaughan*, 1 Burr. 155; 1 Ld. Ken. 320.

Exemption—Hospitals.]—Taxing acts must be construed strictly. And where therefore land which, in 4 Will. & M., being employed for charitable purposes, as the site of an almshouse or hospital, was on that account declared by a statute then passed (4 Will. & M. c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in 38 Geo. 3, c. 5, the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the court of chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt. *Cox* v. *Rabbits*, 47 L. J., Q. B. 385; 3 App. Cas. 473; 38 L. T. 430; 26 W. R. 483—H. L. (E.)

—— **Residence in a Hospital.**]—A house within the limits of a hospital, appropriated to an officer of the hospital for the time being, is not assessable. *Harrison* v. *Bulcock*, 1 H. Bl. 68.

The proviso in 38 Geo. 3, c. 5, s. 25, exempting hospitals from land tax, applies only to hospitals and sites of hospitals founded before the passing of the 38 Geo. 3, c. 60, the act by which the former act was made perpetual. *Colchester* (*Lord*) v. *Kewney*, 4 H. & C. 445; 35 L. J., Ex. 204; L. R. 1 Ex. 308; 12 Jur. (N.S.) 743; 14 L. T. 888; 14 W. R. 994. Affirmed, 36 L. J., Ex. 172; L. R. 2 Ex. 253; 16 L. T. 463; 15 W. R. 930—Ex. Ch.

—— **Crown Property.**]—An asylum for the maintenance and education of children of soldiers who have fallen in active service, built, endowed, and entirely maintained out of a fund subscribed by the public, and administered by commissioners appointed by the crown, is not exempted, quâ crown property, from paying the land tax. *Ib.*

Land previously chargeable with land tax is not exempted by becoming crown property. *Ib.*

The king's dockyards are not assessable. *Att.-Gen.* v. *Hill*, 2 M. & W. 160; 6 L. J., Ex. 105.

—— **Lands Exempt before Statute.**]—Houses built on lands embanked from the Thames, in pursuance of 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, were not liable to be assessed to the general land tax imposed by 27 Geo. 3, c. 5, though such act is conceived in general terms, and is subsequent in point of time to the act creating the exemption. *Williams* v. *Pritchard*, 4 Term Rep. 2; 2 R. R. 310. And see *Perchard* v. *Heywood*, 8 Term Rep. 468.

—— **Colleges.**]—Buildings of a college in one of the universities taken into and made part of the college between the passing of the first Land Tax Act and the act which made that tax perpetual, are exempted. *All Souls' College* v. *Costar*, 3 Bos. & P. 635.

But where a college, soon after the passing of the first Land Tax Act, purchased land of a parish under a private act, which provided that the college should pay all taxes which the premises then were, or should thereafter be, subject to:—Held, that the lands purchased were not exempted. *Ib.*

Tithe Rent-charge.]—The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, in lieu of the extraordinary charge previously levied under the Tithe Commutation Acts, is not liable to land tax. *Carr* v. *Fowle*, 62 L. J., Q. B. 177; [1893] 1 Q. B. 251; 5 R. 163; 68 L. T. 123; 41 W. R. 365; 57 J. P. 136.

On Exchange of Lands.]—Upon an exchange of lands under 6 & 7 Will. 4, c. 115 (which contains a clause assimilating the tenure and quality of lands exchanged and allotted to that of the lands in respect of which the allotment or exchange is made), the statute does not transfer a liability to land-tax from one property exchanged to the other. *Cooch* v. *Walden*, 46 L. J., Ch. 639.

In What County—New River Company.]—By a charter of King James I. the governor and company of the new river were incorporated, and the new river, cut, and stream granted to them in fee. The shares of the proprietors have been held to be real estate. By 38 Geo. 3, c. 5, s. 57, all persons having shares in the new river, are to be assessed by the commissioners for the city of London, and the tax is to be paid by the treasurer to such person as the commissioners should appoint. From time to time various shareholders redeemed the land tax on their shares. The new river commences in Hertfordshire, and runs for three miles through a parish in that county. The river, as it existed in 1798, has never been redeemed from land tax except as aforesaid. The company has since that time purchased land in Hertfordshire, the land tax on the whole of which, with the exception of two roods and ten perches, has been redeemed:—Held, first, that no other land tax is payable upon the property of the New River Company as it existed in 1798, than that imposed by s. 57, and consequently that the river is not taxable in Hertfordshire. *New River Co.* v. *Hertford Land Tax Commissioners*, 2 H. & N. 129; 26 L. J., Ex. 281; 5 W. R. 611.

Held, secondly, that, as to the property since purchased, the land tax of which had not been redeemed, such property continues to be taxable in Hertfordshire. *Ib.*

2. Redemption.

Construction of Statutes.]—As to construction of the Land Tax Redemption and Sale Act, see *Williams* v. *Steward*, 3 Mer. 472.

The Confirming Statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land Tax Redemption Acts, arising from the property so sold not having been originally saleable, or not

having been property sold, within the meaning and according to the directions of the Acts. *Beadon* v. *King*, 9 Hare, 499; 22 L. J., Ch. 111.

The restriction expressed or implied in the words of s. 25 of the confirming stat. 57 Geo. 3, c. 100, "the titles derived under such sales," construed to mean that the acts were not to operate upon titles anterior to the sales under those acts, and not to limit the confirmation to the titles of such purchasers only. *Ib.*

Under the statutes for the redemption of the land tax, the lords commissioners are placed in the position of vendors, and, therefore, if the trustees of a charity should purchase the property of the charity under those acts, they would not be purchasing from themselves but from the lords commissioners. *Ib.*

The Confirming Statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling under the acts, being both vendor and purchaser. *Ib.*

An objection to the validity of a sale under the Land Tax Redemption Acts, upon the ground that the lands were not properly saleable, and apart from any question of fraud, were not properly sold under the acts, is a legal objection; and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. *Ib.*

If it were shown that a purchase under the Land Tax Redemption Acts had been effected by fraud, the court would rectify it notwithstanding the confirmation statutes, for a purchase so effected would not acquire validity from those statutes. *Ib.*

Effect of — Manor.] — When a manor has once been charged with land tax, and the tax once redeemed, no subsequent inclosure of the waste lands will render the manor liable to reassessment. *Hodgson* v. *Pearson*, 31 L. T. 679.

—— **Bridge—Abuttals.**]—The redemption of land tax on the land on which the abuttals of a bridge are built does not relieve the bridge company from being assessed for the tolls. *Charing Cross Bridge Co.* v. *Mitchell*, 4 El. & Bl. 549; 24 L. J., Q. B. 249; 1 Jur. (N.S.) 608; 3 W. R. 378—Ex. Ch.

Sale by Ecclesiastical Corporation for — Minerals.]—The 39 Geo. 3, c. 21, s, 12, in effect provides that upon sales of lands by ecclesiastical corporations for redemption of land tax, the minerals shall not pass by the conveyance of the lands, but shall be always absolutely excepted or reserved to such ecclesiastical corporations. A conveyance of prebendal land, executed under this statute in 1799, contained a general exception of minerals, but purported to except out of such exception the clay under twenty perches of the land:—Held, that the exception out of the exception was not rendered effectual by 57 Geo. 3, c. 100, s. 25, for that act was intended to remedy defects in the mode of conveyance, and not in the subject-matter conveyed, and that the property in the clay under the twenty perches did not pass by the deed of 1799. *Whidborne* v. *Ecclesiastical Commissioners*, 47 L. J., Ch. 129; 7 Ch. D. 375; 37 L. T. 346.

The 39 Geo. 3, c. 21 only applies to sales subsequent to the act. *Wilson* v. *Grey*, 36 L. J., Ch. 62; L. R. 3 Eq. 117.

A contract for the sale of lands, with their appurtenances, belonging to a rector, was entered into under 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase money into the Bank of England, as directed by the acts, and the execution of the conveyance, the 39 Geo. 3, c. 21 was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold, should be absolutely excepted and reserved; and that the provisions of that act should, in the execution of the former acts, be applied as if they had been specially enacted in those acts:—Held, that the minerals passed to the purchaser. *Ib.*

Lease by Bishop—Reservation in.]—In a lease of lands belonging to a bishop in right of his see, granted after 42 Geo. 3, c. 116, the land tax having been redeemed by such bishop with money raised pursuant to the act, such redeemed land tax must, in addition to the ancient and accustomed rent, be expressly reserved and made payable during the term granted by the lease; and, therefore, a lease of such lands granted by a bishop, in which the redeemed land tax was not so reserved and made payable, is voidable by the successor. *Doe* d. *Rochester* (*Bishop*) v. *Bridges*, 1 B. & Ad. 847; 9 L. J. (O.S.) K. B. 113.

By Incumbent—Interest on Purchase-money.]—The representatives of a deceased incumbent of a rectory who has, out of his own estate, redeemed the land tax prior to 1799, are entitled to recover from the succeeding incumbent the interest of the purchase-money, at the rate of 3*l.* per cent. on such purchase-money. *Kilderbee* v. *Ambrose*, 10 Ex. 454; 3 C. L. R. 181; 24 L. J., Ex. 49.

—— **Contract for Purchase of Land—Completion.**]—A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land tax, is not bound to complete his purchase, where it appears that, upon the prior sale for the redemption of the land tax, the rector was himself the actual purchaser in the name of his curate. *Grover* v. *Hugell*, 3 Russ. 428; 27 R. R. 103.

Presumptions as to.]—A man who redeems his land tax must be presumed to do so to exonerate his estate from a periodical and troublesome outgoing, and not to transmit as money to his personal representatives. *Weld* v. *Tew*, Beat. 275.

The court will not declare the land tax on an estate to have been redeemed merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has in fact taken place. *Sparkes, Ex parte*, M'Clel. 518.

Consolidation of Charge.]—A person having a partial interest, redeemed the land tax on three several tenements, by one contract and at one price:—Held, that the three charges were not consolidated so as to give him one aggregate charge on all tenements, but he acquired three separate charges on the three several tenements. *Cox* v. *Coventon*, 31 Beav. 378; 8 Jur. (N.S.) 1142; 7 L. T. 78; 10 W. R. 829.

By Owner of Leasehold Interest—Merger.]—The owner of a leasehold interest redeemed the land tax under 38 Geo. 3, c. 60, by the transfer of stock to the commissioners; he exercised no option as to keeping the charge on foot:—Held, that there was no merger of the charge, but that he was owner of a specific charge on the premises. *Neame* v. *Moorsom*, 36 L. J., Ch. 274; L. R. 3 Eq. 91; 12 Jur. (N.S.) 913; 15 W. R. 51.

Held, also, that the land tax did not revive on the expiration of the lease. *Ib.*

By Tenant for Life.]—A., being under a settlement tenant for life in remainder, after prior estates for life in tail with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; and A. being in a dying state and having no issue, made his will and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land at his death continues to be part of his personal estate. *Trevor* v. *Trevor*, 2 Myl. & K. 675.

Land tax redeemed by a cestui que use for life and in possession at the time of the purchase is personal property. *Monday* v. *Hurley*, 5 L. J., (o.s.) K. B. 212.

A., tenant for life, with remainder to his children, redeems the land tax on the estate with his own money, introducing into the contract for the redemption his own name and that of another person as trustees. A. afterwards became bankrupt; on bill by his assignees against a purchaser of his life estate, and of the land tax so redeemed, a specific performance decreed, as being within the stat. 1 Jac. 1, c. 15, s. 5. *Emly* v. *Guy*, 3 Mer. 702.

On petition by a tenant for life, the court ordered that a sum of money, which the deputy remembrancer had received for lands taken for the public service, might be applied in part of a sum previously paid by the petitioner to redeem the land tax, he not having taken advantage of the clause in the Redemption Act, which enabled him to sell part of the lands, although the next in the remainder was a minor. *Shephard, In re*, Wightw. 131.

—— **Growing Timber.**]—When a tenant for life, without impeachment for waste, makes an absolute sale and conveyance of land under 42 Geo. 3, c. 116, s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance, passes with the land; and the price of it, as well as that of the land, must be paid into the Bank of England, although the price of the land without the timber makes up the sum for which the land tax is to be redeemed. *Doe* d. *Blewitt* v. *Phillips*, 4 P. & D. 562; 1 Q. B. 84; 10 L. J., Q. B. 68.

Tenant for Life—Rent-charge—Sale—Merger.] An equitable tenant in fee contracted to purchase a rent-charge in lieu of land tax redeemed, which was charged upon the estates of which he was so tenant for life in fee, and the rent-charge was conveyed to trustees of the estates. Subsequently, he contracted to sell the estates free from any incumbrances:—Held, first, that land tax was entirely extinguished. *Bulkeley* v. *Hope*, 1 Kay & J. 482; 24 L. J., Ch. 356; 1 Jur. (N.S.) 864; 3 W. R. 360.

Held, secondly, that the rent-charge in lieu thereof was merged in the inheritance, and, consequently, that the purchaser was entitled to hold the estates free from such charge. *Ib.*

—— **Right to Pay off.**]—Under 42 Geo. 3, c. 116, a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest, so as to free the land from the charge and payment of the interest to which it was subject, for the benefit of such tenant. *Cousins* v. *Harris*, 12 Q. B. 726; 17 L. J., Q. B. 273; 12 Jur. 835.

By Crown—Contract to Grant Lease.] — A. agreed with B. to grant him the lease of a house (to be built), when it was complete, finished, and fit for habitation. B. being constantly on the premises during the building, took possession, and then made various objections on the ground that the house was not complete, finished, and fit for habitation. A. claimed 3*l.* per annum additional rent, on the ground that the crown, since the contract, had redeemed the land tax which A. was liable to pay:—Held, that s. 120 of 42 Geo. 3, c. 116, did not apply. *Faulkner* v. *Llewellin*, 9 L. T. 251; 11 W. R. 1055. Affirmed 9 L. T. 557; 12 W. R. 193.

Bequest to Married Woman — Mortgage by Husband.]—Land tax having been redeemed, was bequeathed to a married woman. Afterwards the husband, having registered his marriage in the land tax office in the manner required by 38 Geo. 3, c. 60, s. 78, mortgaged the land tax in the form of assignment which is prescribed by the act, he convenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—Held, that the husband acquired an absolute power of disposition over it. *Pigott* v. *Pigott*, 37 L. J., Ch. 116; L. R. 4 Eq. 549; 16 L. T. 766.

Natural Produce of Lands.]—The New River Company is not liable to be assessed to the land tax in respect of the springs rising in land on which land tax has been redeemed, inasmuch as the redemption of the land tax on the land on which the wells stand, relieves the land and all its natural productions from any further tax, though possibly at the time of such redemption it might not have been known that such springs existed. *New River Co.* v. *Hertford Land Tax Commissioners*, 2 H. & N. 129; 26 L. J., Ex. 281; 5 W. R. 611.

Sale by Hospital—Expenses of Sale.]—A corporation intitled "the Wardein and Poore of the Hospitall of the Holy Trinitie in C., of the foundation of J. W., archbishop of C." by deed, sealed with their common seal, in which they described themselves as "The Warden and poor of the hospital of the Holy Trinity in C.," omitting the name of their founder, sold part of their estate for 50*l.*, paid in discharge of the costs of the sales made by them for the redemption of their land tax:—Held, that the application of the 50*l.* to defray the expenses of the

sale of the corporation's other estates was a valid payment within 39 Geo. 3, c. 6, s. 36. *Croydon Hospital* v. *Farley*, 2 Marsh. 174; 6 Taunt. 467.

Infant Tenant in Tail.]—Guardians of an infant tenant in tail redeemed the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery, and settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words "all the estate, &c.":—Held, that the land tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will. *Blundell* v. *Stanley*, 3 De G. & Sm. 433; 18 L. J., Ch. 300; 13 Jur. 998.

In the application of the personal estate of an infant tenant in tail to redeem the land tax, by persons not having authority within the act, the court will determine by analogy to the option to be reserved by guardians, &c., under the act for the personal representative of the infant to charge the estate in possession of the remainderman. *Ware* v. *Polhill*, 11 Ves. 257; 8 R. R. 144.

The guardian of an infant tenant in tail redeemed the land tax on the estate, but made no declaration, in pursuance of the 38 Geo. 3, c. 60, so as to make the land tax a charge on the inheritance. In a suit by the guardian who was also administrator of the infant tenant in tail, it was declared that the land tax was an annuity or rent charge in favour of the infant's personal estate, and the court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail, the personal representative of the infant claimed the benefit of the decree against the inheritance:—Held, that the declaration effectually charged the inheritance, and (the legal charges executed by the tenant for life and tenant in tail having failed) the tenant in remainder after the determination of these estates was directed legally to charge the estate with the annuity. *Ware* v. *Polhill*, 5 De G. & Sm. 455.

Persons acting as guardians of an infant tenant in tail redeemed the land tax out of his personal property; and in a suit against the tenant in tail in remainder, the court charged the real estates with an annuity equal in amount to the land tax for the benefit of the infant's personal estate, and directed the tenant in tail to give a legal security on the estates. No recovery was ever suffered, and a subsequent tenant in tail sold the estate free of land tax to a purchaser for value. No express notice of the annuity was given to the purchaser, but the abstract of title disclosed the fact that the land tax was redeemed by the guardians of an infant tenant in tail, and that he died before attaining twenty-one:—Held, that this was sufficient constructive notice of the annuity; and the annuity declared to be a subsisting charge on the land. Held, also, that negligence on the part of the annuitant was no answer to his claim. *Ware* v. *Egmont*, 4 De G. M. & G. 460; 24 L. J., Ch. 361; 1 Jur. (N.S.) 97; 3 Eq. R. 1; 3 W. R. 48.

Payment to Infant's Agent.]—Testamentary guardian of infant sold part of the estates for redemption of land tax. Vendee paid purchase-money to agent of vendor, who was also agent for vendee, and conveyance was executed; but agent did not pay money into bank as required by 38 Geo. 3, c. 60. Purchaser entered and continued in possession for many years paying land tax. Nearly twenty years after, attaining his age, heir-at-law brought ejectment against purchaser; bill by purchaser to restrain which and obtain confirmation of contract, was dismissed without costs. *Hicks* v. *Morant*, 3 Y. & J. 286. Affirmed, 2 Dow & Cl. 414; 5 Bli. (N.S.) 643.

Property of Lunatics.]—Notwithstanding the provisions contained in the Land Tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the lord chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land tax. *Wade, In re*, 1 H. & Tw. 202.

Land tax on a lunatic's estates redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts, under the master's report, that it was for his benefit: no equity for a charge in favour of the next of kin. *Phillips, Ex parte*, 19 Ves. 118; 12 R. R. 151.

Surplus Stock.]—Surplus stock, arising from sales under the acts for the redemption of the land tax, will be ordered to be transferred to the party who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *Fortesque, In re*, 3 Russ. 128.

Surplus stock purchased under 42 Geo. 3, c. 116, s. 100, for the redemption of the land tax, cannot be applied to permanent improvement of the lands in respect of which the land tax was redeemed. *Nether Stowey Vicarage, In re*, L. R. 17 Eq. 156; 29 L. T. 604; 22 W. R. 180.

Proof of Redemption.]—The proper evidence to show that the land tax has been redeemed is the certificate of the commissioners or a copy of the register. *Buchanan* v. *Poppleton*, 4 C. B. (N.S.) 20; 27 L. J., C. P. 210; 4 Jur. (N.S.) 414; 6 W. R. 372.

If there is a discrepancy between the contract for and the certificate of redemption on the one hand, and the schedule to such contract and certificate and the duplicate assessment on the other, the contract and certificate is to be deemed the true description, in the absence of affirmative evidence to the contrary, which evidence it lies upon the land tax commissioners to produce. *Hodgson* v. *Pearson*, 31 L. T. 679.

3. Contracts between Landlord and Tenant.

Words of Contract—Net Rent.]—A net rent is a sum to be paid to the landlord clear of all deductions; and if a party agrees to take a lease at a net rent he cannot object that the lease contains a covenant for him to pay the land tax and sewers rate. *Bennett* v. *Womack*, 3 Car. & P. 96; 1 M. & Ry. 624; 7 B. & C. 627; 6 L. J. (O.S.) K. B. 175; 31 R. R. 270.

—— **All Taxes.**]—A tenant verbally agreeing "to pay all taxes," is bound to pay the land tax, although not specifically mentioned. *Amfield* v. *White*, R. & M. 246; 27 R. R. 745.

—— **All Outgoings.**]—Agreement between a landlord and tenant for a lease of a farm for a term of years, at a yearly rent, "free of all outgoings":—Held, that the word "outgoings" included the land tax and tithe commutation rent-charge. *Parish* v. *Sleeman*, 1 De G. F. & J. 326; 29 L. J., Ch. 96; 6 Jur. (N.S.) 385; 1 L. T. 506; 8 W. R. 166.

—— **Without Deduction.**]—On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement for or in any respect whatsoever," the grantee is entitled to receive the full rent without deducting the land tax. *Bradbury* v. *Wright*, 2 Dougl. 624.

—— **Parliamentary Tax.**]—The land tax is a parliamentary tax, within the meaning of an agreement to pay rent and all taxes, parliamentary and parochial. *Manning* v. *Lunn*, 2 Car. & K. 13.

A lessee covenanted "to pay all parliamentary, parochial and other taxes, tithes and assessments, then or thereafter to be issuing out of all or any of the demised premises, or chargeable upon the landlords or tenants thereof for the time being in respect thereof":—Held, that a rent-charge imposed on the premises in lieu of the land tax, which had been purchased by a former tenant of the premises, under 42 Geo. 3, c. 116, was a parliamentary tax or assessment within the meaning of the covenant. *Christ's Hospital* v. *Harrild*, 2 Man. & G. 706; 3 Scott (N.R.) 126.

—— **Improvement of Estate.**]—Under a covenant in a building lease by the tenant to pay all the taxes, except the land tax, the landlord is only to pay the old land tax, and not the additional land tax occasioned by the improvement of the estate. *Hyde* v *Hill*, 3 Term Rep. 377. And see *Rex* v. *Scot*, 3 Term Rep. 602.

A. demised land to B. upon a building lease, at the yearly rent of 60*l.* clear of all rates and assessments, the sewers rate and land tax excepted, with the usual covenant for payment of rent. B. having by building on the land increased its rateable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value. *Smith* v. *Humble*, 15 C. B. 321; 3 C. L. R. 225. See also *Watson* v. *Home*, 7 B. & C. 285; 1 M. & Ry. 191; 6 L. J. (O.S.) K. B. 73; 31 R. R. 200.

Deduction from Rent — Time.]—A tenant having paid land tax and paving rates for six successive years, without claiming any deduction from his landlord for these payments when he paid his rent:—Held, that such deduction should be made from the rent of the current year, and that the tenant could not claim it from his landlord at any subsequent period. *Andrew* v. *Hancock*, 3 Moore, 278; 1 Br. & B. 37; 21 R. R. 569. S. P., *Stubbs* v *Parsons*, 3 B. & Ald. 516.

Where the tenant of premises under a lease, which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax:—Held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land tax, on the ground of their being involuntary payments. *Spragg* v. *Hammond*, 4 Moore, 431; 2 Br. & B. 59.

—— **Amount.**]—Where a landlord covenants to pay the land-tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more. *Whitfield* v. *Brandwood*, 2 Stark. 440; 20 R. R. 712.

A landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant if he pays the tax according to the rent which he receives, although the premises may be taxed at a higher rate. *Yea* v. *Leman*, 1 Wils. 21.

Redemption—Deduction on Fee-Farm Rent.]—A fee-farm rent belonging to the crown was in pursuance of 22 Car. 2, c. 6, and 22 and 23 Car. 2, c. 24, vested in trustees for sale. The owners of the land, out of which it was payable, redeemed the land tax chargeable on it:—Held, that they were notwithstanding entitled to deduct 4*s.* in the pound out of the rent, under 38 Geo. 3, c. 5, ss. 30, 31, which enact, that all receivers of fee-farm rents due to any person claiming by any grant or purchase from or under the crown, by virtue of the 22 & 23 Car. 2, shall allow 4*s.* for every pound of the rents to the party paying the same, the effect of 38 Geo. 3, c. 60, and 42 Geo. 3, c. 116, being to perpetuate those sections. *Moody* v. *Wells* (*Dean and Chapter*), 1 H. & N. 40; 25 L. J., Ex. 273.

—— **Right to Charge for.**]—Where an owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax:—Held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed. *Ward* v. *Const*, 10 B. & C. 634; 5 M. & Ry. 402; 8 L. J. (O.S.) K. B. 291.

4. Assessment and Recovery.

Apportionment.]—Land tax shall not be apportioned as between tenant for life and remainderman, the statute of 11 Geo. 2, c. 19, s. 15, having no application to this case. *Sutton* v. *Chaplin*, 10 Ves. 66.

Tithe Rent-charge—Basis—Rateable Value.]—In assessing tithe rent-charge to the land tax the commissioners, under 42 Geo. 3, c. 116, s. 180, are bound to use as a basis the rateable or net annual value, and not the gross estimated rental. *Reg.* v. *Land Tax Commissioners*, 58 J. P. 446.

Assessment is Conclusive.]—An assessment under 43 Geo. 3, c. 99, and 43 Geo. 3, c. 161, is final and conclusive unless appealed against in the manner prescribed by 43 Geo. 3, c. 99, s. 24. *Allen* v. *Sharpe*, 2 Ex. 352; 17 L. J., Ex. 209.

Information or Scire facias.]—Arrears of assessed taxes cannot be recovered by information in the nature of a popular action of debt, under 43 Geo. 3, c. 99, s. 45, and 5 & 6 Will. 4, c. 20,

s. 13, inasmuch as the latter section provides that the amount "shall be recovered from the person and persons making default of payment thereof, as a debt upon record to the king's majesty." The proceedings ought to be by scire facias, or extent, or information upon the record itself. *Att.-Gen.* v. *Sewell*, 4 M. & W. 77; 6 D. P. C. 673; 6 Car. & P. 376; 1 H. & H. 262; 7 L. J., Ex. 245.

New River Company.]—Whether an annuity or rent-charge of the profits of the New River Company is to bear the full assessment to the land tax, or to have the benefit according to the proportion of a reduction in consequence of an assessment upon the profits of company at an under value, quære. The bill by the annuitant was dismissed, the court refusing to raise an equity as to the profit arising from disobedience to the act. *Adair* v. *New River Co.*, 11 Ves. 429.

Transfer to other Districts.]—Two properties in one parish had been assessed to the land tax, from the time of the earliest schedule in existence, as part of the district or place, in which was comprised the next adjoining parish, these two properties, and a third property which had been reputed to be extra-parochial. The only lands in this district liable to land tax since 1806 had been those belonging to these three properties. In 1873 the two first-mentioned properties were transferred to and assessed in the parish in which they were situated, under 4 & 5 Will. 4, c. 60, s. 1; and upon appeal by the owner of the third property the land tax commissioners affirmed the transfer:—Held, that the usage established under such circumstances ought to be sustained, and that the transfer and new assessment must be set aside under 38 Geo. 3, c. 5, ss. 36, 53. *Reg.* v. *Land Tax Commissioners*, 36 L. T. 374.

On Redemption by Invalid Sale.]—See *Warner* v. *Potchett*, infra.

Action for Wrongful Distress.]—The judgment of the commissioners of land tax on appeal is conclusive in an action brought against the officer for levying under a warrant of distress. *Patchett* v. *Bancroft*, 7 Term Rep. 367; 4 R. R. 465.

An action of trespass lies for a distress made under a bad assessment, notwithstanding the power of appeal to the commissioners given by 38 Geo. 3, c. 5, to parties aggrieved by being overrated. *Charleton* v. *Alway*, 11 A. & E. 993; 3 P. & D. 818; 9 L. J., Q. B. 237.

Upon the plaintiff refusing to pay a rate, the collector, acting under a warrant of distress, signed by the defendant and another commissioner, seized a piece of furniture of the plaintiff's on the premises. The plaintiff brought an an action for an illegal distress:—Held, that the distress warrant, and the proceedings thereunder, being perfectly regular, the case came within *Patchett* v. *Bancroft* (7 Term Rep. 367; 4 R. R. 465), and that the plaintiff could not go behind the warrant, which justified the persons executing it; and that, the quota being established, the rate assessed not being appealed against must be considered as the rate payable under the judgment of the commissioners, and the plaintiff, if he objected to the amount, should have appealed to them under the provisions of 38 Geo. 3, c. 5, by which their decision was made final and conclusive. *Simpkin* v. *Robinson*, 45 L. T. 221.

In an action of trespass against a land tax collector, on a dispute as to whether the plaintiff's lands were in the parish for which the defendant was collector, the question for the jury is whether the whole or any part of the lands were in that parish, so as to comply with ss. 36 and 53 of 33 Geo. 3, c. 5. *Margetts* v. *Morley*, 1 L. J., K. B. 112.

—— **Notice of Action.**]—In an action of trespass against a land tax commissioner for authorising a seizure of the plaintiff's goods for a land tax that had previously been redeemed but without the defendant's knowledge, the defendant is entitled to notice of action under 5 & 6 Will. 4, c. 20, s. 19. *Thomas* v. *Williams*, 1 D. & L. 624; 13 L. J., Ex. 87.

Distress—Presence of a Constable.]—The presence of a constable is necessary at the breaking open of the outer door of a house previously to a seizure of goods for land tax, under 38 Geo. 3, c. 5, s. 17, and the necessity of such presence is not confined to the breaking open of a box or chest within the house. *Foss* v. *Racine*, 4 M. & W. 419; 7 D. P. C. 53; 8 Car. & P. 699; 8 L. J., Ex. 38.

A collector of taxes has no right to take a constable or other person with him into the house of a party of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such arrears if necessary, unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted. *Rex* v. *Clark*, 4 N. & M. 671; 3 A. & E. 287; 1 H. & W. 252; 4 L. J., M. C. 92.

Where, however, a collector, unwarrantably, but without any objection being made, introduced B., a constable, into the house of D., a person from whom he demanded taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduced C., another constable, upon whom D. committed an assault, it is no answer to an indictment against D. for the assault on C. in the execution of his duty, that the collector had wrongfully introduced B. *Ib.*

A collector demanded taxes due from D., the owner of a house, and intimated, in case of nonpayment, he should distrain; upon which D. threatened A. with personal violence, but ultimately promised to send the amount on a certain day. This promise not being performed, A. went again to D.'s house, and demanded the taxes of D. D. left the room in which A. was, and fastened the outer door:—Held, that A. was justified in unfastening the door and introducing constables. *Ib.*

Held, also, that, upon D.'s returning into the room, after the introduction of the constables, accompanied with a number of men, and commanding C., one of the constables whom he knew to be such, to leave the house, it was the duty of C. and the other constables to remain. *Ib.*

—— **Warrant.**]—A collector of taxes may distrain without having his warrant with him. *Ib.*

—— **Previous Demand.**]—The demand required by 43 Geo. 3, c. 99, s. 33, previously to a distress being levied for assessed taxes, need not be made in writing, nor personally on the party from whom they are due; it is sufficient if a demand

has in fact been made, and there has been a refusal on the ground of inability to pay, or for any other cause. *Rex* v. *Ford*, 4 N. & M. 451; 2 A. & E. 588; 1 H. & W. 46; 4 L. J., M. C. 58.

It is not essential that the demand to which the refusal applies should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. *Ib.*

—— **Assessment in Wrong Parish.**]—Where a party has been returned in the schedule of the collector of land tax for a particular parish, under 43 Geo. 3, c. 141, as in default for a sum assessed upon him for land tax in that parish; and the schedule having been duly certified to the court of exchequer, a levari facias was issued, under which such sum was levied on his goods, and paid into the receipt of the exchequer, the court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish. *Glatton Land Tax, In re*, 4 M. & W. 570; 1 H. & H. 430; 8 L. J., Ex. 113.

—— **Arrears.**]—Commissioners under an act of parliament, directing them, yearly and every year, to rate, charge, tax, and assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, and added to it the arrears of the past years, and levied for the assessments so made, including such arrears:—Held, that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad. *Newton* v. *Young*, 1 Bos. & P. (N.R.) 187.

—— **Ownership and Occupation.**]—In an assessment to the land tax, the rectorial and vicarial tithes were assessed together, as in the ownership and occupation of C., when, in point of fact, he was owner of the vicarial, and occupier only of the rectorial tithes:—Held, that such assessment was bad, and a distress levied under it illegal. *Charleton* v. *Alway*, supra.

—— **Past Half-year—Excess.**]—The distress was made for a past half-year; there was consequently due an assessment on the vicarial tithes for the current half-year:—Held, that the collector could not justify the distress, by applying the sum which was in excess to this claim, no demand on the current half-year having been made. *Ib.*

5. Commissioners.

Duty and Powers of.]—The court will grant a summary application against commissioners of land tax to compel a due assessment of the land tax. *Att.-Gen.* v. *Land Tax Commissioners*, 12 Price, 647.

But the court has no jurisdiction to order commissioners to cause the proportion charged upon a division to be equally assessed. *Holborn Land Tax Assessment, In re*, 5 Ex. 548.

The 1 & 2 Vict. c. 58, s. 2, which enabled the court of exchequer, on application by an owner or occupier of lands, to call upon commissioners of land tax to appear and maintain or relinquish their assessments in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated twice by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 21. *Glatton Land Tax, In re*, 6 M. & W. 689; 9 L. J., Ex. 211.

The commissioners acting under 38 Geo. 3, c. 5, are bound to assess the amount chargeable on the division for which they act, according to the real value of the assessable property for the year; and they are not justified in retaining an assessment which has been in use many years, and after changes in the value of property, merely because making a new estimate would be difficult, and require expenses for which they do not possess funds. *Reg.* v. *Land Tax Commissioners*, 16 Q. B. 381. *S. C.*, nom. *Pym, Ex parte*, 20 L. J., Q. B. 211; 15 Jur. 190.

But the court would not grant a mandamus calling on the commissioners to meet and make an equal assessment for the year, according to the best of their judgment and discretion, on a suggestion that they had made their assessment on an old and disproportionate estimate, though requested by an inhabitant of the division paying land tax to reduce the assessment on his district to an equal pound rate; the commissioners deposing in answer to the rule nisi for a mandamus that they had made the assessment for the year, and according to the best of their judgment. *Ib.*

The duty of the commissioners in causing the districts within their divisions to be assessed to the land tax, is regulated not by 38 Geo. 3, c. 5, s. 8, but by 38 Geo. 3, c. 60, re-enacted by 42 Geo. 3, c. 116. *Reg.* v. *Tower Land Tax Commissioners*, 2 El. & Bl. 694; 22 L. J., Q. B. 336; 18 Jur. 285; 1 W. R. 479.

These latter statutes create a fixed quota to be raised from the land in each district (parish or place) within the division, subject to redemption, such fixed quota being that which was laid upon the land in the district in the assessment for 1798, under 38 Geo. 3, c. 5. *Ib.*

Approval of Sales by.]—A prebendary agreed by writing, in consideration of 3*l.* per cent. stock (the amount necessary for redeeming the land tax), to convey to a lessee then in possession a part of the reversion in the prebendal estate, such part to be set out and valued by A., and approved by the king's commissioners. The lessee furnished the sum required for purchasing the stock, and the prebendary concluded the necessary contract with the land tax commissioners, transferred the stock into the names of the commissioners for reducing the national debt, and had the contracts duly registered; the land was also set out and valued; but the lessee refused to sign the necessary memorial for the purpose of obtaining the approbation of the king's commissioners pursuant to 42 Geo. 3, c. 116, s. 76. The prebendary afterwards distrained upon an under-tenant of the land for the amount of the redeemed land tax as additional rent:—Held, that there had been no valid sale of land for want of the assent of the commissioners, because, in order to comply with the provisions of s. 69, the prebendary ought to have sold not only the fee simple of the lands demised, but also the rents, services, and other profits. Held, also, that he had no right by s. 88 to distrain until the precise quantity of land and the portion of reserved rent to be sold were ascertained by the commissioners. *Warner* v. *Potchett*, 3 B. & Ad. 921.

The rector and lord of a manor, by one grant, demised for three lives, at one aggregate holding, and at one undivided rent, three ancient tenements, originally held of the manor under distinct grants and at distinct rents. The same rector afterwards disposed of the reversion in fee, under 42 Geo. 3, c. 116:—Held, that though the grant for lives might be void unless sanctioned by a special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land-tax commissioners. *Doe* d. *Strickland* v. *Woodward*, 1 Ex. 273; 17 L. J., Ex. 1.

Who may Act.]—The marshal of the king's bench may act as a commissioner of the land tax under the qualification of his office. *Stone* v. *Ashton*, 3 Burr. 1287.

6. When Deducted from Payments.

Annuity—Presumption.]—Where an annuity is given to a relation for life, and has been paid for any length of time, without a deduction for land tax, it will be presumed to have been so paid by mutual consent, and the payer is not entitled to be relieved. *Nichols* v. *Leeson*, 3 Atk. 573.

Jointure—Power—Bishop.] — Where a man had a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise, it does not mean only such as are fixed and certain, but the land tax, though fluctuating, is clearly within that power. But a bishop, covenanting to pay all charges, ordinary or extraordinary, does not subject himself to the land tax, because he cannot bind his successors; otherwise in the case of a common person, who can bind his heirs. *Blandford* v. *Marlborough*, 2 Atk. 542.

IV. PROBATE DUTY.

1. *Amount of*, 195.
2. *Property Liable*, 197.
3. *Affidavit of Value*, 205.
4. *Incidence and Payment*, 206.
5. *Return of Duty*, 207.

1. Amount of.

How Calculated.]—The stamp upon letters of administration is to be regulated by the value of the property at the time when they are granted, and not at the time of the death of the intestate. *Doe* d. *Richards* v. *Evans*, 10 Q. B. 476; 16 L. J., Q. B. 305; 11 Jur. 609.

Interest from Date of Death.]—The stamp duty upon letters of administration is to be calculated not only on the principal money which constituted the property of the intestate at the time of his death, but also upon accumulations of interest between the death and the grant of the letters of administration. *Att.-Gen.* v. *Partington*, 3 H. & C. 193; 33 L. J., Ex. 281; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54—Ex. Ch. Affirmed, 38 L. J., Ex. 205; L. R. 4 H. L. 100; 21 L. T. 370.

Effect of Insufficient Stamp.] — A. sued to recover a large unliquidated sum due to her testatrix, but the stamp on the probate did not cover the amount claimed:—Held, that A. could not obtain a decree in equity even for accounts and inquiries until the probate had been properly stamped. *Howard* v. *Prince*, 10 Beav. 312.

Although, where no objection has been taken, the court will make an order for payment at the hearing, on a proper administration being then produced; yet, if the objection be taken, the court will not grant even a stop order to a party claiming as administrator, except upon an administration stamped according to the full value of the claim. *Christian* v. *Devereux*, 12 Sim. 264.

Semble, a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate duty is calculated. *Jones* v. *Howells*, 2 Hare, 342; 12 L. J., Ch. 365.

If an administrator shows that he sues for a greater value than is covered by the ad valorem stamp of his letters of administration, he shows his administration to be void, and cannot recover, although he sues for a doubtful claim. *Hunt* v. *Stevens*, 3 Taunt. 113. S. P., *Carr* v. *Roberts*, 2 B. & Ad. 905; 1 L. J., K. B. 33.

In trover by an executor he gave in evidence the probate, which bore stamp duty on assets under the value of 600*l.*; on cross-examination he admitted that the assets were of greater value:—Held, that the probate was not admissible for want of a sufficient stamp. *Cormack* v. *Barragry*, Ir. R. 10 C. L. 147.

A. sued out a commission of bankruptcy against B. upon a debt due to him as executor, but the probate of the will had an insufficient stamp; afterwards, however, a sufficient stamp being affixed:—Held, that it was sufficient to support the petitioning creditor's debt, in an action by the assignees. *Rogers* v. *James*, 2 Marsh. 425; 7 Taunt. 147.

By 55 Geo. 3, c. 184, s. 49, the commissioners of stamps are authorised to stamp letters of administration de bonis non, on security given, and without payment of the duty, as well in cases where the duty has been paid on the original letters of administration, as where such letters of administration have been originally stamped on credit. *Doe* d. *Hanley* v. *Wood*, 2 B. & Ald. 724; 21 R. R. 469.

In an action by an administrator upon promises made to the intestate and non assumpsit pleaded, the defendant cannot, upon the production of the letters of administration, object that they are not properly stamped; for the plea admits that plaintiff is administrator. *Thynne* v. *Protheroe*, 2 M. & S. 553.

Where, to prove the title of an administrator, an exemplification was offered, which was an exemplification, not only of the letters of administration in question but also of certain other letters of administration, on one piece of parchment, and covered by one 3*l.* stamp:—Held, that the exemplification was sufficiently stamped. *Doe* d. *Edwards* v. *Gunning*, 2 N. & P. 260; W., W. & D. 460; 7 A. & E. 240; 6 L. J., K. B. 229; *Doe* d. *Bassett* v. *Mew*, 7 A. & E. 240.

An intestate died possessed of a leasehold estate under the value of 100*l.*, which, by the subsequent erection of a building upon it, was of the value of 100*l.* and upwards at the date of the letters of administration:—Held (before the passing of the 27 & 28 Vict. c. 56, s. 5), that a stamp of 1*l.* was insufficient. *Ib.*

Letters of administration, under which a

plaintiff makes title, must be stamped ad valorem. *Harper* v. *Ravenhill*, Taml. 145.

Legacies not paid under a charge upon real estate, in aid of the personal, without production of the stamp, under the Legacy Act, 36 Geo. 3, c. 52, s. 7, until it is ascertained that there is no personal estate applicable. *Holme* v. *Stanley*, 8 Ves. I.

2. PROPERTY LIABLE.

Moneys Recoverable by an Executor.]—All moneys recoverable by an executor by virtue of a probate, in whatever form recovered, whether through the agency of a court of equity or of a court of law, are part of the estate and effects of the testator, and are liable to probate duty. *Att.-Gen.* v. *Brunning*, 8 H. L. Cas. 243 ; 30 L. J., Ex. 379 ; 6 Jur. (N.S.) 1083 ; 8 W. R. 362.

—— **Damages for causing Testator's Death.**]—A sum recoverable by an executor against a person for damages in negligently causing his testator's death, is not a subject of probate duty. *Ib.*

Bequest to Executors of Deceased Legatee as part of Legatee's Personal Estate.]—A gift by will to a person, and in case he should die in the testator's lifetime to his executors, with a direction "that the same shall go and be paid as part of his personal estate as if he had survived the testator," is not liable to probate and estate duties as upon a devolution from such person if he predeceased the testator. *Lord Advocate* v. *Bogie* ([1894] A. C. 83) followed. *Perry's Executors* v. *Reg.* (L. R. 4 Ex. 27) distinguished. *Att.-Gen.* v. *Loyd*, 64 L. J., Q. B. 365 ; [1895] 1 Q. B. 496 ; 15 R. 277.

English or Foreign Asset—"Estate and Effects of Deceased"—Local Situation of Chose in Action.]—A testatrix was entitled by the will of her husband to one-fourth share of the residue of his estate. That estate included sums invested on mortgages of real estate in New Zealand. Before the residue had been distributed or the mortgage securities paid off the testatrix died, bequeathing her personal estate to her executors on trust for sale and conversion. The executors in proving her will included as part of her estate a fourth share of the residue of her husband's estate, but claimed to leave out of account the share of the New Zealand mortgages :—Held, that as the only right which the testatrix's executors had in respect to the New Zealand mortgages was to call upon the husband's executors to get in his outstanding personal estate, such right was an asset of the testatrix's estate, whose locality was English, and therefore her executors were liable to pay probate duty in respect of such English asset. *Sudeley (Baron)* v. *Att.-Gen.*, 66 L. J., Q. B. 21 ; [1897] A. C. 11 ; 75 L. T. 398 ; 45 W. R. 305 ; 61 J. P. 420—H. L. (E.)

—— **Foreign Land upon Trust for Sale—Bequest of Share of Proceeds.**]—A legacy of a share of the proceeds of sale of real estate in Jamaica, payable to the representative of the legatee, who has died before the sale, is an English asset, and the representative is therefore liable to pay probate duty thereon. *Sudeley (Baron)* v. *Att.-Gen.* (66 L. J., Q. B. 21 ; [1897] A. C. 11) followed. *Smyth, In re, Leach* v. *Leach*, 67 L. J., Ch. 10 ; [1898] 1 Ch. 89 ; 77 L. T. 514 ; 46 W. R. 104.

Locality of Debt.]—In order that an asset may be liable to probate duty under the Stamp Duties Acts, it must be such as the grant of probate confers the right to administer, and therefore one which exists within the local area of the probate jurisdiction. *Blackwood* v. *Reg.* (8 App. Cas. 82) followed. *Stamps Commissioner* v. *Hope*, 60 L. J., P. C. 44 ; [1891] A. C. 476 ; 65 L. T. 238—P. C.

—— **Simple Contract and Specialty Debts.**]—Though a debt has no absolute local existence, yet it is a well-settled rule that it possesses an attribute of locality—a simple contract debt being within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt being where the specialty is found at the time of the creditor's death. *Ib.*

Freeholds—Conversion.]—Freehold property which is by the doctrine of equitable conversion to be considered as personalty, is chargeable with probate duty. *Gunn, In goods of*, 53 L. J., P. 107 ; 9 P. D. 242 ; 33 W. R. 169 ; 49 J. P. 72.

Probate duty is payable in respect of the purchase-money of real estate on a contract for its purchase made before, but completed after, the death of the testator. *Att.-Gen.* v. *Brunning*, supra.

Where an owner of a freehold property leased it with an option to the lessees of purchasing it within six months after his death, which he extended to three years by his will, and the lessees exercised the option more than six months, but within three years, after the testator's death, probate duty is not payable on the purchase-money. *Goodall, In re, Goodall* v. *Goodall*, 65 L. J., Ch. 63 ; 13 R. 870 ; 73 L. T. 379 ; 44 W. R. 70.

J. S. conveyed fee simple estates upon trust by sale, etc., to pay certain debts, and the residue to himself, his executors, administrators, and assigns, without any equity thereon in favour of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The estate was sold after his death :—Held, that no part of the produce was liable to probate duty. *Matson* v. *Swift*, 8 Beav. 368 ; 14 L. J., Ch. 354 ; 9 Jur. 521.

—— **Not Sold before Death of Legatee.**]—One seised in fee of realty devised and bequeathed by will all his realty and personalty to trustees in trust to sell and to stand possessed of the proceeds, after making certain payments, and to invest the moneys, and to hold the investments and the income in trust to pay an annuity to his widow for life, and as to the residue, in trust for all his children who should attain twenty-one ; in default of such children the testator bequeathed the investments, as to certain portions, to certain legatees, and as to the residue on certain trusts which failed. On his death his only child, Margaret, was his heiress-at-law and one of his next of kin. She died afterwards under twenty-one and unmarried. The realty at her death was unsold and uncontracted to be sold, but was subsequently sold, under the trusts of the will, for a sum which was its value, and which was paid to her legal personal representative as such : —Held, that probate duty was payable at Margaret's death upon the value of the realty, as being part of her estate and effects. *Att.-Gen.*

v. *Lomas*, 43 L. J., Ex. 32; L. R. 9 Ex. 29; 29 L. T. 749; 22 W. R. 188.

—— **Partnership Assets—Conversion.**]—The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary: and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty. *Custance* v. *Bradshaw* (4 Hare, 315) discussed. *Att.-Gen.* v. *Hubbuck*, 53 L. J., Q. B. 146; 13 Q. B. D. 275; 50 L. T. 374—C. A.

The share of a deceased partner in freehold and copyhold property of the partnership:—Held, not to be personal estate for the purpose of probate duty on his share. *Custance* v. *Bradshaw*, 4 Hare, 315; 14 L. J., Ch. 358; 9 Jur. 486.

—— **Partnership Assets—Local Situation of—England or India.**]—In an action for probate duty it appeared that the deceased had been a member of a partnership firm. By the articles of partnership it was provided that the business should be the carrying on and working of certain silks and indigo concerns, and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realisation in Europe of such produce. The articles further provided that the entire business of the firm in India should be carried on by certain managing agents, who were required to be partners, who were alone entitled to use the name of the firm, to keep the books and prepare the balance-sheets, and who were also empowered (but subject to the opinion of the committee hereinafter mentioned) to determine what branches of business should be undertaken. A committee of partners in England was appointed to advise with the agents, both in London and Calcutta, on all matters affecting the interest of the partnership, and subject to the approval of a general meeting of the partners to decide all matters affecting the partnership. It was further provided that on the death of any partner his representatives should not become partners in respect of his share, but that the interest of the deceased partner should cease from 30th September next after his decease, with power for the representatives to sell the share within a stipulated period, or else to receive its fair value. A firm in London were declared to be the agents of the partnership in Europe, to whom the produce of the firm was to be consigned and the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, and held a mortgage over the assets, which were vested in trustees resident in the United Kingdom. The estates cultivated by the firm were situate in India, and the business properly so called was entirely carried on there. There were sixteen partners, all but two of whom resided in the United Kingdom:—Held, that the share or interest of the deceased in the partnership was not properly situated in the United Kingdom, and was, therefore, not liable to probate duty. *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468—H. L. (Sc.)

Lands Purchased by Committee of Lunatic from Accumulations of Personalty.] — The committees of a lunatic, acting under certain orders of the lords justices of appeal sitting in lunacy, invested the accumulations of his personal estate in the purchase of land. In pursuance of, and in conformity with, these orders, certain lands (the price for which was paid out of the accumulations of the lunatic's personal estate) were conveyed "unto and to the use of the" committees, "their heirs and assigns, for ever, upon trust for" the lunatic, "his executors, administrators, and assigns"; and certain powers of leasing and sale were given to the committees; and the deeds of conveyance contained a declaration that the lands thus bought should be considered as part of the personal estate of the lunatic, but they contained in terms no trust for sale:—Held, that the value of the lands thus bought was part of the lunatic's personal estate and effects at his decease, and was liable to probate duty. *Att.-Gen.* v. *Ailesbury* (*Marquis*), 57 L. J., Q. B. 83; 12 App. Cas. 672; 58 L. T. 192; 36 W. R. 737—H. L. (E.)

Land Tax Redeemed.]—Land tax redeemed under s. 99 of 38 Geo. 3, c. 60, is liable to probate duty. *Pigott* v. *Pigott*, 37 L. J., Ch. 116; L. R. 4 Eq. 549; 16 L. T. 766.

Power of Appointment.]—Prior to 23 Vict. c. 15, no duty was payable in respect of property, the subject of appointment by will. *Platt* v. *Routh*, 6 M. & W. 756; 10 L. J., Ex. 105. *S. C.*, 3 Beav. 257; 10 L. J., Ch. 131. Affirmed, nom. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257.

J. R., by will, directed his real estates to be sold and converted into personalty; and after giving certain legacies, he thereby vested the residue in trustees for the use of his daughter, I. A. P., for life, with power to her to appoint the same by will, but expressly excluding from the benefit certain persons named or indicated in his will; and directed that the appointment, so far as such appointment should be incomplete, the residue should be held by the trustees of the next of kin of D. R. This power was exercised by I. A. P., by her will, partly in favour of other persons:—Held, affirming the decree of the master of the rolls, first, that she must be considered to have had, notwithstanding the special exclusion in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52; and that, consequently, legacy duty was payable by her appointees, upon the bequests made by her, as being, under s. 7, made by her out of personal estate which she had the power of disposing of. Secondly, that this property, though subject to her power of disposal, was not so strictly her own property as to render it, under s. 18, liable to probate duty under her will, as property which she died possessed of or entitled to. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257. Affirming *S. C.*, nom. *Platt* v. *Routh*, 3 Beav. 257; 10 L. J., Ch. 131.

Where a testator, having a general power of appointment over a fund, exercises it by will, probate duty must be paid in respect of the fund. *Palmer* v. *Whitmore*, 5 Sim. 178.

A married woman, having a testamentary power to appoint a fund, exercised it in favour of her husband, and appointed him her executor:—Held, that if the husband claimed the fund as his wife's executor he must pay probate duty on the fund. *Nail* v. *Punter*, 5 Sim. 563.

A testator gave to A. a power to dispose by her will of 5,000*l.*, part of his estate, on which probate was paid. A. exercised the power by her will:—Held, that probate duty was not again payable in respect of the 5,000*l.* *Vandiest* v. *Fynmore*, 6 Sim. 570.

—— **Exercise of a Power, what is.**]—A testator bequeathed stock to trustees, upon such trusts, and subject to such powers, as A. should by deed or will direct or appoint; and in default of appointment, to pay the dividends to A. during her life, and after her decease to pay the principal amongst her children. After the testator's death, A. executed a deed according to the mode prescribed by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts and subject to such powers, as A. should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint, with limitations over, in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. and the new trustee. A. afterwards by will, by virtue and in execution of that power, appointed the fund to be transferred to certain persons in trust that the same might be consolidated with and become part of her residuary estate, and follow the dispositions thereof thereinafter mentioned:—Held, that the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, and became her personal estate, in which she had an interest, and consequently was liable to the payment of probate duty. *Att.-Gen.* v. *Staff*, 2 C. & M. 124; 4 Tyr. 14; 3 L. J., Ex. 6.

Shares in Company—Duty, in what Country.]—Shares in railway companies are assets in the country in which the holders must be registered, and therefore, it is in that country the probate duty must be paid thereon by the executors or administrators of deceased proprietors. *Att.-Gen.* v. *Higgins*, 2 H. & N. 339; 26 L. J., Ex. 403.

When a creditor of an English company which is being wound up by the court dies domiciled abroad, the official liquidator cannot send a dividend abroad to be paid to the foreign executors, but the dividend can only be paid on production of an English stamped probate. *Commercial Bank Corporation, In re, Inland Revenue Commissioners, Ex parte*, 39 L. J., Ch. 497; L. R. 5 Ch. 314; 22 L. T. 219; 18 W. R. 411.

—— **Purchase out of Assets of Testator.**]—Shares in a banking company purchased by executors with the assets of their testator in the name of a party who was entitled to the dividends for life, are included in the probate stamp, and do not require to be covered by the stamp upon the letters of administration granted to the estate and effects of the party in whose name the purchase was made. *Hennell* v. *Strong*, 25 L. J., Ch. 407.

If the bankers refuse to transfer the shares after an affidavit made by the executor of the testator, in conformity with 48 Geo. 3, c. 149, they do so at the peril of costs. *Ib.*

Lighthouse Tolls.]—The tolls of a lighthouse are not subject to probate duty. *Att.-Gen.* v. *Jones*, 1 Macn. & G. 574; 1 H. & Tw. 493; 19 L. J., Ch. 266; 14 Jur. 379.

Money Charged on Realty.]—Testatrix, as heir, was entitled to the equity of redemption, and also entitled, under her settlement, to the mortgage money. She devised the estate, but did not dispose of her personal estate:—Held, that the money was subject to probate duty. *Swabey* v. *Swabey*, 15 Sim. 502.

Foreign Securities—Certificates—Marketable Securities.]—The executors of a testator domiciled in England included in their affidavit and account of the personal estate certain foreign securities, comprising mainly shares in railway companies in the United States. The documents of title issued to the shareholders by the said companies were found by the special case to be certificates indorsed with a form of transfer and power of attorney in blank and passing by delivery as marketable securities on the London Stock Exchange. The certificates were at the death of the testator in his possession or in that of his agents or trustees in England, and his whole interest in them passed under his will as a part of his personal estate. The executors sought to recover the probate duty paid, as they alleged, in error upon the value of the said securities:—Held, that the duty was properly paid on the value of these securities, inasmuch as the certificates were documents of title marketable in England in the hands of the executors within the jurisdiction of the Probate Court. *Stern* v. *Reg.*, 65 L. J., Q. B. 240; [1896] 1 Q. B. 211; 73 L. T. 752; 44 W. R. 302.

Assets Coming to England at Time of Death.]—Bills drawn in India on a London bank in favour of the testator's London bank are, if he dies abroad before they reach England, assets within the jurisdiction, and are liable to probate duty in England under 55 Geo. 3, c. 184, s. 38. *Att.-Gen.* v. *Pratt*, 43 L. J., Ex. 108; L. R. 9 Ex. 140; 30 L. T. 531; 22 W. R. 615.

Assets beyond Jurisdiction.]—Probate duty is payable only on property actually within the jurisdiction of the ecclesiastical courts at the time of the probate being taken out. Accordingly, where a testator held securities of the Indian government, which he had agreed, before his death, to exchange for East India stock; but such conversion did not actually take place till after probate had been granted:—Held, that the duty was not payable. *Pearse* v. *Pearse*, 9 Sim. 430.

Probate duty is not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property is brought into and administered in this country by the executor. *Att.-Gen.* v. *Dimond*, 1 C. & J. 356; 1 Tyr. 243; 9 L. J. (o.s.) Ex. 90.

—— **Proceeds of Foreign Stock.**]—French stock belonging to an English testator may be sold abroad by the English executor, and its proceeds administered by him here, without paying probate duty thereon. *Ib.*

Probate duty is not payable under 55 Geo. 3, c. 184, in respect of personal assets of an Englishman domiciled and dying in England, which being locally situate in a foreign country at the time of his death, were not brought hither till after that event by his executors; though they

had obtained an English probate in respect of his personalty situate in England, and proceeded by virtue of that probate to collect and administer in this country the whole of the assets. *Att.-Gen.* v. *Hope*, 1 C., M. & R. 530; 4 Tyr. 878; 2 Cl. & F. 84; 8 Bligh (N.S.) 44.

Foreign Bonds.]—But probate duty is payable in respect of bonds of a foreign government, of which bonds a testator, dying in this country, was holder at the time of his death, and which have come to the hands of his executors in this country; such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom to render the transfer of them valid. *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171; 1 H. & H. 319; 7 L. J., Ex. 297.

Executor de son Tort—English Company—No Probate or Administration in England—Taking "possession" of Estate in England.]—An American subject domiciled in New York was at his death the registered holder in the books of an English company, whose registered office was in London, of shares and debentures of the company. The company, at the request of the American executors, transferred the shares and debentures into the names of the American executors, who had proved the will in New York, but had obtained no grant of administration or representation to the testator's estate in England, and paid them the interest and dividends:—Held, that the English company had, by such transfer, taken possession of the shares, debentures, dividends, and interest, within the meaning of s. 37 of the Stamp Act, 1815, and had become executors de son tort, and chargeable as such with probate duty on the testator's assets administered by them in England. *Att.-Gen.* v. *New York Breweries Co.*, 67 L. J., Q. B. 86; [1898] 1 Q. B. 205; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132—C. A.

Legatee Dying in Testator's Lifetime.]—A testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue:—Held, that the executors of the son were chargeable with probate duty on the amount of the bequest, in the same manner as they would have been had the son actually survived the father. *Perry's Executors* v. *Reg.*, L. R. 4 Ex. 27; 19 L. T. 520; 17 W. R. 382. *S.C.*, *Bacon* v. *Reg.*, 38 L. J., Ex. 5.

Gift over on Contingency.]—When the whole beneficial interest in a testator's estate was under his will vested in his widow and children, with a limitation in favour of his grandchildren, the defeasible character of each child's interest only affecting the shares of the children or grandchildren inter se with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent., notwithstanding that additional duty is payable on the gift over taking effect. *Armytage* v. *Wilkinson*, 47 L. J., P. C. 31; 3 App. Cas. 355; 38 L. T. 185; 26 W. R. 559.

Contingent Interests.]—The duty must be paid on the whole personal estate belonging to an intestate, including contingent interests. *Lord* v. *Colvin*, 36 L. J., Ch. 354; L. R. 3 Eq. 737; 16 L. T. 53; 15 W. R. 485.

Where such duty was not paid on a contingent interest, which afterwards fell into possession:—Held, that duty must be paid on the present value of the absolute interest, and not on the value of the contingent interest at the date of administration only; although if duty had been paid on the value of the contingency, the crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession. *Ib.*

Alexander, Duke of Hamilton, made a trust-disposition and settlement of his property in the year 1850, by which he declared, inter alia, that the collection of certain articles, pictures, objects of vertu, marbles, bronzes, and a library at Hamilton Palace, should remain vested in trustees until the extinction of the Scotch consolidated family debt, when the trustees were to make over to his son, the Marquis of Douglas—afterwards Archibald, Duke of Hamilton—or failing him, to the heir in possession of the title and estates, the said property. Duke Archibald succeeded his father in 1852, and before his death in 1863 paid off the family debts. He was succeeded by his son the appellant, who was decerned his executor, quâ general disponee:—Held, that the appellant was liable to pay to the crown inventory duty concluded for as chargeable on the value of the collection which was in bonis of Duke Archibald at his death. *Hamilton (Duke)* v. *Lord Advocate*, 1 R. 70; 68 L. T. 94—H. L. (Sc.)

Title through more than one Person.]—A married woman, entitled as next of kin to the estate of an intestate, died without asserting her claim, leaving her husband surviving, who also died without asserting his claim:—Held, that it was necessary for the next of kin of the husband, in order to enforce the right of the wife and reduce it into possession, to take out letters of administration to both husband and wife, and pay stamp duty upon the property for each grant of administration. *Att.-Gen.* v. *Partington*, supra, col. 195.

Direction by Testator that Charges should merge in his Real Estate.]—Semble, that probate duty was payable on certain charges vested in a testator which, by his will, he directed should merge in his real estate. *Nunn's Estate, In re*, [1894] 1 Ir. R. 252.

Settlement—Covenant to bequeath by Will "the Residue" of Settlor's Estate to Trustees.]—By indenture of settlement, executed upon his marriage, A., in accordance with an agreement in that behalf recited in the settlement, covenanted that he would, out of his real and personal estate, by his will bequeath to the trustees of the settlement the sum of 20,000*l.* with interest at 4 per cent. from the date of his death, to be held upon certain trusts therein declared, and would also (subject to the payment of the sum of 20,000*l.* and interest, and of his funeral and testamentary expenses and debts) by his will effectually devise and bequeath or appoint to the trustees the whole of the residue of the real and personal estate of or to which he should be seised or possessed, or entitled at his death, to be held upon the trusts in the settlement declared. A., by a codicil to his will, bequeathed to the trustees of his settlement the sum of 20,000*l.*, to be held by them upon the trusts of the settlement, and he left and bequeathed to them the residue of his real and personal property, upon the trusts in the settle-

ment declared as to such residue:—Held, that the amount of the residue of A.'s estate did not constitute a debt due by him at his death under 44 Vict. c. 12; and further, that the residue formed part of the estate and effects of the testator A., and was, as such, subject to probate duty. *Att.-Gen.* v. *Murray*, 20 L. R., Ir. 124—C. A.

Probate affected by subsequent Statute.]—A testator having died in the colony of Victoria whilst act No. 388 was in force, and probate to his will having been applied for and granted before act No. 523 was passed, but after the time fixed for its coming into operation retrospectively:—Held, that the duty payable on the testator's estate under the former act having been directed by s. 10 to be deemed a debt of the testator to her Majesty, accrues due eo instanti on his death, at the rate prescribed by that act, although the amount of such duty might have to be subsequently ascertained. *Bell* v. *Master in Equity*, 2 App. Cas. 560; 36 L. T. 936—P. C.

Probate duty in England is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted. The duty payable under act No. 388 is more in the nature of a succession duty, payable, whether probate is sought or not, on the value of the estate at the time of the testator's death. *Ib.*

J. died on the 2nd of August, 1879, having previously made a will which his executors proceeded to prove, and on the 13th of September, 1879, paid 45*l.*, the amount of duty then payable. A caveat being lodged by the next of kin the will was not established until the 13th of April, 1880. Meanwhile the duty payable on or after April 1st, 1880, was increased by 43 Vict. c. 14:—Held, that the probate was liable to the increased duty. *Joy, In re, Lalor* v. *Jones*, 5 L. R. Ir. 282.

3. Affidavit of Value.

Of Applicant not Conclusive.]—In granting probate or letters of administration the court is not restricted to the oath of the applicant as to the value of the property, but may receive the oath of any competent person to that fact. *De Angulo y Urruela, In goods of*, 38 L. J., P 21; L. R. 1 P. 598; 19 L. T. 704.

Where, therefore, the property was sworn below its value by the executor who was abroad, the court allowed a fresh affidavit, in which the true value of the property was stated and the mistake in the executor's oath explained, to be sworn and filed by his agent in this country, and probate was ordered to go accordingly. *Ib.*

Calculation of Value.]—Executors in filing, pursuant to s. 97 of the Administration and Probate Act, 1890, a statement of their testator's estate, are entitled to enter as the value of securities their market price at the date of the statement, though it may be less than the face value. Uncalled capital on shares held by the testator is a debt due by the deceased which his executors are entitled to deduct from the sum total of the assets. *Master in Equity* v. *Pearson*, 66 L. J., P. C. 25; [1897] A. C. 214; 75 L. T. 526—P. C.

An executor need not include debts due to his testator which are either desperate or doubtful. *Moses* v. *Chafter*, 4 Car. & P. 524.

When Executors Swear under different Sums.]—One of two executors proved the will, swearing the property (the amount of which depended on the result of a pending suit in chancery) under a certain amount, and paying the duty thereon. The other executor was allowed to take probate, swearing the property under a smaller amount. *Bell, In goods of*, 40 L. J., P. 67; L. R. 2 P. 247; 25 L. T. 163.

4. Incidence and Payment.

Incidence of.]—A married woman who died on the 13th of December, 1887, leaving a husband and three children surviving, made a will on the 7th of September, 1887, in exercise of a power of appointment, and appointed executors. The will did not purport to dispose of any other property. At her death she was entitled to separate personal estate not included in the power. Probate of the will was granted under the amended probate rules of April, 1887, in the ordinary form without any exception or limitation:—Held, that the executors were trustees for the husband of the undisposed of property, and that the probate duty and the costs connected with probate ought to be apportioned rateably between the appointed and the undisposed-of property. *Lambert, In re, Stanton* v. *Lambert*, 57 L. J., Ch. 927; 39 Ch. D. 626; 59 L. T. 429.

A testatrix made several appointments of specified sums, and lastly made an appointment of "all the residue" of the trust funds. No other property was disposed of:—Held, that probate duty must be paid out of the funds lastly appointed. *Currie, In re, Bjorkman* v. *Kimberley*, 57 L. J., Ch. 743; 59 L. T. 200; 36 W. R. 752.

A wife who had a power of appointment over a fund invested in government stock by her will gave legacies of specified sums of the fund; the legacies so given did not exhaust the fund, and there was a residuary gift of the fund after payment of the testatrix's debts, funeral and testamentary expenses:—Held, that though the disposition of the residue of the fund was also specific, the words of the will threw the payment of the whole of the probate duty upon the residue. *Davies* v. *Fowler*, 43 L. J., Ch. 90; L. R. 16 Eq. 308; 29 L. T. 285.

Insufficient Amount Paid—Bonâ fide Mistake—Estate fully administered.]—Executors by a bonâ fide mistake had undervalued their testator's estate for probate duty; they fully administered the estate; subsequently, the mistake as to undervalue was discovered:—Held, that they did not come within the words "the person acting in the administration of such estate and effects" in s. 32 of the Customs and Inland Revenue Act, 1881; and, accordingly, were not under any liability to the crown. *Att.-Gen.* v. *Smith and Cocks*, 62 L. J., Q. B. 288; [1893] 1 Q. B. 239; 4 R. 233; 68 L. T. 6; 41 W. R. 245; 57 J. P. 389—C. A.

An executor, by mistake, paid an insufficient amount of probate duty, fully administered his testator's estate, and died:—Held, applying *Att.-Gen.* v. *Smith* (4 R. 233), that the inland revenue had no remedy for additional duty under the Customs and Inland Revenue Act, 1881. *Nunn's Estate, In re*, [1894] 1 Ir. R. 252.

Exemption of Heir-at-Law.]—An heir-at-law, though liable for debts, held not liable to pay probate duty, either directly or indirectly, which,

in case of a deficiency of the impure personalty, after payment of debts and costs, was ordered to be borne by the specific bequest to a hospital. *Shepheard* v. *Beetham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 36 L. T. 909; 25 W. R. 764.

5. RETURN OF DUTY.

Rule to Enforce.]—The court cannot entertain an application for a rule calling on the commissioners of inland revenue to show cause why they should not grant a return of probate duty under 5 & 6 Vict. c. 79, s. 23, unless by consent of the crown. *Webster, In re*, 1 L. T. 45.

Mandamus—Petition of Right.]—The rule governing the discretion of the court as to granting a mandamus is, that where there is no specific remedy a mandamus will be granted that justice may be done. A petition of right is such a remedy, though it depends upon the fiat of the attorney-general being given. *Reg.* v. *Inland Revenue Commissioners* or *Nathan*, 53 L. J., Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452—C. A.

The prosecutor applied for a mandamus to the defendants to return excess of probate duty, under 5 & 6 Vict. c. 79, s. 23. Probate duty is paid to the defendants to and for the use of the crown, and when received it is handed over by them to the crown. The defendants had declined to return the duty paid, on the ground that they were not satisfied of the lawfulness of the claim:—Held, that, assuming the claimant to be entitled to some remedy, still a mandamus ought not to issue, for that there was a specific remedy by petition of right, inasmuch as the money was in the hands of the crown. *Ib.*

Duty Paid in two Places—The Amount Returnable.]—Where a testator left personal property in each of the provinces of Canterbury and York, and probates were taken out for the property being in each province, and respective duties paid on each probate, and the executors afterwards paid debts indiscriminately out of the whole personalty:—Held, that they were not entitled, for the purpose of demanding a return of duty, to add together the amounts in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, and then estimate the duty payable on the remainder, and demand back the difference between such duty and the aggregate of the sums paid on the two probates. *Reg.* v. *Stamps and Taxes Commissioners*, 9 Q. B. 637; 16 L. J., Q. B. 75; 11 Jur. 365.

Semble, that an equitable mode of calculating the sum to be returned was to apportion the sum paid for debts in the ratio of the estate in each province, and deduct the respective portions of the debts from the values of the respective estates. *Ib.*

—— **Paid in England and India.**]—Where a testator or an intestate dies possessed of personal estate both in England and India, and indebted to English creditors in respect of debts contracted in England, the amount of assets in India cannot be taken into consideration in estimating the amount of duty to be returned to the executor or administrator: India being, for this purpose, to be considered as a foreign country. *Reg.* v. *Stamps and Taxes Commissioners*, 18 L. J., Q. B. 201; 13 Jur. 624.

A. died intestate in England, possessed of personal estate in England to the amount of 5,858*l.* 16*s.* 1*d.*, in respect of which a duty of 150*l.* was paid on the letters of administration. His administratrix paid debts due to creditors resident in England, and contracted in England, to the amount of 4,890*l.* 0*s.* 10*d.*, leaving a balance of 968*l.* 15*s.* 3*d.*, on which the duty would only be 30*l.* A., at the time of his death, was also possessed of personal property in the East Indies to the amount of 12,118*l.* 10*s.* 4*d.*, which had been received by his administratrix by means of letters of administration granted to an agent in India, and there were no other debts due from the intestate:—Held, that the administratrix was entitled to a return of 120*l.* of the duty. *Ib.*

Debts "Due from Deceased."]—The words "debts due and owing from the deceased and payable by law out of his or her personal or movable estate," in 5 & 6 Vict. c. 79, s. 23, mean such debts as of themselves and in their own nature and character are payable out of the personal estate, and have no relation to any provision which a testator may make in his will for their payment. *Percival* v. *Reg.*, 3 H. & C. 217; 33 L. J., Ex. 289; 10 Jur. (N.S.) 1059; 10 L. T. 622; 12 W. R. 966.

When the provisions in a marriage settlement constitute a debt, inventory duty is not chargeable under 5 & 6 Vict. c. 79, s. 23. *Lord Advocate* v. *Hagart*, L. R. 2 H. L. (Sc.) 217.

In a marriage settlement the husband became bound to make a provision for his children, the contract giving him a power of appointment, in the exercise of which power he appointed to one of his sons 10,000*l.*, which was duly paid to him. The executors claimed a return of duty in respect of this sum, on the ground that it constituted a debt of the deceased:—Held, that, their contention was right, and that they were entitled to a return of 150*l.* *Ib.*

Executors are not entitled to a return of probate duty in respect of mortgage debts, which they are not justified in paying out of the testator's personal estate, notwithstanding the 11 Geo. 4 & 1 Will. 4, c. 47, s. 3, rendered them liable to actions on the covenants in the deeds. *Taylor's Estate, In re*, 8 Ex. 384; 22 L. J., Ex. 211.

Recovery of Duty returned.]—Pending a suit for the administration of assets, and before the accounts had been taken, the attorney-general presented a petition for payment out of the assets of a sum which, under false representations, had been returned to the administrator, as overpaid in respect of probate duty, and for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, and the widow, who was entitled to one-third, had not been paid:—Held, that the application was premature; and the petition was dismissed. *Hicks* v. *Keat*, 3 Beav. 141.

V. LEGACY DUTY.

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1. Under what Instruments.

Must be Testamentary.]—An instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and consequently not liable to the payment of legacy duty. *Tompson* v. *Browne*, 3 Myl. & K. 32; 5 L. J., Ch. 64.

Where three sisters, in Scotland, executed an instrument by which they assigned all their present and future property to and in favour of each other, and the heirs and the assigns of the survivor of them:—Held, that, on the death of one of them, legacy duty was not payable upon the property so assigned, the instrument not being testamentary, but a gift inter vivos. *Brown* v. *Advocate-General*, 1 Macq. H. L. 79.

A., being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named 60,000*l.*, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. The deed was never enrolled in chancery. On the same day he made a will, giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from the drawers, and handed them to the persons attending upon his death-bed. They were tied up with a memorandum, which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that if probate duty was paid, in the first instance, it might be got back again in consequence of the covenant creating a debt to be paid out of the assets:—Held, that the indenture was a deed, and not a testamentary paper. *Jeffries* v. *Alexander*, 8 H. L. Cas. 594. See *Patch* v. *Shore*, 11 W. R. 142.

A testamentary instrument is a writing in any form which remains dormant during the life of the grantor, is revocable by him, and only comes into operation at his death. *Advocate-General* v. *Ramsay's Trustees*, 2 C. M. & R. 224, n.; 4 L. J., Ex. 211.

Deed Incorporated in Will.]—A., by deed, gave his leasehold and personal property to trustees, for the use of himself for life, and of several persons at his death. A. reserved a power of revocation, but never parted with the deed, or with any of the property. By his will he confirmed this disposition in most respects:—Held, that the two instruments shall be construed together as testamentary instruments, and that the property passing under them will pass as legacies, and be subject to the legacy duty. *Att.-Gen.* v. *Jones*, 3 Price, 368.

P., on the marriage of his daughters, covenanted to pay to the trustees of the settlements then made, certain sums. The trusts were to pay the income to the daughters for life, and after their death to their husbands for life, with subsequent limitations. By his will the testator directed, "that the covenants on his part contained in the settlements made on the marriage of his daughters, for the payment of moneys and annuities for the benefit of themselves and their respective children and grandchildren, as therein stated, should be performed," and gave the trustees further sums, to be held upon the same trusts, as declared as to the property settled:—Held, that the words "to be held upon the same trusts in all respects for the benefit of my daughter, and her children and grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference, incorporating the trusts of the settlements in the will; that the trusts for the husbands were not excluded, and therefore that legacy duty was payable upon that principle. *Palmer, In re*, 3 H. & N. 26.

2. In Respect of what Gifts or Interests.

Release of Debt.]—The forgiveness of a bond debt by will is a legacy, and as such is liable to the payment of legacy duty. *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114; 12 Price, 407. S. P., *Morris* v. *Livie*, 1 Y. & C. C. C. 380; 11 L. J., Ch. 172.

Bequest to Official Assignee in Trust for Creditors.]—A., who had been a bankrupt in 1822, by his will, dated in 1851, directed his just debts to be paid, in which he included the unpaid-in-full debts proved in the bankruptcy, and directed his executors to pay to the official assignee, in trust to pay all the creditors under the bankruptcy, so much money as would make the dividend on the estate equal to 20*s.* in the pound:—Held, that legacy duty was payable on the amount. *Turner* v. *Martin*, 7 De G., M. & G. 429; 26 L. J., Ch. 216; 3 Jur. (N.S.) 397; 5 W. R. 277.

Bequest of Mortgage Debt—Previous Illegal Agreement.]—By agreement in 1794, 8,000*l.* stock was transferred by O. to H., upon the terms that H. should repay the money produced by the sale of it, or replace the stock, at the option of O., and in the meantime pay interest at the rate of 5*l.* per cent.; the loan was secured by a bond, mortgage, and a deed of covenant. O. and H. being dead, E. O. being the legatee and heiress, but not the personal representative of O., and J. H. being the devisee of H., J. H. applied to E. O. to assist to raise money, which E. O. agreed to do on having a security for the replacement of the stock. E. O. accordingly assigned, in 1842, the bond, mortgage, and deed of covenant of 1794 to H. and P., by way of mortgage, to secure an advance to J. H.; and in consideration thereof, J. H., in 1842, by indenture, conveyed to E. O. the premises comprised in the original mortgage, together with other lands by way of mortgage, with a proviso and covenant to secure the transfer to E. O. of 8,000*l.* stock. E. O. died, and by will forgave the mortgage debt of 1842 to J. H.:—Held, that the

mortgage and covenant of 1842 were not so connected with the illegal agreement of 1794 as to be usurious and void; and that therefore legacy duty was payable on the bequest. *Att.-Gen.* v. *Hollingworth*, 2 H. & N. 416; 27 L. J., Ex. 102; 5 W. R. 684.

Succession or Legacy Duty.]—By a marriage settlement after trusts for the husband and wife for life and trusts for the children (which failed by reason of there being no issue), personal property was settled in trust for the persons who would, at the death of the wife, have been entitled to her personal estate under the statute of distributions, in case she had died unmarried and intestate. The wife died in 1831, and her mother became entitled under the trust as her next of kin. She died in 1832, having left the property by will to executors in trust for certain legatees. In 1868 the husband died, and the bequests fell into possession:—Held, that the crown was entitled to legacy duty only. *Att.-Gen.* v. *Littledale*, 40 L. J., Ex. 241; L. R. 5 H. L. 290; 24 L. T. 921; 20 W. R. 473.

Rent-charge on Real Estate.]—Legacy duty is chargeable upon annuities out of, or rent-charges on, real estate devised. *Att.-Gen.* v. *Jackson*, 2 C. & J. 101; 2 Tyr. 50; 1 L. J., Ex. 21.

A. devised real estates to B. and C. in trust to convey to the use of D. for life, remainder to B. and C. for D.'s life to preserve contingent remainders, remainder to the use that E. shall take out of the premises such annuity or yearly rent-charge not exceeding 500*l.* per annum for her life as D. shall appoint; and in default of issue of D. the testator devised the premises charged with the annuity or rent-charge to F. D. appointed that the annuity shall be the full annuity of 500*l.* D. died, F. entered, and was compelled by exchequer process to pay the legacy duty on the annuity:—Held, that the annuity was chargeable with legacy duty. *Stow* v. *Davenport*, 2 N. & M. 805; 5 B. & Ad. 359.

Rents and Profits—Advance for Maintenance.]—A testator devised real estates to the use of trustees for a term of 500 years, to commence from his decease, and subject thereto and the trusts thereof to A. and B., their heirs and assigns, during the life of C., an infant, to preserve contingent remainders, and after the decease of C. to the use of the first and other sons of C. in tail, with remainder over. The testator declared that the trustees of the term should, until C. attained twenty-one or was married, in aid of another fund provided by the will for the same purpose, apply so much of the rents and profits not exceeding in the whole in any one year, including other payments thereby directed, 2,000*l.*, as they in their discretion should think fit, in maintaining and educating C., and should invest and accumulate the residue of the rents and profits for the absolute benefit of C., in case she attained twenty-one or was married; but if she should die under twenty-one and unmarried, the accumulated fund was to go over for the benefit of the parties to whom the real estates were in the same event limited:—Held, that legacy duty was not payable upon such portion of the rents and profits as had been applied for the maintenance of C. in each year during her minority until the time of her marriage. *Shirley* v. *Ferrers* (*Earl*), 1 Ph. 167; 12 L. J., Ch. 111; 6 Jur. 1047.

Annuity out of Rents of Real Estate—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life of Estate subject to Trust.]—Testator, who died in 1876, by his will gave certain real estate to the use of trustees for a term of 500 years, and subject thereto to uses in strict settlement, under which J. was tenant for life, with divers remainders over. The trusts of the term were out of the rents and profits of the estate to raise and pay an annuity to the person for the time being entitled to the rents and profits subject to the term. Subject to that trust, the trustees were during twenty-one years from the testator's death to accumulate the rents and profits, and invest them in land to be settled to the uses of the will, and, after the determination of the twenty-one years, to pay the rents and profits to the person for the time being entitled to the estates in reversion expectant upon the term:—Held (Rigby, L.J., dissenting), that the duty payable in respect of the annuity was legacy duty and not succession duty. *Shirley* v. *Ferrers* (*Earl*) (1 Ph. 167; 12 L. J., Ch. 111) distinguished. *De Hoghton, In re, De Hoghton* v. *De Hoghton*. 65 L. J., Ch. 528; [1896] 1 Ch. 855; 74 L. T. 297; 44 W. R. 550—C. A.

Gift for Maintenance.]—A testator made his will in the following terms: "I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children; and I constitute my wife to be executrix of this my will":—Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to deliver an account to the legacy duty office. *Harris, In re*, 7 Ex. 344; 21 L. J., Ex. 92.

Income of Real and Personal Estate—Life Estate.]—Where there is a devise to A. for life of the rents and profits of a real estate, and the interest and dividends of personal property, and, after his death, the whole estates, both real and personal, to be divided between B. and C.; the executors and trustees are bound to pay to A. the annual produce of the personal as well as real property (especially if the personal property is money in the funds), without requiring a receipt stamped as for a legacy, such annual payment not being subject to the tax imposed on legacies. *Green* v. *Croft*, 2 H. Bl. 30.

Annuity for carrying on Testator's Business.]—Testator bequeathed to his trustees his business upon certain trusts, and declared that, whilst the trustees should be carrying on the business, each of them should receive the annual sum of 250*l.* out of the profits thereof; and, further, that whilst his son W. should be managing the business in conjunction with the trustees, he should be entitled to the "annual sum of 250*l.* more":—Held, that all these annual sums were legacies and liable to legacy duty, under 8 & 9 Vict. c. 76, s. 4. *Thorley, In re, Thorley* v. *Massam*, 60 L. J., Ch. 537; [1891] 2 Ch. 613; 64 L. T. 515; 39 W. R. 565—C. A.

Trust not Enforceable.]—A devise to executors in full confidence, but without imposing any trust or obligation enforceable either at law or in equity or otherwise, that they will apply a sum of money in a particular manner does not create a trust upon which legacy duty is payable. *Martineau, In re*, 48 J. P. 295.

Annuity appointed in Lieu of Dower.]—A testator directed a settlement of his estates to be executed, containing a power for the tenant for life, by deed or will, to charge the estates with an annuity for the benefit of his wife. The donee, by his will, in execution of that power, charged the estates with the payment of an annual sum of 2,000*l.* to his wife during her life, in lieu, bar, and satisfaction of her dower, which she accepted:—Held, that this annuity was a gift subject to legacy duty under 45 Geo. 3, c. 28, s. 4, and not a purchase for a valuable consideration. *Henniker* (*Lord*) v. *Att.-Gen.*, 7 Ex. 331; 21 L. J., Ex. 293. Affirmed, 8 Ex. 257; 22 L. J., Ex. 41; 16 Jur. 1143—Ex. Ch.

Bequest — Charge on Realty — Election.] — Under the acts of 1795 and 1805, no legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election; but where the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on the real estate. *Laurie* v. *Clutton*, 15 Beav. 131; 21 L. J., Ch. 226; 16 Jur. 825.

Money Charged on Real Estate.]—A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate as his heir, and under his marriage settlement to the mortgage money. The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for repayment of the money. Afterwards she granted an annuity to M., and, as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate:—Held, that money was subject to probate and legacy duty. *Swabey* v. *Swabey*, 15 Sim. 502.

Fund in Court.]—A testator, by his will, bequeathed a sum of 30,000*l.* to his three children, and directed his personal estate to be applied, in the first instance, in payment of that sum; he then devised certain real estates to trustees, upon trust, to invest the rents and profits from time to time in government stock, until a fund should be realised, which, with the produce of his personal estate, would be sufficient to pay the legacies. A bill having been filed to carry the trusts of the will into execution, a receiver was appointed over the real estate, by whom a large fund was brought into court, which was reported to be applicable to the payment of the legacies:—Held, that under the true construction of the statutes 54 Geo. 3, c. 92, and 56 Geo. 3, c. 56, the legacies, though paid out of this fund, were liable to legacy duty. *Cleland* v. *Ker*, Dr. 227; 6 Ir. Eq. R. 35; *id.* 288.

Rent-charge—Estate pur autre vie—Foreign Domicil.]—A testator gave a rent-charge, to issue out of lands in England, to A. for life, and directed that after her death it should be continued, and equally divided between B., C., and D., during their lives and the lives of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. and D., the crown claimed from B.'s executors legacy duty in respect of B.'s third share of the rent-charge:—Held, that such duty was payable, for that the interest in the rent-charge which passed to B.'s executors was, by the Wills Act, "an estate pur autre vie, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not exempt from duty by reason of B.'s foreign domicil, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person. *Chatfield* v. *Berchtoldt*, 41 L. J., Ch. 255; L. R. 7 Ch. 192; 26 L. T. 267; 20 W. R. 401.

Partnership Real Estate Situate Abroad.]—Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in a foreign country, used for the purposes of the partnership, and forming a partnership asset. *Forbes* v. *Steven*, 39 L. J., Ch. 485; L. R. 10 Eq. 178; 22 L. T. 703; 18 W. R. 686. S. P., *Stokes, In re*, *Stokes* v. *Ducroz*, 62 L. T. 176; 38 W. R. 535.

Money to be Laid out in Purchase of Land.]—Where a testator by his will directs his trustees within six years of his death to realise his whole estate, and to purchase at their discretion land in Scotland and settle it in tail, and the heir of entail, after valuing the succeeding interests, disentails, the crown is entitled to legacy duty upon the capital value of the entire residue, the heir of entail having "become entitled to an estate of inheritance in possession in the real estate to be purchased therewith," within the proviso to s. 19 of 36 Geo. 3, c. 52. *Macfarlane* v. *Lord Advocate*, [1894] A. C. 291; 6 R. 287—H. L. (Sc.).

Semble, that, under the above circumstances, legacy duty was chargeable under ss. 2 or 3 of 36 Geo. 3, c. 52. *Ib.*

Lighthouse Tolls.]—The profits arising from the tolls of a lighthouse are real estate, and not subject either to legacy duty. *Att.-Gen.* v. *Jones*, 1 Mac. & G. 574; 1 H. & Tw. 493; 19 L. J., Ch. 266; 14 Jur. 379.

Annuity—Husband and Wife.]—Husband and wife being entitled in succession, under the will of the wife's aunt, to life interests in the dividends of stock standing in court, the wife being the first annuitant, the husband granted an annuity to E. charged upon the life interests of his wife and himself. The legacy duty on the wife's annuity was duly paid: and upon the death of the wife E. procured an order in the suit for payment to him of all the dividends of the fund towards payment of his annuity and arrears, undertaking to pay the surplus to the husband. On the death of the husband, who died insolvent, it was ascertained that no part of the legacy duty on his annuity had been paid:—Held, that this annuity was a legacy within the meaning of s. 25. *Bryan* v. *Mansion*, 26 L. J., Ch. 510; 3 Jur. (N.S.) 473; 5 W. R. 483.

Trust Deed — Life Rent — Construction.]—Alexander, Duke of Hamilton, made a trust-disposition and settlement of his property in the year 1850, by which he declared, inter alia, that

the collection of certain articles, pictures, objects of vertu, marbles, bronzes, and a library at Hamilton Palace, should remain vested in trustees until the extinction of the Scotch consolidated family debt, when the trustees were to make over to his son, the Marquis of Douglas—afterwards Archibald, Duke of Hamilton—or failing him, to the heir in possession of the title and estates, the said property. Duke Archibald succeeded his father in 1852, and before his death in 1863 paid off the family debts. He was succeeded by his son the appellant, who was decerned his executor, quâ general disponee:—Held, that the appellant was liable to pay to the crown legacy duty in respect to the property acquired by Duke Archibald in the collection under the trust-disposition of 1850. *Hamilton (Duke)* v. *Lord Advocate*, 1 R. 70; 68 L. T. 94—H. L. (Sc.).

Property of Testator Abroad — Personalty follows Domicil.]—Personal property, having no situs of its own, follows the domicil of its owner. *Thomson* v. *Advocate-General*, 12 C. & F. 1; 9 Jur. 217.

The law of the domicil of a testator or an intestate decides whether his personal property is liable to legacy duty. *Ib.* S. P., *Att.-Gen.* v. *Napier*, 6 Ex. 217; 20 L. J., Ex. 173; 15 Jur. 253.

—— **What is a Testator's Domicil.**]—*See* INTERNATIONAL LAW.

Stock in Foreign Funds.]—Stock in foreign funds locally situated abroad is personalty following the domicil of the owner; therefore a bequest of such stock by a party domiciled in England is liable to legacy duty. *Ewing, In re*, 1 C. & J. 151; 1 Tyr. 92; 9 L. J. (O.S.) Ex. 37.

Bequest of English Property by Foreigner to English Legatees.]—Property in this country belonging to a foreigner, who dies abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty. *Bruce, In re*, 2 C. & J. 436; 2 Tyr. 475; 1 L. J., Ex. 153.

An English testator by will gave a fund to trustees to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previously to and up to her death was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons, and the residue to her husband:—Held, that the legacies were liable to succession duty. *Wallop, In re*, 1 De G. J. & S. 656; 3 N. R. 679; 33 L. J., Ch. 351; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587. S. P., *Capdevielle, In re*, 3 H. & C. 895; 33 L. J., Ex. 306; 10 Jur. (N.S.) 1155; 12 W. R. 1110.

Direction to Collect Foreign Property and Invest in England.]—When personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the executor, directed to collect foreign property and invest it here, has discharged the duty imposed on him, and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad. *Att.-Gen.* v. *Campbell*, 41 L. J., Ch. 611; L. R. 5 H. L. 524.

Property in, and Remittances from, India.]—The personal assets situate in India, of a testator who resides and makes his will and dies in India, are not subject to legacy duty, although afterwards remitted to this country by an executor who has proved the will in India, to executors who have proved in England, and administered under a decree in the court of chancery here. *Arnold* v. *Arnold*, 2 Myl. & Cr. 256; 6 L. J., Ch. 218; 1 Jur. 255.

Where a testator dies in India leaving personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England. *Logan* v. *Fairlie*, 2 Sim. & S. 291; 3 L. J. (O.S.) Ch. 152; 25 R. R. 208.

Legacies bequeathed by a British subject in the East Indies, out of his personal estate, to persons in England, are liable to the duty, if the executor proves the will in England, and pays the legacies here, notwithstanding the testator realised and possessed his property in India, resided and made his will there, and although the executors were in India at the time of their appointment, and the will was originally proved there. *Att.-Gen.* v. *Cockerell*, 1 Price, 165; 15 R. R. 707.

A British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate, and appointed an English executor. The executor executed a power of attorney to S., in India, who thereupon obtained letters of administration with the will annexed, in India, under which he received the amount of the notes, and remitted it to the executor in England, who paid it over to the legatees:—Held, that legacy duty was payable thereon. *Coales, In re*, 7 M. & W. 390; 10 L. J., Ex. 207.

A testator born in Scotland, who resided and died in India, leaving real and personal property there situate, but no assets in England, by his will and testamentary papers left the whole of his property in equal divisions to his four natural children, or the survivor of them, and their heirs, subject to legacies and annuities. His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in England, and invested it in the funds in their own names. Proceedings were commenced in England against the executors, to determine the claims under the will; whereupon the stock was transferred into the name of the accountant-general of the court of chancery, and the court made a decree ascertaining the shares of the several claimants:—Held, that legacy duty was not payable on the legacies or shares of the residue bequeathed. *Jackson* v. *Forbes*, 2 C. & J. 382; 2 Tyr. 355; 1 L. J., Ex. 159. Affirmed in Dom. Proc., *Att.-Gen.* v. *Jackson*, 8 Bligh. 15; 3 Tyr. 982; 2 Cl. & F. 48.

A testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother J. H., and his sister H. L., in equal shares, but in case his sister should die before him, then to her children. The executor, who was also resident in India, having proved the will there, remitted the residue to his agent in England, with a letter, in which he desired the agent to appropriate the fund according to the annexed extract of the will, by which it

would be perceived that half went to J. H. and half to H. L. or her children. H. L. had died in the lifetime of the testator, leaving nine infant children. A suit having been instituted by the children against the agent, and also against the executor and J. H., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured :—Held, that no legacy duty was payable upon such moiety. *Logan* v. *Fairlie*, 1 Myl. & Cr. 59.

A testator, resident in India, bequeaths to an infant a sum of money to be invested in the company's securities, of which the interest is to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children. He is lost on his voyage to England, leaving all his property in India. Executors resident in that country prove his will at Calcutta, invest the legacy in the company's securities, and for several years remit the interest to their correspondents in London for the benefit of the legatee, who had come to England. A part of that interest is brought into court in a suit established by her for the appointment of a guardian, and for the allowance of maintenance, and an order is made for the payment to her guardian out of the fund so created of 200*l.* a year as maintenance :—Held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a year was not liable to the legacy duty. *Hay* v. *Fairlie*, 1 Russ. 117.

Power of Appointment—Limited.]—A testator gave to his sons real estates, with power to appoint to any woman they might respectively marry a jointure in bar of dower :—Held, that an appointment under this power was a gift within 45 Geo. 3, c. 28, and liable to legacy duty. *Sweeting* v. *Sweeting*, 1 Drew. 331 ; 22 L. J., Ch. 441 ; 17 Jur. 123 ; 1 W. R. 122.

—— **General Power.**]—A donee of a power of appointment, having executed by will in favour of the persons who were to succeed in default of an appointment, so as to bring the subject of the appointment into the sum chargeable with the appointor's debts and legacies :—Held, that the legacy duty must be paid as upon a legacy from the appointor. *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782 ; 32 L. J., Ex. 108 ; 9 Jur. (N.S.) 257 ; 8 L. T. 822 ; 11 W. R. 380.

By a marriage settlement, 20,000*l.* was vested in trustees, to pay the interest to the father of the wife for his life, after his death to the husband for life, with remainder to the wife for her life, with a power of appointment among her children, if any ; and, in default of issue, then on such trusts and subject to such direction and appointment as she should make by her will, in case she died in her husband's lifetime, or by deed or will in case she should survive her husband, and in default of such appointment by her in trust for her next of kin. The wife died in the lifetime of her husband, having by her will appointed the above sum to certain described persons :—Held, that legacy duty was payable in respect of it. *Cholmondeley, In re*, 3 Tyr. 10 ; 1 C. & M. 149 ; 2 L. J., Ex. 65.

—— **General Power—Exclusion of Objects.**]—J. R., by will, directed his real estates to be sold and converted into personalty, and, after giving certain legacies, he thereby vested the residue in trustees for the use of his daughter P., for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will ; and directed that, in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees for the next of kin of D. R. This power was exercised by P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons :—Held, first, that she must be considered to have had, notwithstanding the special exclusion in her father's will, an absolute power of appointment within 36 Geo. 3, c. 52, and that, consequently, legacy duty was payable by her appointees, upon the bequests made by her, as being, under s. 7, made by her out of personal estate of which she had the power of disposing. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257.

—— **Annuity out of Lands by Will.**]—A., by a deed dated in 1802, conveyed lands to trustees, to the use of himself for life, remainder to B. his son for life, with remainder over. The deed contained a proviso, that it should be lawful for B., by his last will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l.*, to be charged upon and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit. B., by his will, by virtue of this power, appointed an annuity of 700*l.* a year to C. for her life, charged upon and payable out of the land :—Held, that legacy duty was not payable in respect of such annuity. *Att.-Gen.* v. *Hertford* (*Marquis*), 14 M. & W. 284 ; 14 L. J., Ex. 266.

—— **Within 8 & 9 Vict. c. 76.**]—A., by deed dated in 1802, conveyed lands to trustees, to the use of himself for life, remainder to B., his son, for life, remainder to the defendant, his grandson, for life, with remainders over. The deed provided that it should be lawful for the defendant and the survivor of A. and B. to declare any new uses of the lands. A. died in June, 1822, and, by indenture of appointment of October, 1822, B. and the defendant declared that it should be lawful for B., by deed or will, to charge the lands with the payment of any sum not exceeding 47,000*l.* In 1823, B., by his will, charged the lands with payment to his executors of 47,000*l.*, to be applied in payment of his debts, and the residue in trust for the defendant. B. died in 1842, and in 1847 his executors raised 11,259*l.* 11*s.* 8*d.*, part of the 47,000*l.*, and paid it to the defendant, the debts having been previously paid :—Held, that this was a gift by will, within the 8 & 9 Vict. c. 76, although it operated originally by virtue of a power, and that legacy duty was chargeable on the 11,259*l.* 11*s.* 8*d.*, it not having been paid to the defendant until after the act came into operation, notwithstanding the testator died before. *Att.-Gen.* v. *Hertford* (*Marquis*), 3 Ex. 670 ; 18 L. J., Ex. 332.

Sale of Estates directed by Will or Court.]—Where a testator directs a sale of real estate, or it takes place under a power, legacy duty is payable ; but where property is sold under the direction of the court, legacy duty is not pay-

able. *Harding* v. *Harding*, 2 Giff. 597 ; 7 Jur. (N.S.) 906.

A testator devised to trustees his real estates, to raise a sufficient sum to pay debts and legacies, and also to pay his two daughters annuities of 300*l.* each, and he directed that, subject to those trusts, the trustees should stand seised of the real estates, for his brother for life, and, after his decease, for his children, provided that it should be lawful for the trustees, with the consent of the testator's brother during his life, and after his decease with the consent of the persons beneficially entitled, to sell the whole or any part of the real estate, and out of the purchase-money invest so much as would be sufficient to pay the annuities. The testator died, leaving his two daughters, his brother, and seven children of his brother, surviving. The trustees sold a part of the real estate, and paid the debts and legacies, when it was found that the rents of the residue of the real estate were not sufficient to pay the annuities, whereupon a bill in chancery was filed by the testator's brother and his children against the trustees and the testator's daughter ; and, in pursuance of an order of the court, the residue of the real estates was sold, and 20,000*l.*, part of the purchase-money, invested, and the interest applied in payment of the annuities. The daughters and brother having afterwards died, the brother's children became entitled to the 20,000*l.*, when the crown claimed legacy duty on that sum :—Held, that if the court of chancery acted on its general power of ordering the sale of real estate to satisfy charges, legacy duty was not payable ; but if the court acted on the clause in the will, and, in consequence of the will containing that clause, compelled the trustees to execute the power, legacy duty was payable, inasmuch as in that case, the sale of the real estate was substantially by direction of the testator himself. *Hobson* v. *Neale*, 8 Ex. 368 ; 22 L. J., Ex. 175. *S. C.*, 17 Beav. 178.

In a chancery suit filed by the trustees for the establishment and performance of a will containing similar clauses, a decree was made accordingly ; and, one of the trustees having prayed a sale of part of the real estate, it was referred to the master, who reported favourably, and, although there were no debts, an order for sale was made. The produce of the sale was paid into the Bank of England to the credit of the cause, and subsequently laid out in consols, and the interest paid to the tenant for life. On his death a decree was made for transferring the stock to the party absolutely entitled to the real estate, according to the terms of the will :—Held, that legacy duty did not attach. *Mules* v. *Jennings*, 8 Ex. 839 n. ; 22 L. J., Ex. 358.

Direction to Sell Land—No Sale.]—Where testamentary papers were construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death :—Held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to legacy duty. *Williamson* v. *Advocate-General*, 10 Cl. & F. 1 ; 13 Sim. 513.

When real property is by will expressly directed to be sold, and the produce and the testator's personalty all are to constitute one fund applicable to the purposes of the will, the land, though unsold, and though, in consequence of the happening of certain events, it might, for the purposes of devolution, go to the heir, is nevertheless, for fiscal purposes, to be treated as personal property. *Att.-Gen.* v. *Lomas*, 43 L. J., Ex. 32 ; L. R. 9 Ex. 29 ; 29 L. T. 749 ; 22 W. R. 188.

—— **When done at discretion.**]—Prior to the Succession Duty Act, 16 & 17 Vict. c. 51, legacy duty was not chargeable upon real estate, except where its conversion into personalty took place under some imperative trust or direction to that effect. Hence, where the conversion was a thing done at discretion, for the convenience and benefit of the parties, the claim of the crown did not arise. *Advocate-General* v. *Smith*, 1 Macq. H. L. 760.

A testator, after giving certain legacies, bequeathed to his executors the residue of his estate, real and personal, at such times as they should think fit, to sell, convey or otherwise convert into money, the same or any part thereof. He also directed that the residue of his estate should be invested as it should be realised, and should be divided amongst his children in certain specified shares and proportions ; that in case any of his daughters should marry under twenty-one, the trustees should settle her fortune upon such trusts as were specified in the will of the testator's father, with respect to certain bequests of personal property to the testator's sisters ; and he directed that the trustees should have full power in making such sales, of causing any part of the real or personal estate to be valued instead of being sold, and of allotting such part to any of his children at the amount of the valuation as part of his or her proportion of his residuary estate, but to be considered as personal property. The trustees sold the personal and a large portion of the real estate ; and the residue of the real estate they caused to be valued, and allotted the same to the son at the amount of valuation. The proceeds of the estate which had been sold they divided amongst the daughters, according to the respective shares :—Held, that legacy duty was payable only on the amount of that part of the estate which had been actually sold. *Att.-Gen.* v. *Mangles*, 5 M. & W. 120 ; 2 H. & H. 74 ; 3 Jur. 281.

A testator devised real estates to trustees, for the benefit of several parties for life, and after their deaths to be distributed amongst their children ; and the will contained a power by which the testator directed that it should be lawful for the trustees to sell the same, or part, &c., "as shall appear most expedient to my trustee or trustees for the time being, towards the management of my property and affairs." Some portion was sold shortly after the testator's death, because, being suitable for building, it was advantageous to the estate to sell it ; and the remainder, after being subject to the trusts for ten years, was sold under an order of a court of equity :—Held, that the money arising from neither sale was liable to legacy duty. *Evans, In re*, 2 C. M. & R. 206 ; 5 Tyr. 660 ; 4 L. J., Ex. 201.

Where a testamentary instrument implies a direction to sell the testator's real estate, the proceeds of the sale are liable to legacy duty. *Advocate-General* v. *Ramsay's Trustees*, 2 C., M. & R. 224, n ; 4 L. J., Ex. 211.

A testator devised his real estates to pay the rents to his brothers and sister, and the survivor of them, for their lives, and after the death of the survivor, to convey the estates to all his nephews and nieces equally, as nearly as they could make partition, and in the meantime to

pay the rents to them. For the purpose of such partition it should be lawful for the trustees to sell all or any part of the estates, and they should stand possessed of the money arising from such sale upon the same trusts as were declared concerning the residue of the personal estate, namely, for his brothers and sister and the survivor of them, for life, and then for his nephews and nieces. The testator died in 1819, leaving his sister and two brothers him surviving, the last of whom died in 1832. He also left ten nephews and nieces. In 1833, and at various times afterwards, the trustees sold the real estates for 9,064*l.*, with the view of dividing the proceeds of the sale among the nephews and nieces :—Held, that legacy duty was payable on this sum, it being money arising from real estate directed to be sold. *Att.-Gen.* v. *Simcox*, 1 Ex. 749 ; 18 L. J., Ex. 61.

A testator, after devising his real estate to trustees, for certain persons in tail male, empowered his trustees, after his death, to sell or exchange such real estate, and to invest the moneys arising from such sale in the purchase of other real estate, to be settled and conveyed upon the same trusts. The will also empowered the trustees, until such purchases were made, to invest the produce of the sale in the funds, or on mortgage of real estate. The trustees, having sold part of the estate under this power, invested the produce in the funds :—Held, that legacy duty was not payable in respect of the money so invested. *Heale* v. *Knight*, 8 Ex. 830 ; 22 L. J., Ex. 358.

—— **Contract for Sale—Vesting in Devisee.**]—Where trustees for sale under a will, who had entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vested the estate in the person to whom (subject to the trust) the land was devised, whereby he became the proper party to convey. Semble, that succession duty, and not legacy duty, ought to have been paid. *Howe (Earl)* v. *Lichfield (Earl)*, 36 L. J., Ch. 313 ; L. R. 2 Ch. 155 ; 15 W. R. 323.

Devise — Power to Compel Sale — Purchase-money.]—H. left an estate to his nieces, with a power to W. to compel them to put him into possession thereof on payment to them of 10,000*l.* W. having done so :—Held, that legacy duty was payable on the 10,000*l.* under 45 Geo. 3, c. 28, and 48 Geo. 3, c. 149. *Att.-Gen.* v. *Wyndham*, 1 H. & C. 563 ; 32 L. J., Ex. 1 ; 8 Jur. (N.S.) 1182 ; 7 L. T. 386 ; 11 W. R. 185.

Fund to be Laid out in Land.]—A fund bequeathed to trustees to be laid out in land, though not actually so laid out, is liable to legacy duty while the trusts of the will remain undischarged. *De Lancey* v. *Inland Revenue Commissioners*, 39 L. J., Ex. 76 ; L. R. 5 Ex. 102 ; 22 L. T. 239 ; 18 W. R. 468—Ex. Ch.

—— **For Persons in Succession—Composition for Duty Payable in respect of Life Estates—Liability of corpus.**]—Legacy duty remains payable in respect of money bequeathed upon trust to be laid out in land to be settled to uses for the benefit of persons in succession, notwithstanding that successive tenants for life have compounded for the duties payable in respect of their estates for life. Money was bequeathed, prior to 1881, in trust to be laid out in land to be settled to uses for the benefit of persons in succession. Under the ultimate limitations, and in the events which happened, the uses were to the testator's grandson for life, remainder to his first and every other son in tail, remainder to the grandson in tail. The grandson executed a disentailing assurance in his lifetime, and died without ever having had a son. No investment in land was actually made. Affidavit duty was, under the Customs and Inland Revenue Act, 1881, paid in respect of the money so far as it formed part of the grandson's estate, after deducting the latter's debts :—Held, that payment of affidavit duty on the money, as part of the grandson's estate, did not exempt it from payment of legacy duty as part of the testator's estate. *Haygarth's Trusts, In re* (22 Ch. D. 545) distinguished. *Kenlis (Lord)* v. *Hodgson*, 64 L. J., Ch. 585 ; [1895] 2 Ch. 458 ; 13 R. 603 ; 72 L. T. 866.

Charitable Legacies.]—A testator bequeathed to trustees 3*l.* per cent. consols, as to a part to pay and apply the dividends in establishing and supporting a daily school, for the instruction of twenty boys, on the principle of a national school, the dividends to be retained by R. B., sen., and R. B., jun., two of the trustees, to be so applied ; and he directed that R. B., jun., should be the schoolmaster, and that the management of the school should always remain in the family of R. B. And as to the other part of the stock, the testator directed that the dividends should be paid by the trustees to, and applied by, the schoolmaster for the time being of the school, in providing the boys with pinafores, caps and shoes, and also with books and slates, such clothes, books and slates to be left behind them on leaving the school :—Held, that these bequests were subject to legacy duty. *Griffiths, In re*, 14 M. & W. 510 ; 15 L. J., Ex. 130.

A bequest of moneys to trustees for the purpose of building, endowing, and repairing a church is subject to a legacy duty of 10*l.* per cent. *Parker, In re*, 4 H. & N. 666 ; 29 L. J., Ex. 66 ; 5 Jur. (N.S.) 1058 ; 7 W. R. 600.

A testator gave charitable legacies, to be paid out of pure personalty, and afterwards directed the duties on all legacies to be paid out of residue in exoneration of the legacies :—Held, that the charitable legacies were exonerated from duty only in the proportion to which the residue consisted of pure personality. *Jarman, In re, Leavers* v. *Clayton*, 47 L. J., Ch. 675 ; 8 Ch. D. 584 ; 39 L. T. 89 ; 26 W. R. 907.

By 56 Geo. 3, c. 56, sched., part 3, and 5 & 6 Vict. c. 82, s. 38, legacies given for charitable purposes are exempt from duty, but such exemption does not extend to legacies absolute on the face of the will, but bound by a secret trust for charitable purposes. *Cullen* v. *Att.-Gen. (Ireland)*, L. R. 1 H. L. 190 ; 12 Jur. (N.S.) 531 ; 14 L. T. 644 ; 14 W. R. 869.

Bequest by a parish priest in Ireland of "all my property and money to the poor." The assets were all in Ireland, and the will was proved there :—Held, liable to legacy duty. To bring a legacy, for a purpose merely charitable, within the exemption from legacy duty in the 5 & 6 Vict. c. 82, s. 38, it must appear by the will itself that the charitable purpose is to be restricted to Ireland. *Kenny* v. *Att.-Gen.*, 11 L. R. Ir. 253.

Testator gave his residuary estate (which amounted to 13,000*l.*) to his executors, to be by them appropriated to the education of the poor in Ireland, principally those in or about Limerick ;

—Held, that legacy duty was payable on the residue. *Att.-Gen.* v. *Fitzgerald*, 13 Sim. 83; 7 Jur. 569.

A legacy of 50*l.* a year to be laid out in bread for the poor of a parish, is liable to the legacy duty; although the poor were so numerous that no one received more than the value of 2*s.* per annum. *Franklin's Charity, In re*, 3 Sim. 147; 3 Y. & J. 544.

A charitable legacy is liable to pay duty, notwithstanding a direction that the fund is to be distributed among the individual objects in sums of less than 20*l.* *Harris* v. *Howe* (*Earl*), 29 Beav. 261; 30 L. J., Ch. 612; 7 Jur. (N.S.) 383; 9 W. R. 404.

—— **Two Sums to same Person.**]—If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to retain the duty chargeable on such amount. *Ib.*

—— **Discretion of Executors.**] — Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in 10*l.* or 15*l.* as they should see fit. *Wilkinson, In re*, 1 C., M. & R. 142; 4 Tyr. 513; 3 L. J., Ex. 236. S. P., *Att.-Gen.* v. *Nash*, 1 M. & W. 237; 1 Tyr. & G. 584; 5 L. J., Ex. 289.

—— **To Individuals in a Class.**]—A bequest to trustees of 2,000*l.* consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession, is liable to legacy duty. *Pearce, In re*, 24 Beav. 491.

3. When Payable.

On Payment, Delivery, Retainer, Satisfaction or Discharge.]—A legacy, bequeathed by will of a person dying in 1771, of a sum of money to an executor to pay the interest thereon to the testator's natural child for his life, and, on his death, to pay over the principal to his children, the interest of which had accordingly been regularly paid to the legatee for life up to his death, which happened in 1812, his two sons (his only children) having died long before that time, and previously disposed of their interest in the bequest, is within 48 Geo. 3, c. 149, sched. 3, as being a legacy given by will of a person dying before the 5th April, 1805, and not paid, retained, satisfied or discharged till after the 10th October, 1808, and consequently liable (as to the interest taken by the representatives of the children) to the duty of 8*l.* per cent. imposed by that statute on such legacies when given for the benefit of strangers in blood to the testator. *Att.-Gen.* v. *Manners* (*Lady*), 1 Price, 411.

S. M. devised all his real estates, except his mortgages in fee, unto V. and J. M., their heirs and assigns, upon certain uses, viz., to the use of W. M. and his assigns for life, with remainder in tail to his issue, with divers remainders over. The testator devised all the residue of his personal estate as also all such real estates as he was seised of as mortgagee in fee, unto V. and W. M., their heirs, executors, &c., to convert the whole of the residue into money, and to lay out and invest the same in the purchase of real estate, to be conveyed to V. and J. M. (the trustees of his real estates), their heirs, &c., upon the same uses as his real estates. And the testator declared, that until such purchases his executors should place out or continue all the residue at interest, in the names of his executors, on mortgage of real estates, or in the public funds; the interest of which latter was to be paid to the persons to whom the rents of the real estate therewith to be purchased would belong by virtue of his will. The testator appointed V. and W. M. his executors, and died in 1791, when they took upon themselves the execution of the will. The residue amounted to 14,000*l.*, and was invested in mortgage in the names of the executors, before 1796, and before 36 Geo. 3, c. 52; after which V. died; and W. M., who enjoyed the interest during his lifetime, became the surviving executor. W. M. died without issue in 1825. The money was never applied in the purchase of real estate; and W. H. and G. R., the executors named in the will of W. M., on the 26th January, 1832, paid the residue of the personal estate of S. M. (the original testator) to J. M., he being the person entitled to it under S. M.'s will:—Held, that this was a legacy given by the will of a person dying before the 5th April, 1805, and paid, satisfied or discharged after the 31st August, 1815, within 55 Geo. 3, c. 184, and was liable to the payment of the legacy duty under that act. *Att.-Gen.* v. *Hancock*, 2 M. & W. 563; M. & H. 159; 6 L. J., Ex. 168.

A., who died in 1794, bequeathed a legacy in consolidated stock to executors to pay the interest to B. for life; remainder, after B.'s decease, to the surviving children of B. on their attaining twenty-one; remainder, if no surviving children, to the appointment of B.; remainder in default of appointment to B.'s next of kin. Upon A.'s death the executors transferred the legacies into their own names from that of the testator, paid his debts, and accounted for the residuary estate to the residuary legatee; the dividends were regularly paid by the executors to B. until 1826, when she died, leaving three children:—Held, that the transfer did not amount to a payment, delivery, retainer, satisfaction or discharge of the legacy before the 31st August, 1815, and was therefore liable to the duty under 55 Geo. 3, c. 184. *Att.-Gen.* v. *Wood*, 2 Y. & J. 290.

A. having, by way of provision under a marriage settlement, executed a bond to the trustees of the settlement, for securing 16,000*l.* after his death, for C. and his wife, and then, subject to trusts in favour of their issue, for A. absolutely, A. bequeathed the 16,000*l.*, in case it reverted into the residue of his estate at any time, in trust as to 14,000*l.* for D. Upon A.'s death in 1794, a chancery suit was instituted for carrying his will into effect; and the master having reported that the 16,000*l.* was a specialty debt due from A.'s estate to the trustees of the settlement, stock (paid into court by A.'s executors) to the value of 16,000*l.* was, in 1807, under an order of court, transferred to the account of C. in the cause. C. died without issue between the date of the order and the transfer, and the dividends of the stock were paid to his widow until her death in 1848, when, upon the petition of D., the court ordered the stock to be sold, and the 14,000*l.* to be paid to him:—Held, that the legacy was paid, delivered, retained, satisfied or discharged before the 31st August, 1815, within the 55 Geo. 3, c. 184,

sched. iii., pt. 3, and therefore that no legacy duty was payable on the actual receipt of the 14,000*l.* by D. in 1848. *Att.-Gen.* v. *Loscombe*, 5 H. & N. 564; 29 L. J., Ex. 305.

By will 3,000*l.* given to trustees, upon trust to invest, and to pay the interest to A. for life, and after her death to transfer the principal to B. Under a decree this legacy is paid by the trustees into court, and invested in stock in the name of the accountant-general, previous to the imposition of the duty on legacies, by 20 Geo. 3, c. 28. B. being then an infant, and therefore incapable of discharging the trustees. This is a sufficient appropriation of the legacy within the words of the act 48 Geo. 3, c. 149, "paid, retained, satisfied, or discharged," before the 10th October, 1808, and therefore, upon a question arising at the time of the principal becoming payable, it was determined that no legacy duty was chargeable in respect of it. *Hill* v. *Atkinson*, 2 Mer. 45.

A testator bequeathed a sum of money to A. for life, and after her decease to her children, as she should appoint, and in default of appointment, equally among all her children, who if sons should attain twenty-one, or if daughters should attain that age or be married; and if she should have no such children, then according to her appointment, and, in default of appointment, over. Upon the death of the testator, a suit was instituted for the purpose of having this legacy secured; under the decree made in that suit in the year 1798, the executors paid the amount into court, and prior to November, 1802, the whole of it was invested in stock in the name of the accountant-general and placed to the separate account of A., who continued to receive the dividends during her life:—Held, that this was a sufficient payment of the legacy within the 55 Geo. 3, c. 184, and therefore, that upon A.'s death, in the year 1834, the parties interested in the remainder, who were children of A., were entitled to receive their several shares of the fund without producing receipts for the legacy duty. *Coombe* v. *Trist*, 1 Myl. & C. 69.

Payment on Death.]—Where father and son were entitled each to estates for life, with remainder to the sons of the latter in tail male, with power to them both to dispose of that property, and they jointly charged the same with a sum payable on the death of the father in payment of his debts and legacies, and to be paid to his executors for that purpose:—Held, that this was the creation of a new personal estate within the meaning of 55 Geo. 3. *Att.-Gen.* v. *Metcalfe*, 6 Ex. 26; 20 L. J., Ex. 329.

Realty handed over—Direction to Sell.]—A devise of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies, given either by his will or any codicil thereto, is liable to the legacy duty imposed by 48 Geo. 3, c. 149, although the residuary legatee took the property in statu quo, and the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary. *Att.-Gen.* v. *Holford*, 1 Price, 426; 16 R. R. 737.

Disclaimer—When Allowed.]—Although a legatee may disclaim a legacy, yet after he has accepted and bequeathed it by his will, his executor cannot disclaim the legacy. *Att.-Gen.* v. *Munby*, 3 H. & N. 826.

Exemption—Deficiency of Estate.]—T., being seised in fee of lands, mortgaged them as a security for money lent. The deed contained a covenant by T. to pay the principal and interest on a certain day. By another deed, T. covenanted to pay, on a certain day, a further sum of money lent, and that the same lands should be charged with that sum also. T., by will, devised his real estate to B., whom he appointed his executor. T. paid the interest on the mortgage debts, but died without having paid the principal. The personal estate of T. was only sufficient to discharge his funeral and testamentary expenses. B., by will, bequeathed his real and personal estate to his two sons, whom he appointed his executors, and died without having paid the mortgage debts. The executors of B. exhausted his personalty by paying with it those debts, and on that ground claimed an exemption from legacy duty:—Held, that the executors were bound to pay legacy duty. *Taylor's Estate, In re*, 8 Ex. 384; 22 L. J., Ex. 211.

A testator left annuities and legacies, the duty on some of which was charged on the residue. The executor paid the legacy duty on the annuities, and paid the legacies, but not the duty on them, and afterwards became bankrupt. The residue of the estate would be insufficient, after payment of the costs of an administration suit, and of the payment of the duty unpaid, to provide for the annuities:—Held, that the crown had no claim on the estate. *Wright* v. *Barnewall*, 19 L. J., Ch. 38; 13 Jur. 1041.

4. Amount on which Payable.

Mode of Calculating.]—The 16 & 17 Vict c. 57, s. 31, which enacts, that where it shall be required to calculate, for the purpose of legacy duty, the value of any annuity, such value shall, after the time appointed for the commencement of the act, be calculated according to the tables in the schedule to that act, and not according to the tables in 36 Geo. 3, c. 52, is confined to cases where the testator died after the commencement of the act, and does not extend to cases where, the death being before, the act of calculation and payment occur after the commencement of the statute. *Cornwallis (Earl), In re*, 11 Ex. 580; 25 L. J., Ex. 149; 4 W. R. 711.

Legacy in Satisfaction of Debt—Evidence.]—A statement in a will that a legacy is bequeathed in satisfaction of a debt is sufficient primâ facie evidence of the testator's indebtedness to exempt the legacy from duty. *O'Leary's Estate, In re*, [1896] 1 Ir. R. 283.

Aggregate Amount.]—The legacy duty is to be paid upon the aggregate amount of the residue of the testator's property, at the time of the executor delivering into the stamp office the note of what he intends to retain as residuary legatee. *Att.-Gen.* v. *Cavendish (Lord)*, Wightw. 82; 12 R. R. 716.

—— **When Payment Deferred—Interest.**]—Where a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on

the aggregate amount of capital and interest which is ultimately received by the legatee. *Thomas* v. *Montgomery*, 3 Russ. 502.

The amount of legacy duty, being calculable from the time when probate is taken out, must be estimated upon the sum devolved by succession, with the addition of such sums as have accrued by way of interest in the interval. *Att.-Gen.* v. *Partington*, 1 H. & C. 457; 10 Jur. (N.S.) 617. Affirmed, 3 H. & C. 193; 33 L. J., Ex. 281; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54—Ex. Ch. Affirmed in H. L., ante, col. 195.

But where a specific sum is bequeathed or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money between the time of such death and the period when the executors close their accounts. *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114; 12 Price, 407.

Property not reduced into Money during course of Administration.]—Shortly after the death of a testatrix her executor brought into the Inland Revenue Office the residuary account of her property, in which a value was set upon certain pictures and other personal property not reduced into money, and the commissioners accepted duty upon that value. Subsequently—the residuary legatee and the executor having always intended that the pictures should be sold in the course of the administration—the executor sold them for a sum greatly in excess of the value upon which duty had been paid, and accounted to the residuary legatee for the proceeds:—Held, that the provisions of 36 Geo. 3, c. 52, s. 22, apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in; that the pictures, &c., therefore, did not satisfy the description in s. 22, and that the crown were entitled to duty under s. 6 upon the amount paid to the legatee. *Att.-Gen.* v. *Dardier*, 52 L. J., Q. B. 329; 11 Q. B. D. 16; 48 L. T. 582; 31 W. R. 499; 47 J. P. 484.

Bequest to Daughter and Husband in Equal Shares.]—A bequest of all the rest, residue and remainder of the personal estate of a testator to his son-in-law B., and to the testator's daughter P., his wife, their executors, administrators, and assigns, for their absolute benefit, is not chargeable under 55 Geo. 3, c. 184, sched. 3, with the highest duty of 10*l.* per cent. on the whole amount, as being a legacy given to, or devolving to or for the benefit of B. the husband, a stranger in blood to the deceased; nor chargeable wholly with the lowest duty of 1*l.* per cent., as being a legacy given to, or devolving to or for the benefit of a child of the deceased (in the person of the daughter), but chargeable by moieties, as being a bequest for the benefit of each to the amount of one-half; and therefore as to one moiety chargeable at the highest, and as to the other at the lowest duty. *Att.-Gen.* v. *Bacchus*, 11 Price, 1; 9 Price, 30.

——**To Son and Daughter-in-Law.**]—A bequest of "a residue of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the testator's son and his wife (a stranger in blood) for their lives, with remainder to the grandchildren of the testator in equal proportions," is liable to a legacy duty to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife, upon the principle that the son and his wife each take a life interest in one moiety of the income of the residue. *Att.-Gen.* v. *Burnie*, 3 Y. & J. 531.

On Life Interests of Husband and Wife.]—A testator directed his executors to assign the residue of his personal estate to the trustees of the settlement of his niece, Mrs. A., the wife of A., on trust out of the annual income to pay to her, during the joint lives of herself and husband, an annuity of 2,000*l.* for her separate use, and that they should stand possessed of the residue upon such trusts, and for such persons and interests, as were expressed in a deed of settlement of Mrs. A. This deed provided that the trustees should stand possessed of the settled property, during the joint lives of A. and his intended wife, to pay her an annuity of 500*l.*, upon trust to pay the residue or surplus of the dividends and annual produce of the stocks, funds, &c., unto A., and authorised him to receive the same during his life, and after the decease of either of them to pay the dividends to the survivor, and authorised him, her or them to receive the same during the life of the survivor:—Held, that, under the 36 Geo. 3, c. 52, s. 1, the duty was to be charged on the value of 2,000*l.* a year to Mrs. A. for the joint lives of herself and her husband, and on the value of the residue of the income for the single life of A. *Att.-Gen.* v. *Wynford* (*Lord*), 9 Ex. 746; 23 L. J., Ex. 223.

Appointment to Person Entitled in Default of Appointment.]—J. R., after directing his real estates to be sold and converted into personalty, bequeathed the general residue of his personal estate to his daughter, J. A. P., and J. R., J. S. and J. G., his executrix and executors, upon trust, to permit his daughter to receive the rents and dividends during her life, and after her decease, for such person or persons (other than and except J. W. and his relations, M. H. and his relations, and the relations of the late husband of the testator's daughter, and every of them), in such parts, shares, and proportions, and in such manner and form, as J. A. P., whether sole or covert, should by will appoint; and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that, in case his daughter should intermarry with J. W., or any of his relations, or should reside with or receive visits from him or them, the bequest in her power should utterly cease. After the testator's death, J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and, in exercise of the power under her father's will, she gave 10,000*l.* consols to the descendants of the before-named D. R.; and gave all the rest of her father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R., the testator:—Held, first, that, on the death of J. A. P., a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof. *Platt* v. *Routh*, 6 M. & W. 756; 10 L. J., Ex. 105. *S.C.*, 3 Beav. 257; 10 L. J., Ch. 131.

Held, secondly, that legacy duty was payable in respect of the bequests contained in the will of J. A. P., at the same rate at which it would have been payable if they had been mere legacies given by her payable out of her own personal estate. *Ib.*

Succession to Estate in Remainder subject to Rent-charge.]—A testator devised real estate to T. for life, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainder over; and gave a power to the several persons, who, by virtue of the limitations in the will, should be in actual possession of the estates by deed or will to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsover. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with 750*l.* per annum, by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—Held, that G. P. was chargeable with legacy duty, after the rate of 10*l.* per cent. on the value of the rent-charge of 750*l.* per annum. *Att.-Gen.* v. *Pickard*, 3 M. & W. 552; 1 H. & H. 174; 7 L. J., Ex. 188. Affirmed, 6 M. & W. 348; 9 L. J., Ex. 329.

Devise of Lands in England — Proceeds to "Daughters" of Foreign Mother.]—The proceeds of land in England devised by a British subject domiciled in France, on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law, are liable to legacy duty at 1*l.* per cent. only. *Skottowe* v. *Young*, 40 L. J., Ch. 366; L. R. 11 Eq. 474; 24 L. T. 220; 19 W. R. 583.

A person of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France:—Held, that the status of the daughters in England must be their status according to the law of France, i.e. that of legitimate children and not of "strangers in blood," and that legacy duty at the rate of 1*l.* per cent. was payable upon the shares taken by them under their father's will. *Ib.*

Cumulative—Bequest to Executors of Deceased Legatee.]—A gift by will to executors, as executors, of a person who has predeceased the testator, does not make the property bequeathed a part of the personal estate of that person within the meaning of the words of the Stamp Duties Act, 1815, "the personal estate and effects of any person deceased," so as to render it liable to the payment of inventory duty as upon a devolution from him. Neither does such a gift come within the words of the Stamp Duties Act, 1860, "the personal and movable estate and effects which" any person "shall have disposed of by will under any authority enabling such person to dispose of the same as he or she shall think fit." *Lord Advocate* v. *Bogie*, 63 L. J., P. C. 85; [1894] A. C. 83; 6 R. 98; 70 L. T. 533—H. L. (Sc.).

Property so bequeathed is not liable to the payment of legacy duty under the Stamp Duties Act, 1845, as being a "gift by any will or testamentary instrument of any person which, by virtue of any such will or testamentary instrument, is or shall be payable or shall have effect, or be satisfied out of the personal or movable estate or effects which such person hath had or shall have had power to dispose of." *Ib.*

—— **Property vesting in Testator—No Possession.**]—A. by his will gave to trustees 10,000*l.* upon trust for B., then the wife of C., and after her death upon trust for all her children who should attain twenty-one. B. had seven children who attained that age, two of whom, D. and E., died in the lifetime of their parents, intestate, whereby their father, C., became their next-of-kin, and entitled beneficially to the two one-seventh shares of the legacy of 10,000*l.* expectant upon the death of their mother, B. Their father, C., never took out letters of administration, but himself died in the lifetime of his wife, B., and by his will, his surviving children became entitled to his residuary personal estate, which included the reversionary value of the two seventh parts of the 10,000*l.*, in respect of which no legacy duty had been paid by C. Upon the subsequent death of B.:—Held, that legacy duty was payable in respect of the beneficial acquisition by C. of the two seventh shares of D. and E., as well as a similar duty in respect of the transmission of the same shares by the will of C. *Att.-Gen.* v. *Cleave*, 31 L. T. 86.

Annuities — Four Equal Payments.] — A testator bequeathed several annuities to relations in equal degree, and therefore subject to the same rate of duty under 36 Geo. 3, 52. He gave all his real and personal estate to trustees for conversion and investment, and payment of the annuities out of the yearly produce, and for accumulation of the remainder. He directed that upon the death of any of the annuitants the trustees should pay, after making provision for the remaining annuities, the capital among a class of persons in the same degree of relationship as the annuitants, and therefore subject to the same rate of duty under 36 Geo. 3, c. 52:—Held, that the duty was payable on the annuities, as annuities, within s. 8, by four equal payments, of which the first instalment was to be made at the end of the first year of the annuity, and not payable upon the whole capital under s. 12. *Crow* v. *Robinson*, 4 De G. F. & J. 337; 31 L. J., Ch., 516; 6 L. T. 372; 10 W. R. 306.

5. By Whom Payable.

Executor should Deduct.]—It is the duty of an executor to deduct the amount of legacy duty; and if he omits to do so, he will become personally responsible for it. *Sammon, In re*, 3 M. & W. 381.

Where legacy duty attaches on a legacy the executors will be accountable for and bound to retain the duty chargeable on the legacy. *Williamson, In re*, 1 C., M. & R. 142; 4 Tyr. 513.

—— **Administration Proceedings Pending.**]—The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of a testator's personal estate and effects received by the executors, and that the personal estate may be administered and the legacy paid, is no answer to an application by the commissioners of stamps, under the 42 Geo. 3, c. 92, if

any duties have become payable on legacies which have been paid, notwithstanding the 36 Geo. 3, c. 52, which provides that the court in which such suit shall be instituted shall, in giving directions concerning the payment of legacies, take care that no allowance be made in respect of any legacy, without due proof of the payment of the duties thereby imposed. *Sammon, In re*, 3 M. & W. 381.

Erroneous payment by Executors—Liability.]—Executors, in passing their residuary account, erroneously represented the legatees as strangers in blood to the testator, whereby a large sum for legacy duty was paid to the crown. A suit having been instituted to take an account of the trust funds, the executors, by their answer, admitted their liability for the principal money erroneously paid, but disputed their liability to the payment of interest. The decree at the first hearing was silent as to interest, and merely directed a reference to take an account of the trust fund:—Held, first, that the executors could properly be charged with interest on further directions. *Shaw* v. *Turbett*, 14 Ir. Ch. R. 476.

Held, secondly, that interest was chargeable on the principal money erroneously paid. *Ib.*

Executor's Right of Recovery from Legatee.]—An executor allowed the legatee of leasehold to occupy for fifteen years, the legacy duty being unpaid. The executor was then called upon to pay duty on the profits accruing for the fifteen years, as well as the principal value of the premises:—Held, that he was liable to the whole of such duty, and that he might recover all the money paid on that account as money paid to the use of the legatee. *Bate* v. *Payne*, 13 Q. B. 900; 18 L. J., Q. B. 273; 13 Jur. 609.

An executor, in every instance, made the half-yearly payments, due to the tenant for life of the residuary estate, through the solicitor employed by him in the administration of the trusts of the will. The solicitor, having neglected to retain the legacy duty out of such payments, applied to the tenant for life for a return of the amount of such duty. Having accordingly received the amount from the tenant for life, the solicitor, instead of paying the same to the crown, retained it for his own purposes, and soon afterwards absconded. The executor subsequently paid the duty to the crown:—Held, that he was not entitled to retain out of the life interest of the tenant for life what he had so paid. *Horn* v. *Coleman*, 26 L. J., Ch. 213; 2 Jur. (N.S.) 1127; 5 W. R. 32.

Where executors have paid the amount of legacies in full to the legatees, and the duties were subsequently paid by the executors when the accounts were passed through the stamp office:—Held, that they could not maintain an action to recover the amount of the duties against the legatees in respect of whose legacies they were paid. *Foster* v. *Ley*, 2 Scott, 438; 2 Bing. (N.C.) 269; 1 Hodges, 326; 5 L. J., C. P. 17.

Under 36 Geo. 3, c. 52, s. 6, executors who have paid the legacy duty on an annuity eight years after the death of the testator, may recover the amount from the legatee, although such legatee assigned the annuity three years before; on the ground, that the payment by the executors was compulsory, and that they stood in the situation of trustees or sureties to the legatee. *Hales* v. *Freeman*, 4 Moore, 21; 1 Br. & B. 391; 21 R. R. 663.

Reimbursement, when Allowed.]—The dividends on a fund in court were ordered to be paid to the tenant for life under a will. After her death it was discovered that legacy duty had not been paid on her life interest:—Held, that neither the executor nor an assignee from the tenant for life had any claim to be recouped out of the reversion what they might be compelled to pay in respect of duty. *Bowra* v. *Rhodes*, 8 Jur. (N.S.) 1050; 10 W. R. 747.

Devise of real estate in trust for A. for life, with a power to A. by will to grant an annuity thereout to B. not to exceed 500*l.*, remainder to F. charged with the annuity. A. died and F. entered:—Held, that F. took the land subject to the payment of the annuity, and could not compel B. to refund the legacy duty paid by him. *Stow* v. *Davenport*, 2 N. & M. 805; 5 B. & Ad. 359.

A cestui que trust of a portion of the proceeds of a contingent reversionary interest in an estate directed to be sold, in case of, and upon the happening of the contingency, bequeathed his reversionary interest to a legatee, who sold the same before the happening of the contingency. The executor was a party to the assignment, to obviate all question as to the existence of debts of the cestui que trust, and the purchase-money was thereby expressed to be paid to him, but was in fact paid to the legatee by the purchaser:—Held, that the executor had no claim on the purchaser to be reimbursed the legacy duty, which, after the happening of the contingency, he was compelled to pay on the full value of the share. *Farwell* v. *Seale*, 3 De G. & S. 359; 18 L. J., Ch. 189; 13 Jur. 483.

Trustees.]—When a residue is bequeathed to trustees in trust for various persons in succession, the trustees originally appointed, as well as any new trustees, are liable under s. 13 of 36 Geo. 3, c. 52, to pay legacy duty. *Jones's Trust, In re*, 21 L. J., Ch. 566.

Trust for Payment of Debts.]—A testatrix, after giving several legacies free of duty, bequeathed a part of her estate to trustees, "upon trust to pay off all and every debt and debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged":—Held, that the creditors were liable to the duties payable on this bequest. *Foster* v. *Ley*, 2 Scott, 438; 2 Bing. (N.C.) 269; 1 Hodges, 326; 5 L. J., C. P. 17.

A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150*l.* as the price to be paid for a release of all claims. Legacy duty was claimed on this account:—Held, that it must be borne by the administrator, and not by the creditor, *Greville* v. *Greville*, 27 Beav. 596.

Purchaser or Assignee of Subject Matter.]—Husband and wife being entitled in succession, under the will of the wife's aunt, to life interests in the dividends of stock standing in court, the wife being the first annuitant, the husband granted an annuity to E. charged upon the life interests of his wife and himself. The legacy duty on the wife's annuity was duly paid, and upon the death of the wife E. procured an order in the suit for payment to him of all the dividends of the fund towards payment of his annuity

and arrears, undertaking to pay the surplus to the husband. On the death of the husband, who died insolvent, it was ascertained that no part of the legacy duty on his annuity had been paid:—Held, construing the 36 Geo. 3, c. 52, liberally, that this annuity was a legacy within s. 25, and that the receipt of the annuity, without deducting the legacy duty, made E. a debtor to the crown. *Bryan* v. *Mansion*, 26 L. J., Ch. 510; 3 Jur. (N.S.) 473; 5 W. R. 483.

A testator directed his estates to be sold, and gave the dividends of one portion of the proceeds to his wife for life, and after her death he gave the capital to A. The second portion he gave to A., subject to annuities. By an agreement between the widow and A., the first portion was paid over by the executors to A. during the widow's life, and no sum was retained to answer the legacy duty, which would become payable on her death. A. sold the second portion to the plaintiff, and the surviving executors of the surviving executor of the testator joined in the assignment, for the purpose of admitting A.'s title to the property, and stating that they knew of no incumbrance upon it. Upon the death of the annuitants, the purchaser filed a bill against the executors for a transfer of the fund:—Held, that the executors were not entitled to retain the legacy duty payable upon the first portion of the property. *Bignold* v. *Giles*, 28 L. J., Ch. 238; 7 W. R. 99.

A. B. being entitled to a legacy, and being indebted to C. D., by a deed, which represented that it was "unincumbered," assigned it to C. D. upon trust to retain a moiety, and as to the residue in trust for A. B. The fund was in court, and liable to legacy duty:—Held, that C. D.'s moiety must bear its share of the legacy duty. *Bliss* v. *Putnam*, 7 Beav. 40.

Mixture of Two Sums—Assignment of one, subject to Annuities.]—A., who died in 1820, by will directed his estate to be divided into two moieties, in one of which 4,300*l.* three per cent. consols, standing in his name, were to be included; and as to this moiety he directed that (after payment of certain debts) the surplus beyond the 4,300*l.* consols should be invested in the funds in the names of his executors, in trust to pay the dividends thereon, and also on the 4,300*l.* consols, to his wife for life; and upon her death he bequeathed this moiety to A., save and except the 4,300*l.* consols, the dividend upon which, amounting to 129*l.* a year, he directed to be paid to three annuitants of 20*l.* a year each, and the remainder to a nephew during his life. He then bequeathed the annuities of 20*l.* to three other annuitants, and after the death of the survivor of them he bequeathed the 4,300*l.* consols to A. absolutely. The executors realised the property, and it was ascertained that 5,099*l.* was the amount to be invested to make up, together with the 4,300*l.* consols, the moiety of the dividends on which was to be paid to the wife for life. The executors entered into an arrangement with the widow, and A. and her husband, by which the 5,099*l.* was paid over to the latter, but no legacy duty was paid upon it. The widow died in 1835, and in 1837 A. sold and assigned to B. the 4,300*l.* consols, subject to the annuities then in existence, and legacy duty chargeable on A. in respect thereof:—Held, first, that the 5,099*l.* and 4,300*l.* were separate legacies, and that B. was not a debtor to the crown in respect of the legacy duty payable on the 5,099*l.* *Att.-Gen.* v. *Giles*, 5 H. & N. 255; 29 L. J., Ex. 176; 1 L. T 553; 8 W. R. 342.

Held, secondly, that the crown had no lien on the 4,300*l.* in respect of such duty. *Ib.*

6. Out of what Fund Payable.

Legacy.]—Legacy duty is a charge on legacy, not on estate, but where legacy is given free of duty, it is an increase of legacy itself, and ought to be paid out of the same fund. *Noel* v. *Henley*, 7 Price, 253; 26 R. R. 660.

In an administration suit, the court provides for the payment of legacy duty before payment to the legatee. *Hicks* v. *Keat*, 3 Beav. 141.

Residuary Estate.]—A testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to A. A. and the legatees in remainder were strangers in blood to the testator:—Held, that the legacy duty was payable out of the testator's residuary estate, both in respect of the interest given to A., and to those in remainder. *Calvert* v. *Sebbon*, 2 Keen, 672; 7 L. J., Ch. 275; 2 Jur. 438.

Testatrix, in exercise of a general power of appointment, made several appointments of (in each case) "so much and such part of" the said trust in funds as should be of the "clear" value of a specified sum of money in each case, and lastly made an appointment of "all the residue" of the said trust funds. The will disposed of no other property except that subject to the power, and contained no direction for payment of testamentary expenses, probate or legacy duty:—Held, that the testamentary expenses and probate duty, and the legacy duty on the specified portions of the trust funds, must be paid out of that part of the trust funds which was lastly appointed as residue. *Currie, In re, Bjorkman* v. *Kimberley (Lord)*, 57 L. J., Ch. 743; 59 L. T. 200; 36 W. R. 752.

Part of Residue free from Duty.]—A testator gave his residue to trustees, to convert and divide into two equal parts; and he bequeathed one equal part to A., free from any duty in respect thereof, and the other equal part to be given to his nephews (but without the addition of the latter words):—Held, that the legacy duty on the first moiety was payable out of any lapsed residue; and if none, out of the second moiety. *Warbrick* v. *Varley*, 30 Beav. 241.

When Residuary Estate Insufficient.]—A testator gave certain legacies free of legacy duty, simpliciter, and other legacies free of legacy duty, with a direction that the duty should be paid out of his residuary estate. The corpus of the legacies and the duty having been paid, it was ascertained that the estate was deficient, so that there was no residue available for payment of the duty directed to be thereby borne:—Held, that the gift of duty out of the residuary estate failed pro tanto, and that the legatees whose legacy duty was to be borne by the residuary estate must themselves bear the legacy duty to

the extent to which the general personal estate was insufficient to pay the same. *Wilson* v. *O'Leary*, L. R. 17 Eq. 419.

The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personalty. *Wilkinson* v. *Barber*, 41 L. J., Ch. 721; L. R. 14 Eq. 96; 26 L. T. 937; 20 W. R. 763.

—— **Abatement.**]—A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, and in the case of a deficiency of assets must abate along with other pecuniary legacies. *Farrer* v. *St. Catherine's College, Cambridge*, 42 L. J., Ch. 809; L. R. 16 Eq. 19; 28 L. T. 800; 21 W. R. 643.

When a testator's estate is insufficient (after payment of his debts) to pay in full annuities given by his will, the fund must (after payment of costs) be apportioned between the annuitants in the proportion which the sum composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, and this rule applies in a case in which the annuitants are all living at the time of distribution. A testator gave an annuity of 150*l.* to his widow, and an annuity of 100*l.* to a stranger in blood, and he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—Held, that (after payment of costs) the fund must be apportioned as above between the two annuitants; that the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, and the balance then divided in the same proportion between the two annuitants. *Heath* v. *Nugent* (29 Beav. 266) followed. *Wilkins, In re, Wilkins* v. *Rotherham*, 54 L. J., Ch. 188; 27 Ch. D. 403; 33 W. R. 42.

7. Proceedings against Executors.

Rule to Account.]—A rule for an attachment against an executor for not delivering an account at the Legacy Duty Office is nisi only. *Vyvyan, In re*, 1 Tyr. 379; 1 C. & J. 409.

Where, on a rule nisi calling upon executors to account for and pay over legacy duties, the executor did not appear to show cause, and the rule was therefore made absolute; the court ordered that it should form part of the rule, if, upon the delivery of the accounts, there should be found to be any duties payable to his majesty, that the executor or administrator should pay the costs of the crown, to be taxed in the usual manner. *Robertson*, or *Robinson, In re*, 2 M. & W. 407; 5 D. P. C. 609; M. & H. 71; 6 L. J., Ex. 158.

A rule was obtained for the surviving executor of the executrix of the executor of a testator, to account for legacy duties due on the estate of the original testator. The original testator died in 1812; the surviving executor had never acted, except in signing documents; he knew nothing of the estate of his testatrix, and had received no assets of hers, or of the original testator:—Held, that the power given to the court by 42 Geo. 3, c 92, s. 2, is discretionary, and that the case was not one in which they ought to exercise it. *Pigott, In re*, 1 C. & M. 827; 3 Tyr. 859; 2 L. J., Ex. 298.

When, in pursuance of the 13 & 14 Vict. c. 97, s. 8, a rule nisi for the payment of a sum of money to the receiver-general of inland revenue as legacy duty has, on no cause being shown, been made absolute against the person withholding the duty, and both rules have been personally served, the court will grant a rule for an attachment absolute in the first instance. *Evans*, or *Eaton, In re*, 3 H. & C. 562; 34 L. J., Ex. 87; 11 Jur. (N.S.) 182; 11 L. T. 717; 13 W. R. 350.

Costs of Proceedings.]—Where the crown succeeds in imposing the legacy duty, it is entitled to costs out of the property; but where it fails, there should be no costs. *Lyall* v. *Paton*, 25 L. J., Ch. 746.

Against Administrator.]—Pending a suit for the administration of assets, and before the accounts had been taken, the attorney-general presented a petition for payment out of the assets of a sum which, under false representations, had been returned to the administrators as overpaid in respect of probate duty, and for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, and the widow, who was entitled to one-third, had not been paid:—Held, that the application was premature, and the petition was dismissed. *Hicks* v. *Keat*, 3 Beav. 141.

8. Money Paid into Court.

Payment out.]—A testamentary guardian is not entitled as such to obtain payment out of court of funds, the property of his infant ward, which have been paid into court under the Legacy Duty Act:—Semble, that in ordinary cases, which do not depend upon a special act, a testamentary guardian is entitled to give a receipt for funds coming to his infant ward. *Cresswell, In re*, 45 L. T. 468; 30 W. R. 244.

On a petition for payment of a fund out of court, the certificate from the inland revenue department of payment of legacy duty ought to be produced. Where that certificate was refused on other grounds, although duty had been paid, and an affidavit to that effect was produced, the court ordered such affidavit to be served on the solicitor for the inland revenue, together with notice to show cause with seven days why the fund should not be paid out, and in default, that it should be so paid. *Marsham, In re, Playford, In re*, 9 L. T. 533; 12 W. R. 45.

9. Return of Duty.

Legacy to Stranger — Duty Paid—Will disputed by Next of Kin.]—By an instrument purporting to be the will of S., the whole of his personalty, amounting in the net to 12,748*l.*, was bequeathed to J., a stranger in blood, who was made executor. J. took out probate, and paid the duty of 10*l.* per cent. on the whole net; afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid 6,000*l.* to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to J. her claim on the 12,748*l.* T., from her nearness in blood, was liable to a duty of less than 10*l.* per cent.:—Held, that under 36 Geo. 3, c. 52, s. 37, J. was entitled to a return of duty, not only on the 6,000*l.*, but also on the remaining 6,748*l.* and that the duty on the whole 12,748*l.* was to be accounted for between

T. and the commissioners of stamps, as duty charged on T. at the lower rate. *Reg.* v. *Stamps and Taxes Commissioners*, 6 Q. B. 657.

See also PROBATE DUTY, ante, col. 207.

10. PROOF OF PAYMENT.

What sufficient.]—A copy of an entry in the stamp-office books of the payment of the duty on a legacy is evidence of the payment of the duty. 36 Geo. 3, c. 52, s. 27. *Harrison* v. *Borwell*, 10 Sim. 380.

A certificate from the inland revenue office, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser. *Howe* (*Earl*) v. *Lichfield* (*Earl*), 35 Beav. 373; L. R. 1 Eq. 641; 14 W. R. 468. Affirmed, 36 L. J., Ch. 313; L. R. 2 Ch. 155; 16 L. T. 436; 15 W. R. 323.

11. GIFTS WHEN FREE OF LEGACY DUTY.

a. Particular Words.

Full Salary.]—A gift of six months' full salary is not a gift free from legacy duty. *Marcus, In re, Marcus* v. *Marcus*, 56 L. J., Ch. 830.

Clear.]—A direction that all the testator's legacies shall be paid clear, means that they shall be paid clear of legacy duty. *Ford* v. *Ruxton*, 1 Colly. 403.

A devise to trustees of a sum of money to be laid out in the purchase of an annuity "clear for A." means free from taxes. *Hodgeworth* v. *Crawley*, 2 Atk. 376.

Clear of Property Tax and all Expenses.]—A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property tax, and all expenses attending the same"; the legacy duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty. *Courtoy* v. *Vincent*, Turn. & R. 433; 24 R. R. 94.

Clear of all Taxes and Deductions.]—An annuity to be paid "clear of all taxes and deductions whatsoever," must be paid without deducting legacy duty. *Stow* v. *Davenport*, 5 B. & Ad. 359; 2 N. & M. 805.

A bequest of a sum of money to be laid out, so as to produce the clear yearly sum of 300*l.*, clear of all deductions, entitles the annuitant to require that the legacy duty on the annuity shall be paid out of the residue of the estate. *Marris* v. *Burton*, 11 Sim. 161; 9 L. J., Ch. 373.

A testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half yearly out of real estate, clear of all taxes and outgoings. The annuitant takes it clear of the legacy duty. *Louch* v. *Peters*, 1 Myl. & K. 489; 3 L. J., Ch. 167.

Free from all Expense.]—A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease his property consisted of 600*l.* 3 per cent. consols, and 119*l.* in sovereigns:—Held, that the stock did not pass under the word "money"; and that under the words "free from all expense" the legacy of 100*l.* was to be paid discharged of duty. *Gosden* v. *Dotterell*, 1 Myl. & K. 56; 2 L. J., Ch. 15.

A testator devised to J., for his life, one annuity or clear yearly sum of 100*l.*, and charged an estate with the payment thereof. He then devised the estate in trust to raise the annuity, and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A., for life, with remainder to B. in fee:—Held, that J. was entitled to the annuity clear of legacy duty. *Gude* v. *Mumford*, 2 Y. & Coll. 448.

The question whether a legatee is to take his legacy free from duty, depends upon the intention of the testator, as manifested on the face of the will; therefore, the words "without deduction," "clear of all deductions," &c., may be sufficient to free the legacy from duty, although there be, from the nature of the property on which it is charged, other outgoings to which those words applied. *Ib.*

"Without Deduction."]—A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdaile* v. *Gilliat*, 1 Swanst. 562; 18 R. R. 139.

Where a testator gives annuities, and directs them to be paid without any deductions whatsoever, and where from the nature of the property out of which the annuities are to be paid, there could be no deduction except in respect of the legacy duty, there the annuities shall be paid clear of legacy duty. *Smith* v. *Anderson*, 4 Russ. 352; 6 L. J. (O.S.) Ch. 105; 28 R. R. 122.

An annuity was given by a will, clear of all deductions, and was directed to be paid out of certain sums of stock standing in the testator's name:—Held, that it was not subject to the legacy duty. *Dawkins* v. *Tatham*, 2 Sim. 492.

A testator directed his executors to set apart a sum not more than 7,500*l.*, the dividends of which, when invested as thereinafter mentioned, would amount to the clear yearly sum of 300*l.*, clear of all deductions whatsoever, and to invest the sum so to be set apart in government or other securities, and gave the annuity to the plaintiff for life, and directed that if at any time the dividends of the trust named from any cause should prove deficient, the trustees should make good the deficiency out of the residue:—Held, that the annuity was free of legacy duty. *Marris* v. *Burton*, 11 Sim. 161; 9 L. J., Ch. 373.

A testator, after reciting that a sum of 50,000*l.* was charged on certain estates, which bore interest at 4*l.* per cent., and was payable, subject to a power of appointment, to the male issue of his marriage, and in certain events reverted to him, bequeathed that money, upon trust, to pay out of the interest an annuity to his wife, and the residue of the interest to his granddaughter for life; and he directed that, with the exception of the said sum so charged, all his debts, legacies, and legacy duty should be paid and payable out of such portions of his estate as were not specifically bequeathed; and he directed that all his

legacies should be paid within twelve months after his decease, without any deduction for legacy or stamp duty; and that all his legacies should bear interest at 5*l.* per cent., from the time of his death; and that his executors should pay the legacy duties payable on the legacies; and that all legacies be payable without any deduction whatever:—Held, that the 50,000*l.* was payable free from legacy duty. *Ferguson* v. *Ogilby*, 12 Ir. Ch. R. 411.

Free from any Charge or Liability.]—Bequest of legacy "free from any charge or liability in respect thereof":—Held, that it was given free from the legacy duty. *Warbrick* v. *Varley*, 30 Beav. 241.

Clear Yearly Sum.]—A testatrix gave a sum of money described as sufficient to produce in the funds the clear yearly sum of 500*l.*, on trust for certain persons in succession, and as to some of the legatees upon contingency, the legacies being liable to different rates of legacy duty, upon which, therefore, the whole amount of duty could not at once be calculated:—Held, not exempt from the duty. *Sanders* v. *Kiddell*, 7 Sim. 536; 5 L. J., Ch. 29.

On a bequest of such a sum as when invested would produce a clear yearly sum of 500*l.*, on trusts in succession, some not being ascertained at the testatrix's death:—Held, that the word "clear" was to be construed not to exempt the fund from legacy duty, but only from expenses of investment. *Ib.*

Direction to set apart a fund to produce a clear yearly sum of 300*l.* during the life of A.:—Held, legacy duty must be paid out of residue of the testator's estate. *Harper* v. *Morley*, 2 Jur. 653.

R. by will gave all his real and personal estate to trustees upon trust for sale and conversion, and directed them, "out of the proceeds to pay to S., until she shall marry, a clear yearly annuity of 25*l.*, and after her marriage upon trust to pay to the said S. a clear yearly annuity of 10*l.* during the remainder of her natural life." The testator proceeded, "And after payment of the said annuity of 25*l.* or 10*l.*, as the case may be, out of the net moneys to arise as aforesaid, upon trust to pay E. a clear yearly sum of 31*l.* 4*s.*, free of legacy duty." This was a summons taken out by the trustees for the determination of the question whether S.'s annuity was given free of legacy duty:—Held, that the words "clear yearly annuity" properly mean an annuity free from legacy duty, and this meaning could not be cut down by the fact that in another case the testator had added the words "free of legacy duty." *Robins, In re, Nelson* v. *Robins*, 58 L. T. 382.

A testator gave "an annuity or clear yearly sum of 100*l.*" to S. for life, and directed his trustees to purchase so much at 3*l.* per cent. consolidated bank annuities as would be sufficient to yield the clear annual sum of 100*l.* as and for a fund for the payment of the annuity. After the death of S. he directed the trustees to stand possessed of the stock constituting the fund in trust for J. The rate of duty on legacies to S. and J. was the same:—Held, that the annuity and the fund to answer the same were given free of legacy duty. *Wilks* v. *Groom*, 2 Jur. (N.S.) 798; 4 W. R. 697.

A testator directed the investment of a sufficient sum "to raise and pay an annuity or clear yearly sum of 100*l.*," which was given to parties in succession:—Held, that it was free from legacy duty. *Pridie* v. *Field*, 19 Beav. 497. And see *Haynes* v. *Haynes*, 3 De G. M. & G. 590; 1 W. R. 204.

Distinction between such a gift and a direct bequest of a clear annuity. *Ib.*

A. gave the residue of his personal estate to trustees, to set apart 10,000*l.* consols. and pay the dividends to his sister for life; and after her decease, to retain so much of the 10,000*l.* as should be sufficient to realise the clear yearly income of 150*l.*, and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them, to his nephew:—Held, that the nephew took the annuity, subject to legacy duty. *Banks* v. *Baithwaite*, 32 L. J., Ch. 35; 7 L. T. 149; 10 W. R. 612.

A testator gave his residuary personal estate to his executors upon trust out of a certain part thereof to set apart and appropriate so much as would produce the clear income or sum of 100*l.* a year, and pay such income or yearly sum to a named charity:—Held, that the legacy was given free of legacy duty. *Coles, In re*, L. R. 8 Eq. 271; 22 L. T. 221.

A bequest of one clear yearly rent-charge or annuity of 100*l.* a year out of real and personal estate, is payable without any deduction for legacy duty. *Bailey* v. *Boult*, 14 Beav. 595; 21 L. J., Ch. 277; 15 Jur. 1049.

Arising from Residue.]—Legacy duty on income arising from a residue directed to be laid out in land must be paid by the tenant for life entitled to such income, although the will contained a direction for payment of the duty on all annuities and legacies out of the general personal estate. *Londesborough* (*Lord*) v. *Somerville*, 19 Beav. 295; 23 L. J., Ch. 646.

b. What Legacies included.

Annuity.]—P. by his will gave all his property to trustees to the use of certain persons for successive estates tail with a direction that parties becoming first entitled to the rents should allow various specified sums to other parties. Then followed a charge on his realty of all the "annuities" thereinbefore mentioned, with a trust to convert and invest. The testator made five codicils, by which he gave various annuities, and directed that an annuity to F. B., and all the pecuniary and specific legacies given by his will, should be payable to the legatees (including a certain contingent annuity, if payable) free of legacy duty. On the question whether annuities as well as legacies were given free of duty:—Held, that they were. *Pearse* v. *Pearse*, 2 W. R. 129.

Alteration made by Codicil.]—Testator gave 4,000*l.* to trustees, upon trust, for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue: by codicil, reciting this bequest, and that he is desirous of increasing the same to 5,000*l.*, he revoked the gift of 4,000*l.* and gives 5,000*l.* upon the same trust, &c. By a second codicil, reciting the former, and that he is desirous of further increasing to 6,000*l.*, he revokes the gift of 5,000*l.*, and gives in lieu thereof 6,000*l.*, upon the same trusts. This is not a revocation, but substitution

in each instance, and the 6,000*l.* is therefore exempt from the legacy duty. *Cooper* v. *Day*, 3 Mer. 154.

Testator gave an annuity of 300*l.* free from all taxes and stamp duties to T. and H. during their joint lives, and to the survivor during her life, and after the death of the survivor, to G. for her life. By a codicil he revoked the annuity of 300*l.* given to T. and H., and gave them an annuity of 100*l.* each, with benefit of survivorship. The annuities of 100*l.* are subject to the legacy duty. *Burrows* v. *Cottrell*, 3 Sim. 375; 30 R. R. 171.

Testator, by his will, directed that the legacies therein given should be paid free of legacy duty. By a codicil, which he directed might be considered and taken as part of his will, he gave other legacies:—Held, that the legacies given by the codicil were not given free of legacy duty. *Early* v. *Benbow*, 2 Coll. 354; 10 Jur. 280.

Testator, by his will, gave an annuity to his grandson, and directed his executors to pay the legacy duty on all the legacies and annuities given by his will. By a codicil he gave an annuity to his grandson, in lieu of the annuity given by his will:—Held, that the annuity given by the codicil was free from the legacy duty. *Shaftesbury* (*Earl*) v. *Marlborough* (*Duke*), 7 Sim. 247.

A testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and as to the remaining 30,000*l.* she was to receive the interest to her separate use, during her life; and after her death the principal was to be paid to such person or persons as she might, by her will, appoint; and after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees, free of the legacy duty; the daughter having died in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by will, which are now lapsed, bequeathed to her husband 20,000*l.*":—Held, that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty. *Chatteris* v. *Young*, 2 Russ. 183; 26 R. R. 44. Affirming 6 Madd. 31.

By a will, some legacies were given free of duty, and their amounts were varied by a codicil:—Held, that they were still exempt from duty. *Fisher* v. *Brierley*, 30 Beav. 267.

Pecuniary Legacies—Gift of Stock.]—A testator gave to M. S. 50,000*l.* 3 per cent. consols, to be transferred within six months after his decease, and after giving a variety of specific and the pecuniary legacies thereinbefore bequeathed directed that the duty on his pecuniary legacies should be paid out of his general personal estate:—Held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the will from the payment of legacy duty. *Douglas* v. *Congreve*, 1 Keen, 410; 6 L. J., Ch. 51.

A testator gave certain sums of money as legacies, and two shares in a company, and directed the legacy duty on the "above-mentioned sums" to be paid out of residue:—Held, that the shares were not given free of legacy duty. *Dakers* v. *Lilburn*, 11 Jur. (N.S.) 292; 12 L. T. 167; 13 W. R. 568.

A testatrix directed all her personal estate to be converted into money, and her debts and funeral expenses and legacies to be paid out of the proceeds, and that out of the residue large sums of stock should be appropriated upon certain trusts. She then gave some pecuniary legacies of small amount, and directed that all the said legacies, and all legacies thereinafter given should be paid free from legacy duty:—Held, that the exemptions from legacy duty applied to the bequest of stock as well as to the pecuniary legacies. *Ansley* v. *Cotton*, 16 L. J., Ch. 55.

—— **Specific.**]—A testatrix, after having bequeathed various pecuniary legacies, and also legacies of specific chattels, directed that "all the legacies left by my will and codicil be paid free of legacy duty":—Held, that the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. *Ansley* v. *Cotton* (16 L. J., Ch. 55) discussed and followed. *Johnston, In re, Cockerell* v. *Essex* (*Earl*), 53 L. J., Ch. 645; 26 Ch. D. 538; 52 L. T. 44; 32 W. R. 634.

Different Classes of Legacies.]—A testatrix bequeathed a legacy of 6,000*l.* She afterwards, in a separate sentence, said, "I also bequeath the several legacies hereinafter mentioned" [specifying them], "all which legacies I direct to be free from legacy duty." She then proceeded, "I also give E. R. 200*l.*, T. C. 4,500*l.*," "all which said legacies I direct shall be paid free of legacy duty":—Held, that the legacy of 6,000*l.* was not included in the legacies given free of duty. *Fisher* v. *Brierley*, 30 Beav. 265.

The testator bequeathed to F. A. W. a leasehold messuage, "free of all outgoings and payments, except the annual and other rent." The will provided that all bequests, whether of legacies or annuities, should be paid free from legacy duty. Upon the question whether F. A. W. was entitled to the premises free from legacy duty, and whether or not free and discharged from the covenants and liabilities under the lease, except the rents:—Held, that the bequest was free from legacy duty, but subject to the covenants and liabilities. *Taher, In re, Arnold* v. *Kayess*, 51 L. J., Ch. 721; 46 L. T. 805; 30 W. R. 883.

Where a testator directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only as are payable within two years; but the general words, "all my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time. *Byne* v. *Currey*, 2 C. & M. 603; 4 Tyr. 479; 3 L. J., Ex. 177.

A testator gave several pecuniary and specific legacies, and directed that "all the legacies and bequests" by his will given should be paid or satisfied free of duty, and he devised his residuary real estate to A. for life, and afterwards upon trust for sale:—Held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the will, that the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate. *White* v. *Lake*, L. R. 6 Eq. 188.

VI. SUCCESSION DUTY.

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a. *INTERESTS AND PROPERTY LIABLE.*

1. Effect of Succession Duty Act.

Succession after 1853—Interest before.]—A party is liable to duty in respect of property to which he has succeeded after the act of 16 & 17 Vict. c. 51, came into operation, although he became entitled to it, in immediate expectancy, on the death of a person dying before the passing of the act. *Att.-Gen.* v. *Middleton* (*Lord*), 3 H. & N. 125; 27 L. J., Ex. 229; 6 W. R. 300.

The second section applies not merely to cases where the title accrues at death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death occurring after the act. *Att.-Gen.* v. *Gell*, 3 H. & C. 615; 34 L. J., Ex. 145; 11 Jur. (N.S.) 566; 12 L. T. 461; 13 W. R. 900.

—— **Children and Grandchildren.**]—A testator bequeathed to trustees 5,000*l.* in trust, to invest the same, and pay the dividends to his daughter during her life, and upon further trust after her death for her children, equally to be divided amongst them. The testator died in 1803, at which time no duty was payable on legacies to children or grandchildren. His daughter died after the act came into operation:—Held, first, that the interest of the grandchildren in the property bequeathed to them was a succession, within the meaning of that act. *Att.-Gen.* v. *Fitzjohn*, 2 H. & N. 465; 27 L. J., Ex. 79; 5 W. R. 876.

Held, secondly, that it was not within the exemption of s. 18, since that applied only to express exemptions by former acts, and consequently that succession duty was chargeable. *Ib.*

—— **Reversioners.**]—A testator, who died before the 19th May, 1853, devised a reversion, in respect of which he would not have been liable to succession duty, if it had vested in possession in his lifetime after that date:—Held, that he thereby created a new succession which was not exempt from duty under s. 15 of 16 & 17 Vict. c. 51. *Att.-Gen.* v. *Gardner*, 1 H. & C. 639; 32 L. J., Ex. 84; 9 Jur. (N.S.) 281; 7 L. T. 682; 11 W. R. 373.

—— **Remainderman.**]—The property of a remainderman whose estate vested upon his birth, before the act came into operation, but did not fall into possession until the death of the tenant for life, which took place after the act came into operation, but before it received the royal assent, was liable to succession duty. *Wilcox* v. *Smith*, 4 Drew. 40; 26 L. J., Ch. 596; 3 Jur. (N.S.) 604; 5 W. R. 667.

—— **Accumulations of Rents.**]—A testator devised property to A. for life, after her husband's death; remainder to the child of A., if any; remainder over to P. for life, with power of appointment to his children, and in default to his second son; the rents and profits, during the joint lives of A. and her husband, were to accumulate, and at the end of twenty-one years were, if A. and her husband were both alive, to go to the person who would have been entitled to the corpus if A. and her husband had died without leaving children of A. The twenty-one years expired in 1863, and P. died previously, leaving a second son, who so became entitled to the accumulations:—Held, that he was liable to succession duty, by reason of the death of P., as having become entitled to property upon the death of a person dying after the time appointed for the commencement of the act. *Att.-Gen.* v. *Gell*, 3 H. & C. 615; 34 L. J., Ex. 145; 11 Jur. (N.S.) 566; 12 L. T. 461; 13 W. R. 900.

A testator died in 1850, having devised his real estates to trustees to accumulate the rents for twenty-one years, and then to convey and assure the estates and accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving an heir-at-law who died in 1865. Four co-heiresses of the testator succeeded to the property in 1871:—Held, that succession duty was payable. *Ring* v. *Jarman*, 41 L. J., Ch. 535; L. R. 14 Eq. 357; 26 L. T. 690; 20 W. R. 744. See *S. C.*, cor. L.JJ., 21 W. R. 213.

—— **Appointments.**]—Section 4 of 16 & 17 Vict. c. 51, does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made after the commencement of the act. *Lovelace, In re*, 4 De G. & J. 340; 28 L. J., Ch. 489; 5 Jur. 694; 7 W. R. 575.

2. Effect of Foreign Domicil.

Semble, the 16 & 17 Vict. c. 51, applies to persons wherever domiciled, and the rule mobilia sequuntur personam cannot, as under the legacy duty acts, be made the ground of an exemption from duty. *Wallop, In re*, 1 De G. J. & S. 656; 5 N. R. 679; 33 L. J., Ch. 351; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.

Personal property may be subject to succession duty, although exempt from legacy duty by reason of the testator having a foreign domicil. *Capdevielle, In re*, 3 H. & C. 985; 33 L. J., Ex. 306; 10 Jur. (N.S.) 1155; 12 W. R. 1110.

Of Testator.]—Succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. *Wallace* v. *Att.-Gen.*, 35 L. J., Ch. 124; L. R. 1 Ch. 1; 11 Jur. (N.S.) 937; 13 L. T. 480; 14 W. R. 116.

C. was domiciled in Portugal, but on a visit to this country made his will in the English form, and appointed executors, some of whom resided

in England. He desired his executors to collect his property, which was in Portugal, to convert it into cash, pay certain legacies, and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of 50*l.* to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died, the part appropriated to satisfy her annuity became divisible among the children:—Held, that this constituted a succession within s. 2 of the succession duty act, and was liable to the payment of succession duty. *Att.-Gen.* v. *Campbell*, 41 L. J., Ch. 611; L. R. 5 H. L. 524; 21 W. R. 34, n.

By his will, the husband, domiciled in Sydney, appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit it to trustees and executors in England, who were to invest the funds so transmitted in government funds or real securities, and pay the income to his wife for her life, and after her death to divide it among the children. At the time of the wife's death, no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:—Held, that no succession duty was payable by the child on the funds to which he became entitled under the will. *Lyall* v. *Lyall*, infra.

A testator who was domiciled in Belgium, but for the last ten years of his life resided and carried on business in England, by his will directed 12,000*l.* to be invested in consols and held in trust for A. for life, with remainder for his nephews and nieces, most of whom were Belgians:—Held, that upon the death of A. succession duty was payable on the amount. *Badart's Trusts, In re*, 39 L. J., Ch. 645; L. R. 10 Eq. 288; 24 L. T. 13; 18 W. R. 885.

In 1845 a testator, domiciled in the Mauritius, left stock in the funds to his widow for life with remainders over. In 1852 all parties joined in a deed appointing persons trustees in the room of the executors, the trusts of the deed being the same as those of the will. The tenant for life died in 1863:—Held, that succession duty was payable. *Smith, In re*, 10 L. T. 598; 12 W. R. 933.

Of Beneficiaries.]—The act applies to a succession under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British court, although the persons entitled are aliens domiciled abroad. *Lovelace, In re*, 4 De G. & J. 341; 28 L. J., Ch. 489; 5 Jur. (N.S.) 694; 7 W. R. 575.

The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty. *Cigala, In re*, infra.

—— **English Settlement.**]—The word "property" in s. 2 of the Succession Duty Act, 1853, includes foreign movable property—as, for instance, funds or shares of a foreign government or trading corporation—comprised in a British settlement, vested in trustees subject to British jurisdiction, and recoverable by action in a British court. *Cigala, In re*, 47 L. J., Ch. 166; 7 Ch. D. 351; 38 L. T. 439; 26 W. R. 257.

Of Settlor.]—By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for 2,000*l.*, payable at the expiration of six months after his death, and the sum of 1,047*l.* 3*s.* 8*d.* consols, and covenanted to pay to the trustees within three years 1,000*l.*; and it was declared that the policy moneys and the 1,000*l.* should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, who was also domiciled abroad. At the time of the wife's death, neither the policy moneys nor the 1,000*l.* covenanted to be paid to the trustees of the settlement had been paid to them:—Held, that succession duty was payable by the child on the funds to which he became entitled under the settlement. *Lyall* v. *Lyall*, 42 L. J., Ch. 195; L. R. 15 Eq. 1; 27 L. T. 530; 21 W. R. 34.

Of Appointor—English Will.]—An English testator by will gave a fund to trustees to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previously to and up to her death was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons, and the residue to her husband:—Held, that the legacies were liable to duty. *Wallop, In re*, 1 De G. J. & S. 656; 5 N. R. 679; 33 L. J., Ch. 351; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.

The legacies, by reason of the domicil in Jersey, were not liable to legacy duty; but, notwithstanding the fact of such domicil, were liable to succession duty. *Ib.*

Of Appointee under General Power.]—Personal property appointed under a general power, and not coming within s. 4, ought not to be treated as the property of the donee so as to be, in the case of the donee being domiciled abroad, exempt from succession duty. *Lovelace, In re*, 4 De G. & J. 340; 28 L. J., Ch. 489; 5 Jur. (N.S.) 694; 7 W. R. 575.

3. Interest in Possession.

Heir Apparent.]—When an apparent heir dies without taking possession, without making up a title, without drawing rent, and without incurring representation:—Held, that the case did not come within the meaning of the 16 & 17 Vict. c. 51, and that succession duty was not demandable by the crown. *Lord Advocate* v. *Stevenson*, L. R. 1 H. L. Sc. 411.

The "beneficial interest" must be regarded as an interest to which the successor has become entitled in possession. It must not be a mere apparency. *Ib.*

4. Advowsons.

Extinguished by Legislature.]—At the passing of the Irish Church Act, 1869, several advowsons were vested in the defendant, who applied for and obtained compensation in respect of them:—

Held, that the advowsons had not been disposed of by the defendant, but had been taken from him and extinguished by the church act, and that, therefore, succession duty was not chargeable on the amount of compensation received in respect of them. *Att.-Gen.* v. *Leconfield* (*Lord*), 2 L. R. Ir. 290.

5. DEVOLUTION.

Who Predecessor.]—A person succeeding on the death of an uncle to an estate, either in England or in Scotland, under an entail created by a direct ancestor, becomes beneficially entitled to the property by devolution by law within s. 2 of the succession duty act, and has not derived the interest from the original settlor, and he is, therefore, liable to pay succession duty at the rate of three per cent. *Zetland* (*Earl*) v. *Lord Advocate*, 3 App. Cas. 505; 38 L. T. 297; 26 W. R. 725—H. L. (Sc.)

S., by deed of entail in Scotland, gave an estate to her eldest son, A., and the heirs of his body, whom failing, she gave the same to her grandson, C., and the heirs of his body, with remainders over. A. died without issue:—Held, that S. was the predecessor, and therefore that the duty payable by the grandson was 1*l.* per cent. *Saltoun* (*Lord*) v. *Advocate-Gen.*, 3 Macq. H. L. 659; 6 Jur. (N.S.) 713; 8 W. R. 565.

Where the succession is by provision, the settlor is the predecessor; but where by devolution, the last possessor is the predecessor. Hence C. took by provision. He must be considered in the situation of a remainderman in tail, according to English law, taking per formam doni, to whom the donor, and not the last person who held under the first estate tail, would be considered the predecessor. *Ib.*

Where there is an entail giving an estate tail to one, with remainder to another, the donee or remainderman who takes by purchase is the successor, and the entailer the predecessor; and with respect to the heirs of the body, the donee in tail is the ancestor, and the heir of the body is the successor. *Ib.*

6. PREDECESSORS AND SUCCESSORS.

Generally.]—The successor from whom duty is payable is the person who, on the happening of the death, eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest, not a succession. The interest of an executor, not being beneficial, is not a succession within s. 2, or within s. 15; for s. 15 imposes no new duty, only a duty in substitution for that imposed by s. 2. *Att.-Gen.* v. *Littledale*, 40 L. J., Ex. 241; L. R. 5 H. L. 290; 24 L. T. 921; 20 W. R. 473.

The act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. *Braybrooke* (*Lord*) v. *Att.-Gen.*, infra.

Barring Entail—Resettlement—Joint Power of Appointment.]—A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his predecessor. *Braybrooke* (*Lord*) v. *Att.-Gen.*, 31 L. J., Ex. 177; 9 H. L. Cas. 150; 7 Jur. (N.S.) 741; 4 L. T. 218; 9 W. R. 601.

A stranger, in 1796, devised real estates to A. for life, with remainder to his first and other sons in tail male. In 1841 A. became tenant for life in possession, and his eldest son, B., joined A. in executing a disentailing deed, whereby the estates were conveyed, subject to his life estate, to such uses as they should jointly appoint. In 1850 A. and B. jointly executed this power of appointment, and conveyed the property to the use that B. should receive an annuity of 1,200*l.* during the joint lives of A. and himself, and subject thereto to the use of A. for life, remainder to B. for life, remainder to B.'s first and other sons in tail male. By this deed also A. gave up a charge he had on the property for 10,000*l.* On the death of A.:—Held, that B. succeeded to the property by virtue of a disposition made by himself, and not made by himself and A. jointly; and that therefore, under s. 12, B. must pay duty as if he had succeeded to the testator. *Ib.*

Held, also, that as A. gave up a charge of 10,000*l.* on the property by the deed of 1850, B. must be charged only one per cent. on that extent of the succession. *Ib.*

The protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition. *Ib.*

Where a power is created, to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or "succession" is to be derived, is, within s. 2 of the succession duties act, the "predecessor" of the person taking such benefit or "succession." *Charlton* v. *Att.-Gen.*, 49 L. J., Ex. 86; 4 App. Cas. 427; 40 L. T. 760; 27 W. R. 921—H. L. (E.)

St. J., tenant for life in possession, and W., tenant in tail in remainder of certain estates, barred the entail and settled the estates to such uses as they should jointly appoint. On the following day they appointed the estates to such uses as they should jointly appoint, and in default of appointment to St. J. for life, remainder to W. for life, remainder to the first and other sons of W. in tail male, remainder to such uses as St. J. and T. should jointly appoint, and in default of appointment to T. for life, remainder to the first and other sons of T. in tail male, with remainders over. W. died in 1864, a bachelor, without having exercised his power of appointment. In 1866 St. J. and T. appointed the estates, subject to the life estate of St. J., in the events which happened, to the use that A., the widow of St. J., should receive an annuity, and subject thereto, and to an annuity given in certain events which had not happened to the wife of T., to the use of D. during so much of a certain period as she should live. St. J. died in 1873, and the uses limited in favour of A. and D. thereupon took effect:—Held, that the case fell within s. 2 and was not within s. 4 of the succession duty act. *Ib.*

And, held, following *Braybrooke* (*Lord*) v. *Att.-Gen.* (9 H. L. Cas. 150), *Att.-Gen.* v. *Floyer* (9 H. L. Cas. 477), and *Att.-Gen.* v. *Smythe* (9 H. L. Cas. 497), that duty was payable upon the interests of A. and D. as successions derived from W. as predecessor. *Ib.*

Full Enjoyment deferred by Prior Interest—Alienation of Property before Determination thereof—Duty on Increased Value accruing on Determination—"Successor."]—A testator devised real property let on lease, not purporting to be at a rack-rent, to a devisee in fee-simple. The devisee paid succession duty assessed on the rent

reserved by the lease, and before the determination of the lease sold the property to the defendants subject to the lease. The annual value of the property at the determination of the lease was greater than the rent reserved by the lease. Upon an information on behalf of the crown claiming succession duty from the defendants in respect of the increased value accruing to them on the determination of the lease as upon the value of an annuity equal to the amount of the increase of the annual value during the residue of their lives :—Held, that the succession to the property, within the meaning of the Succession Duty Act, 1853, became fully vested in the devisee upon the death of the testator, the effect of s. 20 of the act being merely to postpone the payment of the duty upon the increased value until the determination of the lease; and that the defendants, not being successors within the meaning of the act, were only liable, under s. 42 of the act, as persons claiming in right of the successor, for duty as upon the value of an annuity equal to the amount of the increase of annual value for the residue of the life of the devisee. *Att.-Gen.* v. *Mander*, 65 L. J., Q. B. 246; 74 L. T. 103; 44 W. R. 413.

Life Policy—Gratuitous Assignment—Payment of Premiums.]—The gratuitous assignee of a policy of life insurance who, subsequently to the date of the assignment, pays the premiums on the policy, is not liable to pay succession duty on the policy moneys. *Lord Advocate* v. *Fleming* or *Robertson*, 66 L. J., P. C. 41; [1897] A. C. 145; 76 L. T. 125; 45 W. R. 674 61 J. P. 692 —H. L. (Sc.)

Donor or Donee of General Power.]—A tenant for life having a general power of appointment by deed or will, by will, executed after the statute came into operation, exercised the power in favour of B. B. was a stranger in blood to the tenant for life, but was the niece of her husband, the donor of the power, who had created it, and died before the act came into operation :—Held, that B. was only liable to a duty of 3*l.* per cent. as on a succession derived from the donor of the power. *Barker, In re*, 7 H. & N. 109; 30 L. J., Ex. 404; 7 Jur. (N.S.) 1061; 5 L. T. 206.

In cases of appointments by donees of general powers which fall within s. 2 and do not fall within s. 4 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), the canon of construction adopted in *Barker, In re* (7 H. & N. 109), and *Charlton* v. *Att.-Gen.* (4 App. Cas. 427), is to be applied whether the power be joint or sole, and the appointees must be held to derive their interest from the donor of the power as "predecessor," and not from the donee. The testator, in 1826, bequeathed personalty in trust for his daughter for life and afterwards (in the event which happened), for such persons as she should by deed appoint, and in default of appointment for her next of kin. The testator died before the coming into operation of the Succession Duty Act, 1853, and legacy duty at 1 per cent. was paid upon the whole absolute interest of the trust fund. After that act came into operation the daughter, by deed, appointed the trust fund to her sister's daughters :—Held, that, as owing to the date of the testator's death, s. 4 did not apply, the appointees derived their interest from their grandfather, the testator, as predecessor within s. 2, and not from their aunt the appointor, and that succession duty was therefore payable on their succession at the death of the appointor at 1 and not at 3 per cent. *Att.-Gen.* v. *Mitchell*, 50 L. J., Q. B. 406; 6 Q. B. D. 548; 44 L. T. 580; 29 W. R. 683; 45 J. P. 618.

Donee of General Power of Appointment.]—The appointee under a general power of appointment, which has taken effect on a death happening since the commencement of the act, takes a succession from the donee of the power. *Att.-Gen.* v. *Upton*, 4 H. & C. 336; 35 L. J., Ex. 138; L. R. 1 Ex. 224; 12 Jur (N.S.) 489; 14 L. T. 334; 14 W. R. 732.

Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, on trust for the separate use of the wife. Both the testator's nephew and his wife were strangers in blood to the testator's widow :—Held, that the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself, and that therefore a duty of 10*l.* per cent. was payable. *Ib.*

Partnership between Father and Son—Death of Father—Sale.]—A father, who had carried on business as a cotton spinner, entered into partnership with his son for the term of five years. The son brought no capital into the business, but, by the deed of partnership, it was agreed that the father was to be taken to have brought in two-thirds of the estimated capital of the business, and the son the remaining one-third, and the profits were to be divided accordingly. Among other terms of the partnership it was agreed that, if the partnership continued for the five years or was determined by any cause other than the death of a partner, the son's share of the capital was to be one-half; and if the father died during the term, the son was to have the whole business, and was to pay 10,000*l.* to the father's executors; but if the son died during the term, the father was to have back the business and was to pay 15,000*l.* to his son's executors. The father died during the term. The crown claimed succession duty from the son :—Held, that, taking the partnership deed as a whole, the arrangement therein contained was in the main one made for the benefit of the son rather than a sale to him of the partnership business on his father's death; and therefore the crown was entitled to succession duty. *Att.-Gen.* v. *Brown*, 77 L. T. 591; 46 W. R. 145; 62 J. P. 19—C. A.

Barring Entail—Resettlement—Appointment by Tenant in Tail to Himself.]—A testator devised his estates in L. to his brother C. for life, with remainder in tail to his first and other sons. On the 22nd March, 1848, C. and his eldest son executed a disentailing deed, whereby they limited the estate to such uses as they should jointly appoint, and in default of such appointment, to the uses declared by the will of the testator. On the same day C. and his son executed another disentailing deed of estates devised to them by another testator, and also limited them to such uses as they should jointly appoint. On the 23rd March, 1848, C. and his

son executed a joint appointment, whereby, after reciting the two disentailing deeds, and certain arrangements made in respect of incumbrances, with other stipulations, they appointed the estates in L., to the use that the son might receive thereout the yearly sum of 1,000*l.* during the joint lives of himself and C., and subject thereto to the use of C. for life, in restoration, corroboration, and confirmation of his previous life estate, and after his decease to the use of the son for life, and after his decease to the use of his eldest son for life, with remainder, in tail male. In 1855 C. died:—Held, first, that his son took a succession under a disposition made by himself, within s. 12; it was therefore chargeable with duty at the rate of three per cent. *Att.-Gen.* v. *Sibthorp*, 3 H. & N. 424; 28 L. J., Ex. 9; 6 W. R. 774.

Held, secondly, that the son was not entitled to any allowance in respect of the 1,000*l.* a year, which ceased on the death of C. *Ib.*

B., tenant for life, and W., his eldest son, tenant in tail in remainder, suffered a recovery, and in 1821, by virtue of a joint power of appointment, which they exercised, resettled the estates to the use of the father for life, with remainder to the son for life, with remainders to his sons in tail male, with remainder to G. B. and the son of B. for life, with remainder to his sons in tail male. The father died in 1834, and his son entered into possession, but died in 1856, without issue. G. B. then came into possession, and joined with his son E. in disentailing the estates; and, by virtue of a power of appointment reserved to them, conveyed the estates to the defendant for a term of 500 years, upon trust in case the son survived his father (an event which happened), to pay him an annuity during his life; and power was given to the father to raise portions for younger children, which power he exercised:—Held, that the crown was entitled to duty at 3*l.* per cent. in respect of the succession of G. B., as having been derived from his elder brother W., as predecessor; that the same amount of duty was payable in respect of the succession of E., as having been derived under a disposition made by himself at the time when he was expectantly entitled to the estates, upon a succession derived from W. as predecessor; and also, that the same amount of duty was payable in respect of the portions of the younger children, as being derived from either their niece W., or their own brother E., as predecessor. *Att.-Gen.* v. *Floyer*, 31 L. J., Ex. 404; 9 H. L. Cas. 477; 9 Jur. (N.S.) 1; 7 L. T. 47; 10 W. R. 762.

A. being seised of estates in fee-simple, by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail male successively. A. had three sons, E., R. and C. In 1840 A. and his eldest son E. executed a disentailing deed, and conveyed the estates to such uses as they should appoint, and, in default, to uses of the settlement of 1812. In the same year A. and E., on the intended marriage of E., appointed to the use of A. for life, remainder to E. for life, remainder (subject to provisions for the intended wife and the younger children) to the first and other sons of the marriage successively in tail male, remainder to R. and C. successively in tail male. E. died in his father's lifetime, without issue. A. and R. then conveyed the estates to such uses as they should appoint, and in default to the existing uses. They afterwards appointed to A. for life, remainder to R. for life, remainder to his first and other sons in tail male, with an ultimate remainder to A. and his heirs. R. died without issue. A. then died, and C. succeeded to the estate:—Held, that he was liable to a duty of 3*l.* per cent. as on a succession derived from his elder brother. *Att.-Gen.* v. *Smythe*, 31 L. J., Ex. 404; 9 H. L. Cas. 498.

Tenant for Life in Possession—Tenancy in Tail Base Fee.]—A lunatic was tenant in tail in possession of land, with remainder to his younger brother R., and his sister D., successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure debts of 124,000*l.* with a covenant to convey the fee-simple to the mortgagees if he should become able to do so. The mortgage debt was more than the fee-simple value of the land, and R. had no beneficial interest in the equity of redemption. For the benefit of all parties a compromise was entered into with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Will. 4, c. 75, s. 33), in pursuance of which R. and D. and the mortgagees all joined in deeds of settlement whereby they conveyed the land, subject to the estate tail of the lunatic but discharged from the mortgage, to trustees upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage of the land and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life, with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic, D. became tenant for life in possession, and upon her death the defendant, as her son, became tenant in tail in possession:—Held, that the defendant derived his interest as successor from his mother D., and not from his uncle R., as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent. and not at 3*l.* per cent. *Att.-Gen.* v. *Dowling*, 50 L. J., Q. B. 192; 6 Q. B. D. 177; 44 L. T. 234; 29 W. R. 327; 45 J. P. 422—C. A.

Joint Predecessors—Jointress.]—By a marriage settlement made in 1822, B. and A. (father and son), in pursuance of a joint power of appointment in them vested, limited two rent-charges to the wife of C., if she survived her husband (which event happened); and it was provided that the rent-charges should be in lieu of dower, thirds, and freebench, and should be payable without any deduction or abatement whatsoever on account or in respect of any taxes, charges, impositions, or assessments already imposed or charged, or to be thereafter imposed or charged, upon the hereditaments or upon the jointure; and for the purpose of better securing the same, hereditaments were demised for a term of years, upon trust, in case the rent-charge should fall into arrear, to raise and pay the same, with all costs, charges and expenses which should be sustained by reason of the non-payment thereof, or otherwise in relation thereto. The husband died in 1856, having survived B. and A.:—Held, that succession duty was payable by the jointress in respect of the rent-charge. *Floyer* v. *Bankes*, 3 De G. J. & S. 306; 3 N. R. 16; 33 L. J., Ch. 1; 9 Jur. (N.S.) 1255; 9 L. T. 353; 12 W. R. 28.

Held, also, that the jointress was entitled to have her rent-charge free of the duty, and that the same was, therefore, a charge upon the estate. *Ib.*

"Succession"—"Alienation not conferring a new Succession"—"Contract bonâ fide for Valuable Consideration in Money or Money's Worth"—Annuity—Family Settlement.]—A testator, the holder of a title, by his will bequeathed certain bank shares to his nephew, who was heir to the title, upon trust to receive thereout an annuity of 15,000*l.* and to accumulate the surplus until a certain date, and invest the same for his own use and benefit after that date. The residuary estate was bequeathed to the testator's wife for life with remainder to the nephew, if living, but if not, to the person who should then be the testator's right heir at common law for his absolute use and benefit. Upon the death of the testator, the nephew succeeded to the title, but died in the lifetime of the testator's wife without issue, and was succeeded in the title by the defendant, his younger brother. The testator left five nieces, daughters of a younger brother of the testator, who upon the nephew's death without issue became, as co-heiresses-at-law, the "right heir" at common law of the testator. By a deed of arrangement made between the testator's wife, the co-heiresses, and the defendant, after reciting these facts and that it was apprehended that upon the true construction of the will, except in the event of all the co-heiresses dying in the lifetime of the testator's wife without leaving issue at her death, no part of the residuary estate of the testator, including the bank shares, would come to the person for the time being holding the title, contrary to the testator's supposed intention, the testator's wife, as to her life interest in the bank shares, the co-heiresses as to their respective interests in the residuary estate, including the bank shares, and the defendant as to his contingent interest in such residuary estate, assigned their interests to trustees upon trust (inter alia), (clause 1) subject to the testator's wife's life interest to pay out of the income of the settled property during her life an annuity of 15,000*l.* to the defendant for life; and (clause 2) after her death, and until certain claims were satisfied, and trusts for accumulation had ceased, "to continue to pay the said annuity of 15,000*l.*" to the person for the time being holding the title for his life. On the death of the testator's wife the co-heiresses, who survived her, paid legacy duty at the rate of three per cent. upon the whole of the testator's residuary estate, including the bank shares. Upon an information by the crown claiming succession duty at the rate of 6½ per cent. from the defendant in respect of the annuity to which he became entitled under clause 2 of the deed upon the death of the testator's wife:—Held, that the annuity granted by clause 2, being derived from the estate of the co-heiresses and limited to the person for the time being holding the title, was not the same annuity as the annuity granted by clause 1, which was derived from the life estate of the testator's wife and limited to the defendant, but was a new annuity, as to which upon her death a new succession was conferred upon the defendant, to which, therefore, the defendant had not become entitled by alienation, "not conferring a new succession" within the meaning of s. 15 of the Succession Duty Act, 1853; that the legacy duty paid by the co-heiresses not being paid in respect of this succession, the case was not within the exemption created by s. 18 of the act; that the deed was not a "contract made by any person bonâ fide for valuable consideration in money or money's worth" within the meaning of s. 17 of the act, and consequently that succession duty was payable by the defendant. *Att.-Gen.* v. *Wolverton*, 66 L. J., Q. B. 202; [1897] 1 Q. B. 231; 75 L. T. 569; 45 W. R. 236; 61 J. P. 148—C. A. Reversed in H. L., 12 July, 1898.

Semble, that s. 16 of the Succession Duty Act, 1853, does not apply to an alienation or creation of an interest by way of family settlement, but to an alienation in the ordinary sense. *Ib.*

Disposition by Purchaser—Valuable Consideration.]—In 1852 A., tenant for life, and B., his nephew, and tenant in tail, entered into an arrangement by which they barred the entail and conveyed the property to such uses as they should jointly appoint, and subject thereto to the old uses. By a contemporaneous deed, in execution of the joint power, A. secured to B. a life annuity on the property, and B. secured 25,000*l.*, payable when he, B., came into possession. Of this 20,000*l.* was settled contemporaneously on A.'s daughters and the remainder on A.:—Held, on the death of A. in 1855, that succession duty was payable on the 20,000*l.* as a succession from A., but that no succession duty was payable on the remaining 5,000*l.* *Jenkinson, In re*, 24 Beav. 64; 26 L. J., Ch. 241; 3 Jur. (N.S.) 279; 5 W. R. 301.

Under a settlement in 1812, C. became tenant for life of freehold estates, with remainder to his first and other sons in tail male; remainder to G. for life; remainder to her first and other sons in tail male; remainder to J. for life; remainder to his son F. in tail male. On the 3rd December, 1850, C. and F. executed a disentailing deed, and resettled the estates. By another deed of the same date, F., for valuable consideration, charged the settled estates with 20,000*l.* for the use of C., payable with interest at the expiration of twelve calendar months from the day on which the limitations to C. and G. for their lives and their sons in tail male, or the last of such limitations, should fail. On the 31st December, C., by a deed of settlement, assigned the 20,000*l.* to trustees, as to 14,000*l.* for his adopted son, and as to 6,000*l.* for his adopted daughter. C. died in February, 1857, without legitimate issue; and G. died in November, 1857, without issue, whereupon the adopted children of C. became beneficially entitled to the 14,000*l.* and 6,000*l.*:—Held, that the disposition of the 20,000*l.* by the deed of settlement created a succession, and that duty was payable at the rate of 10*l.* per cent. *Att.-Gen.* v. *Yelverton*, 7 H. & N. 306; 30 L. J., Ex. 333; 7 Jur. (N.S.) 1250; 5 L. T. 451.

In 1885, estates which had been settled on S. for life, with remainder to his first and other sons in tail male, were conveyed to such uses as S. and his eldest son, C., should appoint. In 1857 by deed of appointment S. and C. appointed that certain of the estates should go to trustees upon trust in case E., the third son of S., should survive him, to raise 20,000*l.* for E. In 1860 S. and C. further appointed that in an event (which happened) the 20,000*l.* should be raised and paid to E., whether he survived S. or not. C. died a bachelor in 1866, and S. died in 1868:—Held, that there was a new succession, and not a succession "vested by alienation or title not conferring a new succession" within the Succession Duty Act, s. 15; and that E. was

liable to pay duty under s. 2, as upon a succession from C. as predecessor. *Att.-Gen.* v. *Cecil*, 39 L. J., Ex. 201; L. R. 5 Ex. 263; 23 L. T. 20; 18 W. R. 949.

Upon an information to recover succession duty, payable in respect of the succession of E. to 2,000*l.* derived from W. P. as predecessor, a special verdict was found, which stated that J. P. died intestate, leaving W. P. his brother; and A. S., the wife of J. H. S., claimed to be a daughter of a sister of J. P.; that by indenture, reciting that letters of administration had been granted to W. P., and in order to obviate any doubts or differences which might arise touching any share which J. H. S. or A. S. might be entitled to in the personal effects of J. P., W. P. had proposed and agreed on having a general release from J. H. S. and A. S., to transfer 30,000*l.*, to be settled upon trusts for J. H. S. and A. S., and the children of their marriage, to which proposal J. H. S. and A. S. had consented and agreed; that 30,000*l.* had been directed to be transferred to trustees by W. P., and that J. H. S. and A. S. had that day executed a general release to W. P. of all claims against him as administrator of J. P. or otherwise; and it was declared that B. and O. should stand possessed of the 30,000*l.* in trust to pay the interest to J. H. S. for life, and after his death to A. S. for her life, and after the death of the survivor, if there should be an only child, in trust for such child, and if there should be two or more children, in trust for such children in such shares as J. H. S. and A. S. or the survivor should appoint; and in case no child should live to attain a vested interest, in trust for the survivor of J. H. S. and A. S. absolutely. Contemporaneously with the indenture a release was executed by J. H. S. and A. S. to W. P. There were ten children of the marriage, and J. H. S. and A. S., having appointed 2,000*l.* to E., one of such children, J. H. S. and A. S. died in or before March, 1854:—Held, that the defendant was entitled to judgment, because it could not be inferred that W. P. was either the sole predecessor of E., within s. 2, or a joint predecessor within s. 13. *Att.-Gen.* v. *Baker*, 4 H. & N. 19.

When a settlement contains a power of appointment in some one other than the settlor, and the exercise of the power transfers the property from the settlor to some one else, the donee of such a power is the predecessor of the appointee. *Ramsay, In re*, 30 Beav. 75; 30 L. J., Ch. 849; 7 Jur. (N.S.) 1225; 5 L. T. 166; 9 W. R. 910.

Upon the second marriage of a lady, her second husband settled his property on the children of her former marriage:—Held, that the husband and not the wife was the predecessor, and that 10*l.* per cent. succession duty was payable. *Ib.*

An indenture of marriage settlement recited that the father of the intended husband agreed to advance and give to his son the sum of 6,000*l.*, which was to be repaid in the event of the marriage not taking place. It was further recited that it was agreed between all the parties to the deed that certain persons (as trustees) should stand possessed of the sum upon trust for the father until the intended marriage should be solemnised; and if not solemnised before a certain day therein named to transfer the same to the father, and from and after the solemnisation of the marriage upon trust to pay the income to the husband for life, and from and after his decease to pay the income to the wife, should she survive the husband, with the usual trusts over for her children. The husband having died and the widow having become entitled to the income of the said sum, the commissioners claimed payment of succession duty under 16 & 17 Vict. c. 51, as a succession derived from the father-in-law as the predecessor:—Held, that the father-in-law, and not the husband, was the "predecessor" or settlor, and that succession duty was therefore payable. *Att.-Gen.* v. *Maule*, 56 L. T. 611.

Alienation of Reversionary Property.]—A testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of the testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872:—Held, that the corporation, upon the death of the tenant for life, was a successor within the Succession Duty Act, 1853, ss. 2, 27, and was liable to pay succession duty upon the full value. *Solicitor-General* v. *Law Reversionary Interest Society*, 42 L. J., Ex. 146; L. R. 8 Ex. 233; 28 L. T. 769; 21 W. R. 854.

A. devised his real estate to his wife for life, with remainder in fee to R., a stranger in blood. R. died intestate before the statute. The wife died after the commencement of that act, when the heir-at-law of R. became beneficially entitled in possession to the property so devised:—Held, that the property vested in him by a derivative title under the disposition made by the will of the testator, within the meaning of s. 15, and consequently that he was chargeable with 10*l.* per cent. duty, being at the same rate at which R. would have been chargeable. *Att.-Gen.* v. *Rushton*, 2 H. & C. 812; 33 L. J., Ex. 184; 9 L. T. 332.

"By alienation or by any title not conferring a new succession," in s. 15 of the Succession Duty Act, 1853, means either by alienation or by any title other than alienation, in both cases not conferring a new succession. *Cooper and Allen, In re*, 46 L. J., Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.

Settlement after the succession duty act: A. tenant for life; D. remainder in fee. A. and B. convey their estates for money to C. in fee. C. dies, having devised to D. in fee. D. pays duty on his succession from C., and then sells. On A.'s death no more succession duty will be payable than has already been paid by D. *Ib.*

—— **Liability to Pay Duty.**]—As between a vendor and purchaser of a reversion, the purchaser is liable to bear the succession duty payable in respect of it. *Cooper* v. *Trewby*, 28 Beav. 194; 8 W. R. 299.

The heir presumptive of an estate in fee agreed to sell his interest free from incumbrances:—Held, that as between him and the purchaser the succession duty ought to be borne by the purchaser. *Cooper* v. *Trewby* (28 Beav. 194) followed and approved. *Langham, In re, and Langham Hotel Co.*, 60 L. J., Ch. 110; 39 W. R. 156—C. A.

—— **Sale subject to Leases—Increased Value.**]—Lands subject to leases at ground rents was sold subject to leases, but free from incumbrances, the contract making no provision as to the payment of succession duty:—Held, that the succession duty payable in respect of the increased value of the property on the determina-

tion of the leases, payment of which had been postponed in accordance with s. 20 of the Succession Duty Act, 1853, must be borne by the vendors. *Kidd and Gibbon's Contract, In re*, 62 L. J., Ch. 436; [1893] 1 Ch. 695; 3 R. 268; 68 L. T. 647; 41 W. R. 507.

Extinction of Charges—Dower.]—A testator gave his lands unto trustees, for the benefit of his children on their attaining twenty-one, and authorised his trustees to sell such of his lands as they might see fit, and to invest the moneys in any way which might appear unto them best, and to pay such sums as they might think right for the maintenance and education of the children:—Held, that succession duty was payable on the dower to which the widow was entitled out of a portion of the estate. *Harding* v. *Harding*, 2 Giff. 597; 7 Jur. (N.S.) 906.

7. Reservation of Interest to Settlor.

Subsequently to the Succession Duty Act of 1853 (16 & 17 Vict. c. 51), B. by an irrevocable deed settled personal property upon trust for himself for a term of four years if he should so long live, and at the end of the term or at his death, whichever should first happen, upon trust for his nieces therein named absolutely. Upon B.'s death, eighteen months before the end of the term, the nieces entered into possession of the settled property, whereupon the crown claimed payment from them of succession duty upon the whole amount of the property, which they declined to pay on the ground that they were only liable to duty on the income of the property for the period between B.'s death and the end of the term:—Held, that the defendants were liable to pay duty under s. 2 upon the whole value of the property, and not merely on the income of it for the period between the death of the settlor and the end of the term; that the event on which they came into possession was the death of the settlor, and they were chargeable with duty accordingly, and that they could derive no benefit from the fact that they might have come into possession without being liable for any duty on the happening of an alternative event which never did happen. *Att.-Gen.* v. *Noyes*, 51 L. J., Q. B. 135; 8 Q. B. D. 125; 45 L. T. 520; 30 W. R. 434—C. A. Cp. *Crossman* v. *Reg.* and *Att.-Gen.* v. *Heywood*, post, cols. 272, 273.

8. Acceleration of Succession.

Extinction of Prior Interests.]—By s. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place." By a marriage settlement the trust funds were settled upon trust to pay the income to the husband for life, and upon his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should appoint, and in default of such appointment for the children who should attain the age of twenty-one, or die leaving issue or marry, in equal portions. It was also provided that it should be lawful for the trustees during the joint lives of the husband and wife, or the life of the survivor, with their, his, or her consent in writing, and after the decease of both, at the discretion of the trustees, to raise and apply, or dispose of, all or any part of the then expectant part or share of any such child or issue whose share should not then be payable, for or towards the preferment, advancement or benefit of such child or issue. During the lives of the tenants for life portions of the trust funds were appointed and paid over to the children by the trustees under the power in the settlement:—Held, on the death of the surviving tenant for life, that as to the appointed part of the trust fund, there had been an acceleration of the title to the succession "by the extinction of prior interests" within 16 & 17 Vict. c. 51, s. 15, and that such part was, equally with the unappointed part, subject to succession duty. *Sitwell, Ex parte, Drury Lowe's Marriage Settlement, In re*, 21 Q. B. D. 466; 59 L. T. 539; 37 W. R. 238.

By a marriage settlement a sum of money was vested in trustees in trust to pay the income to the wife for life, with remainder to the husband for life, if he should survive her, with remainder, in default of issue, to the wife absolutely. The husband died, leaving the wife surviving him; there was no issue:—Held, that, on the death of the husband, the widow became entitled to a "succession," and that succession duty was payable on the amount of the fund, less the value of her life interest therein. *Att.-Gen.* v. *Robertson*, 62 L. J., Q. B. 282; [1893] 1 Q. B. 293; 4 R. 260; 68 L. T. 371; 41 W. R. 241; 57 J. P. 421—C. A.

9. Conveyance by way of Bonâ Fide Sale.

In what Cases.]—A conveyance or an assignment by way of bonâ fide sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict. c. 51. *Fryer* v. *Morland*, 45 L. J., Ch. 817; 3 Ch. D. 675; 35 L. T. 458; 25 W. R. 21.

Where the purchaser of a reversionary life interest in settled property had contracted to sell it to the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of the tenant for life, secured by a charge on the reversion:—Held, that there was no "succession" created within the meaning of s. 2, and that no duty would be payable on the death of the tenant for life in respect of the charge. *Ib.*

—— **Title under Will or by Purchase.**]—By the will of X. ecclesiastical leaseholds for lives, of which Y. was the last, were settled upon trusts for Y. for life and over. A. having acquired the life interest of Y., bought the reversion in the leaseholds from the ecclesiastical commissioners, and had been held to have purchased as trustee for the persons entitled under the will of X. Part of the land was represented by a sum paid into court as compensation by a public body which had taken it under statutory powers. After the death of Y. the equitable interest under the will of X. had become vested absolutely in B., who, after satisfying A.'s lien for purchase money, was entitled (inter alia) to the fund in court:—Held, that B.'s title was for purposes of duty, a title acquired under the will and not by purchase, and that succession duty was payable as on the death of Y. as predecessor. *Fryer* v. *Morland* (3 Ch. D. 675) dis-

tinguished. *De Rechberg* v. *Beeton*, 57 L. J., Ch. 1090; 38 Ch. D. 192; 59 L. T. 56; 36 W. R. 682.

—— **Fund Payable to Life Insurance Office.**]—A subscriber to the customs annuity and benevolent fund — established by 56 Geo. 3, c. 73, constituting a fund in the nature of an insurance fund, out of which a sum becomes payable on the death of a subscriber, according to rules made under the authority of the act, under which one-third goes to the widow of the subscriber, and the remainder to his children, relatives, or appointees, other than relatives, nominated with the consent of the directors—appointed part of the fund to which he would be entitled on his death to the trustees of a life insurance society by way of mortgage. The subscriber's family disputed the validity of the appointment, but it having been decided to be valid, succession duty was claimed by the crown at the rate of 10 per cent.:—Held, that the part of the fund which was payable to the life insurance office was not liable to succession duty. *Maclean, In re*, 44 L. J., Ch. 145; L. R. 19 Eq. 274; 32 L. T. 632; 23 W. R. 206.

—— **Insurance Policy Effected by Customs Officer.**]—Succession duty is payable on money due to an appointee of a policy of insurance effected by an officer of customs under an act of parliament, although his power of appointment is not unqualified, and the fund does not exclusively arise from the payments of the subscribers, and the whole is under the regulation of the act. *Att.-Gen.* v. *Abdy*, 1 H. & C. 266; 32 L. J., Ex. 9; 8 Jur. (N.S.) 798; 6 L. T. 756.

—— **Tontine.**]—A tontine is a contract for value, and therefore within the exceptions of s. 17. *Oldfield* v. *Preston*, 3 De G. F. & J. 398; 31 L. J., Ch. 256; 8 Jur. (N.S.) 107; 5 L. T. 650; 10 W. R. 257.

An interest accruing immediately under a tontine does not create the relation of predecessor and successor, so as to make succession duty payable in respect of the accrued interest. *Ib.*

Where a father subscribed to a tontine in the names of three of his children, two of whom died before the time appointed for the commencement of the act, but the third survived it:—Held, in the absence of evidence to the contrary, that such surviving child took, not by succession, but in its own right, by way of advancement, and that no duty was payable in respect thereof. *Ib.*

—— **Release of Dower.**]—Marriage or a release of dower is not a valuable consideration for money or money's worth within s. 17 of 17 & 18 Vict. c. 51. *Floyer* v. *Banhes*, 3 De G. J. & S. 306; 3 N. R. 16; 33 L. J., Ch. 1; 9 Jur. (N.S.) 1255; 9 L. T. 353; 12 W. R. 28.

—— **Trust in Favour of Volunteer.**]—A settlement in consideration of marriage for money or money's worth is not within the exemption in s. 17 of the act. By settlement, made on the marriage of A. and B., a sum of 5,000*l.*, the fortune of A. (the wife) was assigned to trustees, upon trust to pay the interest thereof to her during the joint lives of herself and B., and upon trust, after the decease of the survivor, and in the events which happened, to apply same in payment and discharge (so far as same would extend) of incumbrances affecting lands brought into settlement by B. and his father, C., and over which a jointuring power was reserved to them in favour of A., which they exercised to its full extent; and by the said settlement A. was given a life interest, after B.'s death, in a sum of 4,000*l.*, brought into settlement by C. In the event (which happened) of there being no issue of the marriage, D., who was a grandson of C., but a stranger in blood to A., became tenant in tail of the settled lands, and barred the entail and resettled them. A. survived B., and on her death the 5,000*l.* was applied towards discharging incumbrances upon the settled lands:—Held, that A. was a predecessor of D. within the meaning of the Succession Duty Act, 1853, and that duty at 10 per cent. was payable by D. in respect of his succession to this sum:—Held, also, that, assuming the lands to be of greater value than the incumbrances, the trust of the 5,000*l.* was a trust of personal property in favour (so far as applied in discharge of incumbrances) of D. as a volunteer within the acts, 44 Vict. c. 12, s. 38, and 52 Vict. c. 7, s. 11. *Att.-Gen.* v. *Rathdonnell*, 32 L. R., Ir. 574.

10. Covenant to Pay Money on Death.

A covenant by A. to pay to trustees of a settlement within twelve months after his death the sum of 10,000*l.* free from all deductions whatsoever, is satisfied by the payment by his executors of a sum of that precise amount, without any provision being made for the discharge of succession duty. *Higgins, In re, Day* v. *Turnell*, 55 L. J., Ch. 235; 31 Ch. D. 142; 54 L. T. 199; 34 W. R. 81—C. A.

Such duty, being by s. 42 of the Succession Duty Act, 1853, chargeable on the interest of the successor, is payable by the trustees of the settlement, and not by the executors of the covenantor. *Ib.*

By deed making provision for an endowment, the donor covenanted that he or his executors or administrators after his death would transfer certain bank stock and certain shares into the names of trustees, and by another deed of the same date he declared that the trustees should stand possessed of the stock and shares upon trust for certain charitable purposes. By a subsequent deed he covenanted that he, or his executors or administrators after his death, would transfer a further amount of bank stock into the names of the trustees, and declared that they should stand possessed of it on the same trusts. After the death of the donor, his executors transferred the stock and shares into the names of the trustees:—Held, that the deeds showed a "disposition of property" within s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and that the stock and shares so transferred were chargeable with succession duty. *Higgins, In re* (31 Ch. D. 142), discussed. *Att.-Gen.* v. *Montefiore*, 21 Q. B. D. 461; 59 L. T. 534; 37 W. R. 237.

11. Effect of Conversion.

Though a fund bequeathed to trustees to be laid out in land, but not actually so laid out, may be treated by the court of chancery as land for some purposes, the fund is not, while the trusts of the will remain undischarged, to be so treated for the purposes of the succession duty.

De Lancey v. *Inland Revenue Commissioners*, 39 L. J., Ex. 76; L. R. 5 Ex. 102; 22 L. T. 239; 18 W. R. 468—Ex. Ch.

b. *PAYMENT.*

Instalments a Continuing Charge.]—The power of a tenant in tail in possession to enlarge his estate, so that he shall become competent to dispose by will of a continuing interest in the entailed property, is incident to the estate which such tenant takes under the instrument creating the entail; and if he exercises the power, he must be treated for the purpose of succession duty as if he had succeeded to such enlarged estate; and any instalments of succession duty that may be unpaid at his decease will become a continuing charge on the property in the hands of his successor or other owner for the time being. *Lilford* (*Lord*) v. *Att.-Gen.* 36 L. J., Ex. 116; L. R. 2 H. L. 63; 16 L. T. 184; 15 W. R. 595.

16 & 17 Vict. c. 57, s. 21, by which instalments, not become due at the death of a successor, cease to be payable, "except in the case of a successor who shall have been competent to dispose, by will, of a continuing interest," refers to the quantity of interest, and not to the personal capacity of the individual. *Att.-Gen.* v. *Hallett*, 2 H. & N. 368; 27 L. J., Ex. 89.

A person, therefore, becoming entitled to the disposable interest of a successor, who, being insane or a feme covert, dies intestate before all or any of the instalments of succession are payable, is liable to the payment of such instalments. *Ib.*

By Reversioner—Right to Repayment.]—When a person absolutely entitled to a reversionary interest in personalty settled it on the usual trusts of a marriage settlement, and, on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys:—Held, that, having regard to s. 32 of the Succession Duty Act (16 & 17 Vict. c. 51), he was entitled to be recouped out of the corpus of the settled fund. *Cuddon* v. *Cuddon*, 46 L. J., Ch. 257; 4 Ch. D. 583; 25 W. R. 341.

Sale of Settled Realty—Power in Settlement.]—Estates subject to a jointure rent-charge were settled subject to a power of sale, with trusts for re-investment of the purchase-money in lands to be settled to the like uses, and were sold under the power of sale:—Held, that the charge of succession duty that would become payable on the extinction of the jointure, was shifted by s. 42 from the lands sold to the purchase-money, and the lands on which it might be re-invested, and therefore the purchaser was not entitled to require it to be paid for. *Dugdale* v. *Meadows*, 40 L. J., Ch. 140; L. R. 6 Ch. 501; 24 L. T. 113. Affirming 18 W. R. 310.

—— **Under Settled Estates Act, 1877.**]—The effect of a sale by the court under the powers conferred by the Settled Estates Act, 1877, of any settled estates, is, by the operation of s. 22 of that act, to revoke the uses of the settlement; and by the operation of s. 42 of the Succession Duty Act, 1853, the duty is shifted from the land sold to the purchase-money or its investments, and the land in the hands of a purchaser is freed from the succession duty. *Warner's Settled Estates, In re, Warner* to *Steel*, 50 L. J., Ch. 542; 17 Ch. D. 711; 45 L. T. 37; 29 W. R. 726.

Estate Vested in Devisee to give Title to Purchaser.]—Where trustees for sale under a will, who have entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vest the estate in the person to whom (subject to the trust) the land is devised, whereby he becomes the proper party to convey, such legacy duty is properly paid, and no new contract is created whereby succession duty becomes payable. *Howe* (*Earl*) v. *Lichfield* (*Earl*), 36 L. J., Ch. 313; L. R. 2 Ch. 155; 16 L. T. 436; 15 W. R 323.

Omission to Pay by Trustees—Interest—Liability.]—Real and personal estate was given by will to A. and B. to permit X. to receive the income during his life, remainder to the use of an infant. On the death of X. leaving his widow and the infant otherwise unprovided for, the court made an order for the payment of the whole income of the property for her maintenance, to the widow, by A. and B. Shortly afterwards the circumstances of the widow improved, but A. and B., till the death of B., in 1851, and after that event A. alone still paid the gross income (without ever paying succession duty) to the widow during the minority of the child. The child attained twenty-one in 1873, married, and sought to charge A. and the estate of B. with the amount paid for succession duty, with interest:—Held, that they were liable for succession duty, but not for the interest. *Brown* v. *Smith*, 46 L. J., Ch. 866.

The widow, in 1863, married J. W., who died in 1872. On the 7th May, 1874, she married R. W. Y. sought to charge J. W.'s estate, Y.'s separate estate, if any, and R. W. in the same way:—Held, first, that J. W.'s liability in respect as well of his wife's receipt of income, from 1861 to 1863, as of her accountability for succession duty, terminated with the coverture. Held, secondly, that R. W. was similarly protected by s. 12 of the Married Women's Property Act, 1870. *Ib.*

Jointress—Liability of Estate.]—By a marriage settlement made in 1822, B. and A. (father and son), in pursuance of a joint power of appointment in them vested, limited two rent-charges to the wife of C., if she survived her husband (which event happened); and it was provided that the rent-charges should be in lieu of dower, thirds, and freebench, and should be payable without any deduction or abatement whatsoever on account or in respect of any taxes, charges, impositions, or assessments already imposed or charged, or to be thereafter imposed or charged upon the hereditaments or upon the jointure; and for the purpose of better securing the same, certain hereditaments were demised for a term of years, upon trust in case the rent-charge should fall into arrear, to raise and pay the same, with all costs, charges, and expenses which should be sustained by reason of the non-payment thereof, or otherwise in relation thereto. The husband died in 1856:—Held, that succession duty was payable by the jointress in respect of the rent charge. *Floyer* v. *Bankes*, 3 De G. J. & S. 306; 3 N. R. 16; 33 L. J., Ch. 1; 9 Jur. (N.S.) 1255; 9 L. T. 353; 12 W. R. 28.

Held, also, that the jointress was entitled to have her rent charge free of the duty, and that

the same was, therefore, a charge upon the estate. *Ib.*

Fund in Court.]—Where an application is made for payment out of the court of chancery of a sum of money on which duty will afterwards become payable for succession duty, the court will recommend the petitioner to commute the duty. *Bailey* v. *Tindall*, 18 Jur. 668; 2 Eq. 538; 2 W. R. 129.

Fund set Apart for.]—A fund set apart by the testator for the payment of the legacy and succession duty, "in consequence of his death," is liable to pay the duty upon every succession which occurs upon his death, and not merely upon those successions which are created by his will. *Powlett (Lord)* v. *Hood*, 35 Beav. 234; 12 Jur. (N.S.) 85; 13 L. T. 783; 14 W. R. 298.

A tenant for life directed his executors to pay, out of a particular fund, his pecuniary legacies and annuities, "and the legacy and succession duty payable for the same or in consequence of his death":—Held, that the succession duty payable by the next remainderman, under a prior settlement and in respect of family estates not devised, was charged on the fund. *Ib.*

B., being entitled to 3,500*l.*, surrenders his interest to his son, who would be entitled to it at his death under a trust deed; and on petition presented by father and son, under the 16 & 17 Vict. c. 51, ss. 15 and 53, that the court should provide 1*l.* per cent. to answer succession duty:—Held, that inasmuch as the sum was stock, and not money, 1*l.* 10*s.* per cent. must be set apart, with a personal undertaking of the son to pay the money. *Bailey* v. *Tindal*, 2 Eq. Rep. 538; 18 Jur. 668; 2 W. R. 129.

Incidence of Duty.]—The stamp duty payable under s. 27 of the Customs and Inland Revenue Act, 1881, and the estate duty payable under s. 5 of the Customs and Inland Revenue Act, 1889, must be borne entirely by the general residuary personal estate, and are not payable in part out of property specifically given, unless the general residuary personal estate is not sufficient. *Croft, In re, Deane* v. *Croft* ([1892] 1 Ch. 652), distinguished. *Bourne, In re, Martin* v. *Martin*, 62 L. J., Ch. 69; [1893] 1 Ch. 188; 3 R. 52; 67 L. T. 586; 41 W. R. 70.

A testatrix devised her house at M. to trustees in trust for E. for life with remainders to his children in tail, and then devised all the residue of her real and personal property to her trustees upon trust for conversion and to pay all legacy and succession duty payable upon the legacies and annuities given by her will and then to invest the surplus in land and long leaseholds, such residue when invested to be impressed with the character of real estate and to be held by the trustees upon the same trusts as those declared concerning her house at M.:—Held, that succession duty in respect of the life interest of E. was not payable out of the residuary estate. *King's Trusts, In re*, 29 L. R., Ir. 401.

—— **Appointment—Stock Sufficient to Raise "Net Sum."**]—The donee of a power of appointment under a settlement appointed that "so much of the stocks, funds, shares, and securities" subject to the settlement "as shall be sufficient to raise the net sum of 2,000*l.*," should thenceforth belong to and be vested in E., an object of the power:—Held, that E. was entitled to have the succession duty on the sum appointed paid out of the funds remaining unappointed. *Banks* v. *Braithwaite* (32 L. J., Ch. 35) questioned. *Saunders, In re, Saunders* v. *Gore*, 67 L. J., Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450—C. A. Reversing 45 W. R. 456.

Proof of Payment.]—A certificate from the inland revenue office, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser. *Howe (Earl)* v. *Lichfield (Earl)*, 35 Beav. 370; L. R. 1 Eq. 641; 14 W. R. 468. Affirmed, 36 L. J., Ch. 313; L. R. 2 Ch. 155; 16 L. T. 436; 15 W. R. 323.

Costs.]—Costs of trustees of rendering the necessary accounts for the purpose of paying the succession duty in respect of a life estate, are payable by the tenant for life. *Cowley (Earl)* v. *Wellesley*, 35 Beav. 642.

Onus of Proof—Scale.]—Where the crown has made out a primâ facie case to duty at a particular rate, if events have happened by which the duty would be less, the onus of proof is on those sought to be charged. *Solicitor-General* v. *Law Reversionary Interest Society*, 42 L. J., Ex. 146; L. R. 8 Ex. 233; 28 L. T. 769; 21 W. R. 854.

When Legacy Duty Paid on Purchase-Money.]—A person devised real estate to trustees by sale or mortgage to raise a certain sum of money, and subject thereto for his son. The trustees sold the estate by auction in lots, and L. became the purchaser of two of the lots. Pending the investigation of the title, the required sum was received out of the purchase-money of the other lots. The commissioners having charged and received legacy duty in respect of the purchase-money of the lots sold to L.:—Held, that the lots were protected by s. 18 from any charge for succession duty. *Howe (Earl)* v. *Lichfield (Earl)*, 36 L. J., Ch. 313; L. R. 2 Ch. 155; 16 L. T. 436; 15 W. R. 323.

The payment of legacy duty under 36 Geo. 3, c. 52, s. 18, did not exempt the appointees from succession duty, since their succession did not come within the exemption granted by s. 18 of the Succession Duty Act, 1853, to persons already charged with legacy duty "in respect of the same acquisition of the same property." *Att.-Gen.* v. *Mitchell*, 50 L. J., Q. B. 406; 6 Q. B. D. 548; 44 L. T. 580; 29 W. R. 683; 45 J. P. 618.

The exemption in the 16 & 17 Vict. c. 51 (Succession Duty Act), s. 18, which enacts, that no duty shall be payable "by any person in respect of a succession who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the legacy duty acts," applies only to exemptions expressly provided for by those acts. *Att.-Gen.* v. *Fitzjohn*, 2 H. & N. 465; 27 L. J., Ex. 79; 5 W. R. 876.

H., who died in 1803, bequeathed a sum in trust for his daughter A. for life, and after her death in trust for her children. A. died after the 19th of May, 1853, when the succession duty act (which includes every past or future disposition of property) came into operation:—Held, that although by reason of the testator's death before the passing, in 1805, of the 45 Geo. 3,

c. 28, which first imposed a duty on legacies by parents to children, or descendants of children no duty would have been payable on the bequest as a legacy, it was not exempted from duty within the meaning of the provision of s. 18 of the succession duty act: the exemption there, if applicable at all, applying to express exemptions in the legacy duty acts in favour of gifts to husbands and wives, to the royal family, and to certain charities. *Ib.*

c. *ALLOWANCES AND EXEMPTIONS.*

Real Property—Income-Tax and Expenses.]—In calculating the value of an assessment, the commissioners are not to allow deductions on account of income-tax upon real property, or on stock the produce of real property, nor for the costs of collecting rents of real property during a temporary absence of the owner abroad. *Elwes, In re*, 3 H. & N. 719; 28 L. J., Ex. 46; 4 Jur. (N.S.) 1153. S. P., *Att.-Gen.* v. *Lorton* (*Lord*), 5 L. T. 122; 11 Ir. C. L. R. 429.

When lands are left to trustees, to expend certain sums in keeping the land in a proper state, with salaries to servants, &c., and the residue to a beneficial devisee, the succession duty, whether paid by the trustees or the beneficial devisee, cannot be paid with an allowance for these outgoings. *Cowley's Succession* (*Earl*), *In re*, 4 H. & C. 476; 35 L. J., Ex. 177; L. R. 1 Ex. 288; 12 Jur. (N.S.) 607; 14 L. T. 663; 14 W. R. 836.

Incumbrances—Rent-Charge Payable by Son Tenant in Tail.]—In 1803 estates were settled to the use of P. for life, with remainder to his first son in tail male. In May, 1826, P. and his first son suffered a recovery, and conveyed the estates to the use of P. for life, with remainder to the use that the wife of P., in case she should survive him, should yearly receive, during her life, a rent of 1,000*l.*, with remainder to such uses and subject to such charges as P. and his son should appoint, and in default of appointment to the use of the son for life, with remainder to his first and other sons in tail male. In December, 1826, P. and his son, in execution of the power, appointed the estates to such uses, and subject to such charges, as they during their joint lives should appoint; and in default of appointment to the son for life, with remainder over. Subsequently P. and his son, in exercise of the power, mortgaged the estates for money lent to them, and for the repayment of which they jointly and severally covenanted. They also mortgaged the estate for a debt due from P., and for the repayment of which he alone covenanted. They also charged the estates with an annuity for the grandson of P., during his life and the life of P. and his son, or the survivor:—Held, first, that on the death of P. his son was entitled, on estimating the value of his succession, to an allowance in respect of the rent-charge during the life of the wife of P., inasmuch as she was chargeable with duty in respect of it. *Peyton, In re*, 7 H. & N. 265; 31 L. J., Ex. 50; 7 Jur. (N.S.) 921; 5 L. T. 313; 9 W. R. 838.

Held, secondly, that the annuity to the grandson of P., and the mortgage debts, were incumbrances on the succession created by the son, and not made in execution of a prior special power of appointment within s. 34, and consequently the son was not entitled to any allowance in respect of either of them. *Ib.*

Incumbrances Created or Incurred by Successor—Sinking Fund.]—A. devised certain landed estates to trustees for a term of years, and subject thereto upon divers limitations, of which the following alone took effect, viz.: to B. for life, remainder to C. for life, remainder to D. in tail. The trusts of the term were, out of the rents and profits, to keep down the interest on the debts, charges, and incumbrances affecting the said estates and to raise out of the rents and profits 3,000*l.* yearly, to be applied as and when a sufficient fund should have been thereby accumulated in the discharge of the principal moneys due in respect of the said debts, charges, and incumbrances, and of such portion of the testator's simple contract debts as were by his will directed to be paid out of his real estate, in case his personal estate should be insufficient. Upon A.'s death in 1841, B. went into possession of the estates, as tenant for life, and by a decree made in a chancery suit instituted by the trustees of the will against B. and others, B. was directed to invest the surplus rents, after payment of interest and other outgoings, in 3¼ per cent. stock (not exceeding 3,000*l.* yearly), and transfer the same from time to time to the credit of the cause. B. died in 1855, and a similar decretal order was made as to C., the next tenant for life, in a supplemental suit, to which C. and D., the next remaindermen in tail, were parties. Several investments and transfers were made pursuant to the said orders, and the sinking fund so formed was accumulated in accordance with the directions in A.'s will up to 1863, when C. and D. barred the entail, and limited the lands to such uses as they should jointly appoint; and C. and D. afterwards raised, upon mortgage of the said lands, a sum of 40,000*l.*, which, with the exception of 4,500*l.*, part thereof, which was transferred to the credit of the chancery cause in respect of the sinking fund, was paid to C., to recoup him for payments made for the benefit of the estate, including the rebuilding of the mansion-house and other permanent improvements, adding to their letting value; and the lands were resettled to the use of C. for life, remainder to D. for life, with divers remainders over, subject to a trust term to raise 25,000*l.*, when required by C. and D. and to apply the same as they should direct. C. thenceforward ceased to keep up the sinking fund, until 1877, when the arrears thereof amounted to 42,000*l.*, and an agreement was made between C. and D. providing, amongst other things, that the 25,000*l.* so charged by the resettlement should be released to the extent of 20,000*l.*, such release to be taken in discharge of C.'s liability in respect of the sinking fund up to 20th January, 1878, that certain sums then standing to the credit of the fund should be forthwith applied in discharge of incumbrances affecting the inheritance, and the sinking fund should be thenceforward regularly kept up by C. This agreement was sanctioned by the court, subject to the addition of certain further provisions, and was carried out by deed. C. continued to keep up the sinking fund till his death in 1883, when D. became entitled to the estates. In assessing the succession duty payable by D. the commissioners of inland revenue disallowed from the list of incumbrances which D. claimed to deduct, 45,000*l.*, on the ground that incumbrances to this extent would have been paid off but for the suspension of the sinking fund from 1863 to 1878. Upon petition by D.:—Held, that the

incumbrances represented by this sum were not created or incurred by D., within s. 34 of the succession duty act, and that he was accordingly entitled to the deduction claimed. *O'Neill (Lord), In re*, 20 L. R., Ir. 73.

In respect of Relinquished Property.]—A., by settlement on the marriage of his daughter with B., covenanted to pay them 500*l.* a year during their lives, provided that if B., by reason of the death of his brother without issue, should come into possession of certain estates, the covenant should cease, determine, and be void. In 1853, B.'s brother died without issue, and B. came into possession of the estates:—Held, that in assessing the duty chargeable, B. was entitled to an allowance in respect of the loss of the annuity. *Micklethwaite, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

In 1796, a testator devised freehold estates to his cousin N. for life, with remainder to R. N., eldest son of N., for life, with remainder to the first and other sons of R. N. in tail male. In 1841, R. N. (being tenant for life in possession), and his son (being tenant in tail in remainder), executed a disentailing deed, whereby they limited the estates, subject and without prejudice to the life estate of R. N., to such uses as he and his son should appoint, and in default of such appointment, to such uses as the son, in case he survived him, should appoint, and in default to him for life, with remainder to his first and other sons in tail male. In 1850, R. N. and his son executed a joint appointment, whereby they limited the estate to such uses as R. N. and his son should appoint, and in default thereof (subject to a rent charge to the son of 1,200*l.* a year), to the use of R. N. for life, with remainder to the son for life, with remainder to his first and other sons in tail male. R. N. died in 1858:—Held, that his son was entitled to an allowance in respect of the 1,200*l.* a year, which ceased on the death of R. N. *Braybrooke (Lord)* v. *Att.-Gen.*, 9 H. L. Cas. 150; 31 L. J., Ex. 177; 7 Jur. (N.S.) 741; 4 L. T. 218; 9 W. R. 601.

If a tenant for life, and his son, the first tenant in tail under a will or a previous settlement, resettle the estate, and by such re-settlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under the succession duty act, s. 38, an allowance made to the son in respect of the amount of the annuity. *Inland Revenue Commissioners* v. *Harrison*, 43 L. J., Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 559.

Whether the resettlement was made before or after the succession duty act came into operation makes no difference. *Ib.*

Entailed estates were by a disentailing deed conveyed to such uses as a father, tenant for life, and his son, tenant in tail, should jointly appoint. By indenture of even date made between the father, the son, the son's intended wife and trustees, the father and son, under the powers of the disentailing deed, conveyed the estates to trustees, by way of mortgage, to secure 20,000*l.*, and the father covenanted with the trustees that he would, so long during his life as the 20,000*l.* should remain due to the trustees, pay them interest on the same, or so much thereof as, for the time being, should remain due, at three per cent. per annum. And it was declared that the trustees should stand possessed of the 20,000*l.*, and the interest thereon, on the trusts of the marriage settlement of the son, namely, on trust for him for life, with the usual trusts over for wife and children. The marriage took place, and the son received, under the mortgage and settlement deeds, the yearly sum of 600*l.* (being interest, at three per cent., on the 20,000*l.*), until the death of his father. The son then succeeded to the estates, and the annuity ceased:—Held, that the annuity was other property, which the successor, on taking the succession, was bound to relinquish or was deprived of, and in respect of which he was entitled to an allowance under the Succession Duty Act, 1853, s. 38. *Le Marchant* v. *Inland Revenue Commissioners*, 45 L. J., Ex. 247; 1 Ex. D. 185; 34 L. T. 152; 24 W. R. 858—C. A.

Duty Paid on Letters of Administration.]—A. died intestate and without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of A.'s estate were granted, paid 3 per cent. administration duty under s. 27 of the Customs and Inland Revenue Act, 1881, upon the estimated value of A.'s estate, including the above reversionary interest:—Held, that the father was exempted by s. 41 of the same act, from paying duty at 1*l.* per cent. in respect of A.'s succession to his father, under s. 10 of the Succession Duty Act, 1853. *Haygarth's Trusts, In re*, 52 L. J., Ch. 416; 22 Ch. D. 545; 48 L. T. 24; 31 W. R. 316.

d. *MODE OF VALUING PROPERTY.*

When Interest of Successor Accrues.]—The value of property for the purposes of the succession duty is to be ascertained at the time when the interest of the successor accrues. If the property has then no salable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase nor diminution in the value of the property after the succession accrued is dealt with by the act. *Att.-Gen.* v. *Sefton (Earl)*, 11 H. L. Cas. 257; 5 N. R. 436; 12 L. T. 242. Affirming 2 H. & C. 362; 32 L. J., Ex. 230; 9 Jur. (N.S.) 1296; 8 L. T. 794.

Semble, that if the land at the time of succession is incapable, in its existing state, of yielding any annual income, yet, if it is salable, then such property has an annual value, namely, a value equal to 3*l.* per cent. on the salable value at the time of succession. *Ib.*

e. *CUMULATIVE DUTIES.*

In what Cases.]—Appointees taking upon the death of the appointor are successors to him. *Chapman's Trusts, In re*, 2 H. & M. 447; 11 Jur. (N.S.) 708; 13 L. T. 144.

Therefore, appointees liable to legacy duty, and as such exempt from succession duty, becoming entitled in possession to property chargeable also with a duty in respect of the succession of the appointor to the donor of the power, are successors, and liable to one duty only at the highest rate. *Ib.*

When an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally entitled died before or after the commencement

of the succession duty act, only one duty is payable on any succession to such property, whether such duty be legacy or succession duty. If the duty is succession duty and the interest has passed through more than one successor, then under s. 14 the duty payable shall be the highest that would have been paid by any of such successors. If the duty be legacy duty, then under s. 18, no succession duty of any kind is payable. *Att.-Gen.* v. *Littledale*, 40 L. J., Ex. 241; L. R. 5 H. L. 290; 24 L. T. 921; 20 W. R. 473.

A tenant for life and the reversioner in fee under a will mortgaged their respective interests, with the usual powers of sale, to the same persons. This power of sale was exercised, and the transferee of the mortgages became absolutely entitled, and devised the estates on trust for sale. Succession duty was paid on the succession to the vendor, the transferee of the mortgages. On a sale exception was taken by the purchaser to the title, on the ground that succession duty was payable also on the succession to the original testator:—Held, that the duty was not so payable. *Cooper and Allen, In re*, 46 L. J., Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.

—— **Settlement—Death of Ultimate Beneficiaries before Tenant for Life.**]—A. by his will gave to trustees 10,000*l.* upon trust for B., then the wife of C., and after her death upon trust for all her children who should attain twenty-one. B. had seven children who attained that age, two of whom, D. and E., died in the lifetime of their father, intestate, whereby their father, C., became their next of kin and entitled beneficially to the one seventh share of the legacy of 10,000*l.* expectant upon the death of their mother, B. Their father, C., never took out letters of administration, but himself died in the lifetime of his wife, B., and by his will his surviving children became entitled to his residuary personal estate, upon which the sum of 448*l.* 10*s.* 4*d.* was paid, being at the rate of 1*l.* per cent., and was paid in respect of the beneficial acquisition of his surviving children of his residuary personal estate, and which included the reversionary value of the two seventh parts of the legacy of 10,000*l.* to which he was entitled as next of kin of his children D. and E., and in respect of which two seventh parts no legacy or succession duty had been paid by C. Upon the death of B., F., who was one of the executors under the will of C., obtained letters of administration of the estate and effects of D. and E., so as to enable him to give and receive a good discharge for their two seventh shares:—Held, that the succession duty act did not apply to such a case. *Att.-Gen.* v. *Cleave*, 31 L. T. 86.

VII. ACCOUNT STAMP DUTY.

Gifts made within Twelve Months of Death of Donor.]—Gifts made within twelve months of the donor's death, although made without any reservation of interest to the donor, are liable to account stamp duty under the Customs and Inland Revenue Acts, 1881 and 1889. *Att.-Gen.* v. *Booth*, 63 L. J., Q. B. 356; 10 R. 175.

—— **Incidence of Duty.**]—The account stamp duty imposed by s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, and s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, on an immediate gift made within twelve months before the death of the deceased, must be paid by the donee, and not out of the estate of the deceased. *Foster, In re, Thomas* v. *Foster*, 66 L. J., Ch. 220; [1897] 1 Ch. 484; 76 L. T. 228; 45 W. R. 333.

Release of Mortgage Debt—Gift of Personalty—Covenant to pay Mortgagee Annuity—Benefit reserved to Donor.]—During the six months prior to a decree for foreclosure becoming absolute, the son of the mortgagee purchased the equity of redemption from the mortgagors, and by the same deed the mortgagee released the mortgage debt in consideration of a covenant by the son to pay him an annuity:—Held, first, that the release of the debt was a gift, and not a sale; secondly, that it was gift of personalty, and not of realty; and, thirdly, that the enjoyment by the donee was not "to the entire exclusion of any benefit to the donor by contract or otherwise" within s. 11 of the Customs and Inland Revenue Act, 1889; and that, consequently, on the death of the mortgagee, account duty was payable by the son on the amount of the debt released. *Att.-Gen.* v. *Worrall*, 64 L. J., Q. B. 141; [1895] 1 Q. B. 99; 14 R. 1; 71 L. T. 807; 43 W. R. 118; 59 J. P. 467—C. A.

Policy of Assurance—Gratuitous Assignment—Subsequent Payment of Premiums by Assignee.]—The gratuitous assignee of a policy of assurance who subsequently to the date of assignment pays the premiums on the policy is not liable to pay account duty on the policy moneys. *Lord Advocate* v. *Fleming* or *Robertson*, 66 L. J., P. C. 41; [1897] A. C. 145; 76 L. T. 125; 45 W. R. 674; 61 J. P. 692—H. L. (Sc.)

In 1883 a father assigned two policies of assurance on his life to his daughter. He had himself paid the premiums to the date of the assignment, but from that date until his death in 1890 the premiums were paid by the daughter:—Held, that the policy moneys were not liable to account duty, as it was not money received under a policy of assurance wholly or partially kept up for the benefit of a donee within s. 11, sub.-s. 1, of the Customs and Inland Revenue Act, 1889. *Ib.*

Voluntary Settlement—Partnership Articles—Annuity out of Gross Profits.]—Where in a partnership deed it is provided that on the death of one of the partners, the executors of such partner shall sell his share to the surviving partner subject to an annuity payable out of the gross profits to the widow, such annuity is part of the deceased partner's personal estate within s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and s. 11 of the Customs and Inland Revenue Act, 1889, and consequently account duty is payable on it. *Att.-Gen.* v. *Wendt*, 65 L. J., Q. B. 54; 15 R. 528; 73 L. T. 255; 43 W. R. 701.

Purchase of Stocks by Husband and Wife in their Joint Names in Equal Shares for Benefit of Survivor — Transfer "voluntarily" made.] — Purchase of stocks by a husband and wife in their joint names, even where each of the parties contributes equally out of their separate moneys, under an arrangement that such stock shall, on the death of either, belong to the survivor absolutely, is a transfer of property "voluntarily" made with s. 38, sub-s. 2 (*b*) of the Customs and Inland Revenue Act, 1881, and s. 11, sub.-s. 1 of the Customs and Inland Revenue Act, 1889, and the duty imposed by

these sections is payable by the survivor on the deceased's share. *Att.-Gen.* v. *Ellis*, 64 L. J., Q. B. 813; [1895] 2 Q. B. 466; 15 R. 584; 73 L. T. 190, 350; 44 W. R. 13; 59 J. P. 774.

Settlement on Widow's Second Marriage—Trusts in Favour of Children of former Marriage—"Voluntary Disposition" or Settlement—"Volunteer."]—An immediate gift by a widow, in a settlement on her second marriage, to or in trust for children of her first marriage, is a "voluntary disposition" and chargeable with account duty, under s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881. A widow's children by her first marriage, in whose favour she settles personal property, reserving a life interest, by a settlement made upon her second marriage, are "volunteers" within the meaning of s. 11, sub-s. 1 (*c*), of the Customs and Inland Revenue Act, 1891, amending s. 38, sub-s. 2 (*c*) of the Customs and Inland Revenue Act, 1881, and are chargeable with duty. *Newstead* v. *Searles* (1 Atk. 265) and *Clayton* v. *Wilton* (*Earl*), (6 M. & S. 67, n. p. 787; 18 R. R. 307) as explained in *Mackie* v. *Herbertson* (9 App. Cas. 303) and *De Mestre* v. *West* ([1891] A. C. 264), followed; *Gale* v. *Gale* (6 Ch. D. 144) not followed. *Att.-Gen.* v. *Jacobs-Smith*, 64 L. J., Q. B. 605; [1895] 2 Q. B. 341; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468—C. A.

Voluntary Settlement — Retrospective Operation of Statute.] — The Customs and Inland Revenue Act, 1881, by s. 38 (*c*), imposes stamp duty upon personal property "passing under any past or future voluntary settlement" if a life interest is reserved to the settlor. The Customs and Inland Revenue Act, 1889, s. 11, enacts that the above section "is hereby amended as follows: the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer . . . and whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person." Upon demurrer to an information for stamp duty alleged to be due, under s. 38 of the Customs and Inland Revenue Act, 1881, in respect of personal property to which certain persons became entitled in 1885, under a settlement:—Held, that the provisions of s. 11 of the act of 1889 were retrospective, and that the construction provided by that section must be applied to the description of the property sought to be taxed, and this although the property passed to the beneficiaries, and the proceedings to recover the duty were taken, before the second act came into force. *Att.-Gen.* v. *Theobald*, 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

—— **Post-nuptial Settlement — Sale to take place "upon Request"—Conversion.**]—Freehold hereditaments were, by a post-nuptial settlement, vested in trustees upon trust at the request in writing of the settlor and his wife or the survivor, and after the death of the survivor, at their discretion to sell the same. The settlor died without having made any request, and no sale had in fact taken place:—Held (i.), that the words "at the request in writing of the settlor," &c., did not prevent immediate conversion, but that they merely gave a discretion as to the time and circumstances of the sale, and did not indicate that the sale should not take place ultimately; (ii.) that land equitably converted must be treated as money for all, including fiscal, purposes; and (iii.) that s. 38, sub-s. 2 (*c*), of 44 Vict. c. 12 applies to land equitably converted. *De Lancey's Succession, In re* (L. R. 5 Ex. 102), treated as overruled. *Att.-Gen.* v. *Dodd*, 63 L. J., Q. B. 319; [1894] 2 Q. B. 150; 10 R. 177; 70 L. T. 660; 42 W. R. 524; 58 J. P. 526.

—— **Property "passing under"— Instrument not taking Effect as a Will.**]—By a marriage settlement in 1843 H. F. (then H. H.) transferred to trustees 1,056*l.* three per cent. consolidated bank annuities, to pay the income to her for life, and after her death to J. F., the intended husband, and after the determination of both life estates for the benefit of the children of the marriage; and failing these trusts, upon trust for such person or persons as the said H. F. might, notwithstanding coverture, appoint. In 1848 H. F. executed a deed appointing the trust funds after her own and her husband's death to E. C. J. F., the husband died in 1879, and H. F. in 1888:—Held, that under the Customs and Inland Revenue Act, 1881, s. 38, sub-s. (*c*), as amended by the Customs and Inland Revenue Act, 1889, s. 11, the duties mentioned in s. 38, sub-s. (*c*), were payable on the death of H. F. in respect of the personal property which passed, by virtue of the two deeds in question, to E. C. *Att.-Gen.* v. *Chapman*, 60 L. J., Q. B. 602; [1891] 2 Q. B. 526; 65 L. T. 119; 40 W. R. 79.

The expression "passing under" in s. 38, sub-s. (*c*), was comprehensive, and might fairly be used in respect not only of dispositions effected by the words of the instrument creating them, but of those effected by the subsequent execution of a power created by the instrument in question. *Ib.*

Property, the right to direct the application of which is created by deed A., but the specific direction of which is effected by deed B., passes under (not by) deed A. *Ib.*

—— **Reservation of Life Interest—Accounts.**]—By deed dated the 12th of July, 1883, the settlor, in pursuance of a power given by articles of partnership, appointed and transferred to his sons his shares in the partnership business, as from the 1st of October, 1883, or as from the settlor's death, which should first happen, provided that such appointments were conditional upon the execution by the sons before the 1st of October, 1883, of a deed covenanting to pay to the settlor, from the 1st of October, 1883, during his life, interest at 4 per cent. per annum on the value of the shares appointed as aforesaid, and to pay, out of the profits, certain annuities to other persons. The sons executed this last-mentioned deed on the 12th of July, 1883. The settlor died on the 19th of July, 1883:—Held, that the transfer of the shares was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2, and that by it an interest for life in the property transferred was reserved to the settlor, and therefore duty was payable under that section on the amount of the shares so transferred. *Crossman* v. *Reg.*, 56 L. J., Q. B. 241; 18 Q. B. D. 256; 55 L. T. 848; 35 W. R. 303.

By a voluntary settlement the settlor assigned to trustees a sum of money, with interest, upon certain trusts, and subject to certain powers

provisoes, agreements and declarations, and it was declared that the trustees should apply the income for the benefit of the settlor and his wife, and children, or, at their discretion, for the benefit of one or more of such persons to the exclusion of the others, and after the settlor's death the money was to be held subject to trusts in favour of his widow and children:—Held, that, notwithstanding the power conferred upon the trustees of depriving the settlor of the benefit of the settled property at their discretion, an interest in such property for life was reserved to the settlor, within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and therefore on his death duty was payable. *Att.-Gen.* v. *Heywood*, 56 L. J., Q. B. 572; 19 Q. B. D. 326; 57 L. T. 271; 35 W. R. 772.

A deed of partnership made in 1877 between G. and several other persons provided that it should be lawful for him by deed or will to dispose of his shares in the business to (amongst others) any of his sons of the name of G. The deed also provided that no person should be entitled to enjoy any shares or interest in the business until the senior partners should by writing declare that he was duly qualified. G. died in 1889, and by his will, made in pursuance of the power contained in the deed, bequeathed to his eldest son all his share and interest in the goodwill and assets of the partnership. G.'s son obtained the shares, and executed a fresh deed of partnership with the surviving partners:—Held, that the shares passed to the son under the deed of 1877, which was a "voluntary settlement," and which "reserved" a life interest in them to G., and that therefore stamp duty was payable in respect of them under the provisions of s. 38 of the Customs and Inland Revenue Act, 1881, and s. 11 of the Customs and Inland Revenue Act, 1889. *Att.-Gen.* v. *Gosling*, 61 L. J., Q. B. 429; [1892] 1 Q. B. 545; 66 L. T. 284; 40 W. R. 366; 56 J. P. 358.

Incidence of Duty — Appointee of Specific Sums and of Residue.]—Under a voluntary settlement, and the will of the settlor executing a special power of appointment thereby reserved in favour of the settlor's children, trustees were directed after the death of the settlor (to whom a life interest was reserved) to raise certain specific sums of money out of the trust funds in trust for certain of the settlor's children, and, subject thereto, to hold the entire trust funds in trust for another of his children. The question was raised whether the account stamp duty imposed by the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*c*), and the additional estate duty imposed by the Customs and Inland Revenue Act, 1889, s. 6, on the death of the settlor, ought to be borne by the residue of the trust funds after providing for the specific sums appointed, or whether they ought to be borne ratably by the appointees of the specific sums and the appointee of the residue according to the amounts of their respective interests:—Held, that, in the absence of any direction in the trust instrument, the duties ought to be borne by the appointees of the specific sums and the appointee of the residue ratably. *Croft, In re, Deane* v. *Croft*, 61 L. J., Ch. 190; [1892] 1 Ch. 652; 66 L. T. 157; 40 W. R. 425.

The stamp duty payable under s. 27 of the Customs and Inland Revenue Act, 1881; and the estate duty payable under s. 5 of the Customs and Inland Revenue Act, 1889, are not payable in part out of the property specifically given, but must be borne entirely by the general residuary personal estate, unless the general residuary personal estate is not sufficient. *Croft, In re* ([1892] 1 Ch. 652), discussed. *Bourne, In re, Martin* v. *Martin*, 62 L. J., Ch. 69; [1893] 1 Ch. 188; 3 R. 52; 67 L. T. 586; 41 W. R. 70.

—— **Successive Appointments under Power in Voluntary Settlement.**]—Where successive appointments have been made under a power in a voluntary settlement, the account duty payable under the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*c*), in respect of the life interest reserved to the settlor, and the costs of an action to carry out the trusts of the settlement must be borne by the several appointees ratably according to their shares. *Croft, In re, Deane* v. *Croft* ([1892] 1 Ch. 652), followed. *Shaw, In re, Tuckett* v. *Shaw*, 64 L. J., Ch. 283; [1895] 1 Ch. 343; 13 R. 185; 71 L. T. 873; 43 W. R. 315.

VIII. ESTATE DUTY.

"Succession"—Several Successions to Corpus exceeding £10,000—Individual Interests of Successors valued under £10,000.]—Under a marriage settlement, personal property, valued at the death of the settlor at 20,075*l.*, was settled (inter alia) upon the wife for life, and upon her children absolutely on their attaining twenty-one years of age or on their marriage. Upon the death of the settlor the wife succeeded to the life interest in the said property. The value of her interest, taken on the basis of an annuity, was admittedly estimated at less than 10,000*l.*, and there being nine children entitled in remainder their several interests in the said corpus of 20,075*l.* clearly in no case exceeded 10,000*l.* The trustees having duly presented one account for the several succession duties, all chargeable at the same rate of one per cent., the comptroller of legacy and succession duties claimed further "estate duty," leviable under s. 6 of the Customs and Inland Revenue Act, 1889, upon the value of any succession exceeding 10,000*l.* The trustees declined to pay, on the ground that none of the beneficiaries individually succeeded to personal property exceeding 10,000*l.* in value. Upon an information:—Held, that estate duty was payable on the ground that the term "succession" in s. 6 of the Customs and Inland Revenue Act, 1889, applied to the subject-matter of the succession, and not to the individual interests of the several successors, and consequently that the corpus of the estate being valued in excess of 10,000*l.*, estate duty must be paid as upon a succession the value of which exceeded that amount. *Att.-Gen.* v. *Aberdare (Lord)*, 61 L. J., Q. B. 615; [1892] 2 Q. B. 684; 67 L. T. 588; 56 J. P. 806.

Bequest to Executors of Deceased Legatee as Part of Legatee's Personal Estate.]—A gift by will to a person, and in case he should die in the testator's lifetime to his executors, with a direction "that the same shall go and be paid as part of his personal estate as if he had survived the testator," is not liable to probate and estate duties as upon a devolution from such person if he predeceased the testator. *Lord*

Advocate v. *Bogie* ([1894] A. C. 83) followed. *Perry's Executors* v. *Reg.* (L. R. 4 Ex. 27) distinguished. *Att.-Gen.* v. *Loyd*, 64 L. J., Q. B. 365; [1895] 1 Q. B. 496; 15 R. 227.

Property situate out of the United Kingdom—Foreign Mortgages.]—A testatrix domiciled in Ireland died possessed of mortgages on freehold property in the colony of Victoria and in Switzerland:—Held, that the mortgages were personal or movable property which would have been liable to legacy duty prior to the passing of the Finance Act, 1894, and that, therefore, they were liable to estate duty under that statute. *Lawson* v. *Inland Revenue Commissioners*, [1895] 2 Ir. R. 418.

Effect of Contingent Settlement.]—The settlement of part of an estate coupled with a contingent settlement of the residue is for the purpose of the Finance Act, 1894, a settlement of the whole estate. If, in addition to a life interest to a wife, a contingent life interest is given to another person, the exception contained in s. 5 of the act does not apply, and settlement estate duty is therefore leviable. *Att.-Gen.* v. *Fairley*, 66 L. J., Q. B. 454; [1897] 1 Q. B. 698; 76 L. T. 526; 45 W. R. 589.

Property deemed to Pass on Death—Settled Property—Surrender of Life Interest to Remainderman.]—Estate duty is not payable under the Finance Act, 1894, upon the death of the tenant for life of settled property, where the tenant for life has, more than twelve months before the death, surrendered his life interest in the property to the remainderman so as to merge the life estate in the estate in remainder. *Att.-Gen.* v. *Beech*, 67 L. J., Q. B. 585; [1898] 2 Q. B. 147; 78 L. T. 584; 46 W. R. 435; 62 J. P. 371—C. A.

Husband and Wife entitled to Property—Interest of Survivor—Right to Capital and Income—"Income."]—Where under a disposition which has taken effect before the commencement of the Finance Act, 1894, a husband or wife is entitled to the income of property settled by the other, and on his or her death the survivor becomes entitled to the capital as well as the income of such settled property, estate duty is payable in respect of the property passing on the death, and the case does not come within the exception in s. 21, sub-s. 5, of the Finance Act, 1894. The sub-section only applies to a case where the survivor becomes entitled to the income as distinguished from the capital of the settled property. *Att.-Gen.* v. *Strange*, 67 L. J., Q. B. 629; [1898] 2 Q. B. 39; 78 L. T. 516—C. A. Reversing 61 J. P. 728.

Exemption—"Personal Property settled by Will or Disposition"—Appointment by Will—Probate Duty Paid.]—Under a marriage settlement executed in 1871 a trust fund was created in which the wife and husband were respectively given a life interest, and the reversion was given to the wife, subject to a power of appointment by her by deed or will. The wife died in 1883, and by her will exercised her power of appointment in favour of certain beneficiaries, subject to the husband's life interest as her survivor. The wife's reversionary interest in the trust fund was valued for probate at about two-thirds of the whole amount, and duty was duly paid upon that amount. Upon the death of the husband in 1894, after the Finance Act, 1894, had come into operation, estate duty was claimed upon the whole remaining principal of the trust fund passing on the husband's death to the beneficiaries under the power of appointment:—Held, that, by the combined operation of the marriage settlement and of the will, the trust fund must be taken as "personal property settled by a will or disposition made by a person dying before the commencement of" the act, within the meaning of s. 21, sub-s. 1, of the Finance Act, 1894, on two-thirds of which probate duty had been paid, and which to that extent must therefore be deemed exempt from estate duty. *Att.-Gen.* v. *Dodington*, 66 L. J., Q. B. 684; [1897] 2 Q. B. 373; 77 L. T. 299; 45 W. R. 657; 61 J. P. 644—C. A.

—— **Settled Property—Husband's Death in Wife's Lifetime—Cesser of Contingent Interest.**]—Where a husband's life interest in a fund settled on his wife, but contingent upon his surviving her, is determined by his death in her lifetime, the exemption in s. 5, sub-s. 3, of the Finance Act, 1894, applies, and no estate duty is payable. *Att.-Gen.* v. *Wood*, 66 L. J., Q. B. 522; [1897] 2 Q. B. 102; 76 L. T. 654; 45 W. R. 663.

Deductions from Principal Value of Estate.]—A father and son who were respectively equitable life tenant and equitable tenant in tail in remainder of certain settled property, with a joint power of appointment of the whole equitable interest, in the exercise of the joint power and by virtue of their estates and interests executed a mortgage of the equitable interest in the property in fee to secure certain sums of money advanced to the father and the son, which they jointly and severally covenanted to repay with interest. The substance of the transaction was that the father mortgaged his life interest, and the son mortgaged his reversion in the settled property to secure repayment of the mortgage debt, the life estate of the father being kept alive for that purpose. Subsequently an annuity on the father's life interest was granted to the son. On the death of the father:—Held, that the son was not entitled to deduct from the principal value of the property chargeable with estate duty the amount of the mortgage debt or any part thereof, and, affirming the judgment of the divisional court, that no deduction ought to be made for the capitalised value of the annuity. *Cowley (Earl), In re*, 67 L. J., Q. B. 256; [1898] 1 Q. B. 355; 77 L. T. 668; 46 W. R. 222; 62 J. P. 147—C. A.

Incidence of—Appointment of Part of Settled Fund—Payable in Priority.]—It is the intention of the Finance Act, 1894, that the estate duty shall fall upon the beneficiary or the beneficiaries (as the case may be) according to his or their respective interests. By a settlement made on the marriage of A. and B., personal property was assigned to trustees upon trust to convert, and invest the proceeds in the purchase of real estate; and it was thereby agreed that all the real estate which should be so purchased should be conveyed to the trustees to the use of A. for life, with remainder (in the events which happened) upon such trusts as B. should by will or codicil appoint. B., by codicil, directed her

trustees out of the moneys to arise from the sale (directed by her will) of the real estate, subject to her power of appointment, in the first place to pay to her daughter D. 35,000*l.*, and to stand possessed of the residue of the said moneys as therein mentioned. A. died in December, 1894:—Held, that D., to whom the 35,000*l.* then passed "for a beneficial interest in possession," must bear the proper ratable part of the estate duty payable in respect of the appointed property. *Orford, In re, Cartwright* v. *Del Belzo*, 65 L. J., Ch. 253; [1896] 1 Ch. 257; 73 L. T. 681; 44 W. R. 383.

—— **Money covenanted to be paid to Trustees of Child's Marriage Settlement—Debt—Apportionment of Duty.**]—A sum of money which a testator has covenanted to pay to the trustees of his son's marriage settlement not being a debt which can be deducted under s. 7, sub-s. 1, of the Finance Act, 1894, from the testator's estate before estimating its amount for the purposes of estate duty as between the executors and the trustees of the settlement, the estate duty, in respect of such sum, must be borne by the residue of the testator's estate. *Gray, In re, Gray* v. *Gray*, 65 L. J., Ch. 462; [1896] 1 Ch. 620; 74 L. T. 275; 44 W. R. 406; 60 J. P. 314.

—— **Trust Fund subject to Appointment under Voluntary Settlement—Reverter of Unappointed Part to Settlor.**]—A trust fund comprised in a voluntary settlement which was subject to a revocation by the settlor passed on his death. A part thereof had reverted to him in default of appointment, and passed by his will. His executor, who was also trustee of the settlement, paid estate duty on the whole fund, and claimed to charge the same ratably on the appointed and unappointed parts of the fund:—Held, that he was entitled to do so, on the ground that the fund had not passed to him as executor, but was vested in him as trustee; also that the appointed part was not an incumbrance created on the entire trust fund by the settlor, but was an aliquot part thereof, and must therefore pay a ratable part of the estate duty. *Meyrick, In re, Meyrick* v. *Hargreaves*, 66 L. J., Ch. 33; [1897] 1 Ch. 99; 75 L. T. 621; 45 W. R. 120.

—— **Specifically Bequeathed Leaseholds—Apportionment of Duty—Liability of Residuary Estate.**]—Specifically bequeathed leaseholds come under the description of property which passes "to the executors as such" within the meaning of the Finance Act, 1894. Estate duty in respect thereof must therefore be borne by the residuary personal estate, and not by the person entitled to the leaseholds under the specific bequest. *Culverhouse, In re, Cook* v. *Culverhouse*, 65 L. J., Ch. 484; [1896] 2 Ch. 251; 74 L. T. 347; 45 W. R. 10.

—— **Settlement Estate Duty—Settled Legacy—Settled Share of Residue—General Residue.**]—The estate duty and the settlement estate duty imposed by the Finance Act, 1894, in respect of pecuniary legacies settled by the trusts of the will of a testator, ought to be borne by the general residuary estate. *Webber, In re, Gribble* v. *Webber*, 65 L. J., Ch. 544; [1896] 1 Ch. 914; 74 L. T. 244; 44 W. R. 489.

The estate duty on the whole residue and the settlement estate duty in respect of settled shares of residue ought to be borne by the general residuary estate. *Ib.*

IX. BODIES CORPORATE AND UNINCORPORATE.

Exemption—Lands allotted under Act in Lieu of Common Rights—Income applied "in any Manner expressly prescribed by Act"—"Charitable Purpose."]—In 1763 an act of parliament was passed by which certain parts of C. Common were allotted to the corporation of York in trust for the freemen inhabitants of B. Ward in lieu of their rights of common. In 1632, by agreement with the lord of the manor, a part of the adjoining common of H., afterwards called the "Intack," was conveyed to the Mayor of York in satisfaction of the common rights. The allotments on C. Common and the Intack had ever since been enjoyed by the freemen inhabitants of B. Ward, and after payment of the expenses of management, the profits of both were applied for the benefit of poor freemen, and lately for the benefit of their widows:—Held, that the profits of the allotments made under the act of 1763 were exempt from duty under sub-s. 2, of s. 11, of the Inland Revenue Act, 1885; but that the profits of the Intack were not exempt under the section, nor under sub-s. 3, as being appropriated and applied "for any charitable purpose." *Bootham Ward Strays, In re, Inland Revenue Commissioners* v. *Scott*, 61 L. J., Q. B. 432; [1892] 2 Q. B. 152; 67 L. T. 173; 40 W. R. 632; 56 J. P. 580, 632—C. A.

—— **"Property appropriated for Promotion of Science."**]—By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income or profits of property belonging to any body corporate or unincorporate, subject to an exemption by sub-s. 3 in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." In this exemption "science" is not confined to pure or speculative science, or science generally, but includes various branches of science:—Held, that the property of the institution of civil engineers was entitled to the exemption, because it was in fact legally appropriated and applied substantially for the promotion of mechanical or engineering science, and not for the promotion of the professional interest or advantage of the members. *Inland Revenue Commissioners* v. *Forrest*, 60 L. J., Q. B. 281; 15 App. Cas. 334; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772—H. L. (E.)

—— **Associations established for Trade or Business—Liability to render an Account.**]—A body corporate or unincorporate "established for any trade or business" within the meaning of the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 5, is not bound to deliver any account of its property under s. 15. *Incorporated Council of Law Reporting, In re*, 58 L. J., Q. B. 90; 22 Q. B. D. 279; 60 L. T. 505; 37 W. R. 382; 53 J. P. 119.

In 1870 the Council of "The Law Reports" were incorporated under the provisions of the Companies Act, 1867, obtaining a licence under s. 23 to be registered as a limited company with-

out the addition of the word "limited." The association was established for the objects of preparing and publishing, under gratuitous professional control, reports of judicial decisions; of issuing digests and other publications relating to legal subjects, including the statutes; of continuing the series of reports then called "The Law Reports"; of acquiring the copyright of any other reports, and of doing any other things incidental or conducive to those objects. In carrying them out the association employed editors, reporters, printers, and publishers, and prepared, printed, and published reports and other legal publications, and supplied them to subscribers and others for payment. By the memorandum of association all the property and income of the association were applicable solely to the promotion of the above objects, and no part thereof could be paid as dividend, bonus, or otherwise, to any member:—Held, that the association was established for a trade or business within the meaning of sub-s. 5, of s. 11, of the Customs and Inland Revenue Act, 1885, and was therefore entitled to exemption from the duty imposed by that section. *Ib.*

—— **Property of Club—Entrance Fees and Subscriptions — "Funds voluntarily contributed."**]—Exemption was claimed by a members' club, the property of which was vested in trustees, and which had been established less than thirty years, from the duty imposed on the annual value, income, or profits of bodies corporate and unincorporate by s. 11 of the Customs and Inland Revenue Act, 1885, on the ground that the property of the club was "property acquired by or with funds voluntarily contributed" within thirty years preceding, within the meaning of the sixth exemption in that section. By the rules of the club every member on admission paid an entrance fee and the annual subscription for the current year, and until payment, was not admitted to any of the benefits or privileges of the club, and payment was considered as a declaration of submission to the rules; an annual subscription was payable on January 1st in each year, and if it was not paid on or before March 1st, the member's name was erased from the list of members, and a member intending to withdraw from the club had to give notice on or before January 1st, or otherwise was liable to pay his subscription for the current year:—Held, that, as the entrance fees and subscriptions were paid by members in consideration of the right to enjoy the benefits and privileges of the club, they were not "funds voluntarily contributed" to the club, and therefore duty was payable on property acquired with money so paid. *New University Club, In re*, 56 L. J., Q. B. 462; 18 Q. B. D. 720; 56 L. T. 909; 35 W. R. 774.

—— **Funds "Legally appropriated and applied for any Charitable Purpose"—Funds "voluntarily contributed within Thirty Years" — "Property acquired within Thirty Years where Legacy Duty paid."**]—By s. 11 of the Customs and Inland Revenue Act, 1885, a duty of 5 per cent. is imposed upon the annual value, income, or profits of all property real and personal belonging to or vested in any body corporate or unincorporate during the year of assessment after deducting the costs and expenses of the management of such property, subject to the exemption from duty in sub-ss. 3, 6, and 7, respectively contained, in respect of "property or the income or profits of property legally appropriated and applied for any charitable purpose" (sub-s. 3), "property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding" (sub-s. 6), and "property acquired by any body corporate or unincorporate within the like period where legacy or succession duty has been paid upon the acquisition thereof" (sub-s. 7). The Linen and Woollen Drapers' Institution was founded in 1832, with the object of making provision for decayed members of the said trades, their widows and children. Rules for the government of the institution were framed, by which any person of three years' standing in any of the said trades, residing within twelve miles of the General Post Office, may, on payment of the life or annual subscription, be elected a member. Medical advice and medicine are also provided free of charge to members or their families; all relief being confined to members, and no member being entitled as of right to assistance, the board of directors having absolute discretion in every case to grant or refuse the same, and in no case can a member receive assistance unless in necessitous circumstances. The property of the institution consists of the accumulated subscriptions of members, and of sums contributed as donations by benevolent persons other than members; but no precise or accurate calculation had been made, showing how much of such invested funds was derived from members' subscriptions, and how much from voluntary contributions within the thirty years immediately preceding:—Held, first, that the institution was not a charitable institution, but was in the nature of a mutual benefit society, and therefore that the portion of the funds derived from such subscriptions was not exempt from duty under sub-s. 3; and, secondly, that the other portions of the funds, derived from voluntary contributions within the specified period of thirty years, and from property acquired within the same period on which legacy duty had been paid were, if the amounts could be ascertained, exempt from duty under sub-ss. 6 and 7. *Linen and Woollen Drapers' Institution, In re*, 58 L. T. 949.

B. CUSTOMS AND EXCISE.

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I. IN PARTICULAR CASES.

1. APPRAISERS.

To an action for work done by an appraiser, a defence following the words of 46 Geo. 3, c. 43, viz. that the work consisted of an appraisement of personal property which was done by the plaintiff, in expectation of a reward to be paid by the defendant, without being duly licensed—is good. *Palk* v. *Force*, 12 Q. B. 666; 17 L. J., Q. B. 299; 12 Jur. 797.

2. BEER.

Not Brewed for Sale—Exemption.]—By the Inland Revenue Act, 1880, s. 33, sub-s. 3, if the annual value of a house occupied by a brewer other than a brewer for sale does not exceed 10*l.*, the beer brewed by him shall not be charged with duty. The respondent brewed beer (not for sale) in a house occupied by him of an annual value not exceeding 10*l.*, and he occupied, as a residence, another house, which was of greater annual value than 10*l.*:—Held, that the exemption from duty did not apply to the beer so brewed. *Tippett* v. *Hart*, 52 L. J., M. C. 41; 10 Q. B. D. 483; 48 L. T. 319; 31 W. R. 582; 47 J. P. 199.

What is Botanic Beer.]—M. sold a liquor in bottles called Summer's Botanic Beer, without having a retail licence to sell beer. The liquor was made of sugar, herbs, and water, without hops, and had about 6 per cent. of spirit, while ginger beer and table beer had about the same percentage of spirit. The justices dismissed the information, holding that it was not beer within the meaning of 4 & 5 Will. 4, c. 85, and other acts:—Held, that the justices were right. *Leah* v. *Minns*, 47 J. P. 198.

The appellant sold a liquor called "botanic beer," without having a retail licence for the sale of beer. It contained sugar, herbs, and water, but no hops or malt, and had 6 per cent. of proof spirit:—Held, that such a liquor was "beer" within the meaning of s. 4 of 48 & 49 Vict. c. 51, and that the appellant was rightly convicted. *Howorth* v. *Minns*, 56 L. T. 316; 51 J. P. 7.

Dilution by Publican — Mixing different Strengths.]—By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer. On appeal against a conviction for "diluting" beer under the above section:—Held, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted. *Crofts* v. *Taylor*, 56 L. J., M. C. 137; 19 Q. B. D. 524; 57 L. T. 310; 36 W. R. 47; 16 Cox, C. C. 294; 51 J. P. 532, 789.

Grant of Licences by Justices to Sell Intoxicating Liquors.] — *See* INTOXICATING LIQUOR.

3. CARRIAGES AND CARTS.

Hackney Carriage—Plying for Hire—Omnibus.]—Sect. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, imposes a duty upon every hackney carriage as thereinafter defined, and by sub-s. 3 a "hackney carriage" means "any carriage standing or plying for hire":—Held, that an ordinary omnibus, running along a fixed route is a "hackney carriage" within the meaning of the act. *Hickman* v. *Birch*, 59 L. J., M. C. 22; 24 Q. B. D. 172; 62 L. T. 113; 54 J. P. 406.

Use in Course of Trade.]—The proprietors of a travelling equestrian circus gave a daily parade through the towns which they visited. On the day laid in the information, there was the usual parade in Bishop Auckland, and amongst other carriages in the procession there were three drawn by horses; one conveyed the band consisting of eight performers; two others conveyed four persons each, and the persons in one of these were dressed in gaudy attire and carried flags. These three carriages were used also for carrying portions of the luggage and property of the circus from place to place, and at the time before mentioned there were clothes belonging to the circus in the back locker of the band carriage, and also the music and musical instruments of the circus, and also in the other carriages there were some loose deal boxes and brackets:—Held, that these three carriages were not within the exemption specified in 32 & 33 Vict. c. 14, s. 19, sub-s. 6, as carriages "used solely for the conveyance of any goods or burden in the course of trade or husbandry," and that they required to be licensed. *Speak* v. *Powell*, 43 L. J., M. C. 19; L. R. 9 Ex. 25; 29 L. T. 434.

Letting for Hire—Less than a Year.]—By 32 & 33 Vict. c. 14, s. 27, a penalty of 20*l.* is imposed upon a person keeping a carriage without a licence; and by 38 & 39 Vict. c. 23, s. 11, every person who shall let any carriage for hire for any period less than one year shall for the purposes of the 32 & 33 Vict. c. 14, he deemed to be the person keeping such carriage. A coach-builder by an agreement in writing let to R. two clarence cabs on hire at 30*s.* per week, payable weekly, the cabs to be his property if he regularly paid the 30*s.* for seventy-five weeks consecutively, and an additional 5*l.* at the expiration of that period; but it was stipulated that, if he should omit to make any of the weekly payments as agreed, the owner might resume possession of the cabs:—Held, that under the agreement there was no letting of the cabs for a period less than one year, so as to make him the "person keeping" them within the meaning of

the act. *Barber* v. *Callow*, 2 C. P. D. 558; 37 L. T. 130.

Carriage lent by Coachbuilder during Repair to Customer's Carriage.]—Where the owner of a carriage, which has accidentally become disabled during the year for which an excise licence has been duly taken out is accommodated by his coachbuilder, during the repair of such carriage, with the use of another carriage without any payment, the coachbuilder is not required to take out a licence in respect of such carriage so lent. *Davey* v. *Thompson*, 54 L. T. 495; 34 W. R. 411; 50 J. P. 260.

Taxed Cart—Meaning of.]—A local act provided that there should be charged as toll at a turnpike-gate "for every horse or other beast drawing any taxed cart," *&c.*:—Held, that a cart which had been taxed in the previous year, under 16 & 17 Vict. c. 90, Sch. D, was a taxed cart within the meaning of the local act. *Purdy* v. *Smith*, 1 El. & El. 511; 28 L. J., M. C. 150; 5 Jur. (N.S.) 912; 7 W. R. 306.

The words "taxed cart" mean such a cart as comes within that designation under 43 Geo 3, c. 161, and do not apply to any cart simply because it is a cart in respect of which a tax is paid. *Williams* v. *Lear*, 41 L. J., M. C. 76; L. R. 7 Q. B. 285; 25 L. T. 906.

Cart without Owner's Name on it.]—An information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Will. 4, c. 50, s. 76. The cart was a light spring cart with two wheels, used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty under 32 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—Held, that the "cart or carriage" contemplated by s. 76 of 5 & 6 Will. 4, c. 50, was "ejusdem generis" with a waggon, and that this was not such a cart, and that the magistrates were therefore right. *Danby* v. *Hunter*, 49 L. J., M. C. 15; 5 Q. B. D. 20; 41 L. T. 622; 28 W. R. 228; 44 J. P. 283.

B.'s bailiff used a cart for husbandry, but B.'s name was not painted thereon, though intended to be so:—Held, that B. should have been convicted of keeping a carriage without a licence, even though there was no intention to defraud. *Whitrow* v. *Brown*, 56 J. P. 374.

4. Dogs.

Licence taken out on Same Day as Information.]—On the 21st of October, S. kept a dog without having in force a licence granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the excise, and he took out a licence at a later hour on the same day. Sect. 5 enacts that every licence shall commence on the day on which the same shall be granted. An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he produced the licence granted on the 21st of October, and the charge was dismissed:—Held, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent licence operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the act before the licence existed. *Campbell* v. *Strangeways*, 47 L. J., M. C. 6; 3 C. P. D. 105; 37 L. T. 672.

Exemption—Sheep-Dog—Burden of Proof.]—N., a farmer, obtained a certificate of exemption for a sheep-dog, and was summoned for not having a licence. At the hearing the revenue officer proved that he had seen a trial of the dog as a sheep and cattle dog, and that the dog did not obey its master's orders like a cattle dog:—Held, that as the certificate of exemption was some evidence of a right to exemption, the justices were right in dismissing the information, for the prosecutor had failed to prove that the dog was not a cattle dog. *James* v. *Nicholas*, 50 J. P. 292.

Refusal of Certificate of Exemption by Commissioners—Justices' Jurisdiction.]—Upon hearing an information against the owner of a dog "for keeping a dog without a licence," the justices have no jurisdiction to review the decision of the commissioners of inland revenue in refusing the owner a certificate of exemption from such a licence; and in face of the fact of the absence of such a licence and of such a certificate of exemption they are bound to convict for the offence charged. *Phillips* v. *Evans*, 65 L. J., M. C. 101; [1896] 1 Q. B. 305; 74 L. T. 314; 44 W. R. 429; 18 Cox, C. C. 300; 60 J. P. 120.

The justices, under such circumstances, cannot dismiss the charge, "as of so trifling a nature that it is inexpedient to inflict any punishment" in the exercise of the discretionary power given to them by s. 16 of the Summary Jurisdiction Act, 1879, though they might exercise such a discretion on condition of the licence being then and there paid for by the owner so charged. *Ib.*

Previous Conviction—Reduction of Fine.]—Where, at the hearing of a summons for keeping a dog without a licence it is proved that the defendant has been convicted on a former occasion of a similar offence, but such previous conviction is not stated in the information, the case cannot be treated as the case of a first offence within the meaning of s. 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and therefore the magistrate has no power under that section to reduce the amount of the fine imposed for the offence by 30 & 31 Vict. c. 5, s. 8, and the only power to reduce such fine is that given by 7 & 8 Geo. 4, c. 53, s. 78, under which statute it cannot be reduced to less than one-fourth of the amount. *Murray* v. *Thompson*, 58 L. J., M. C. 41; 22 Q. B. D. 142; 60 L. T. 151; 37 W. R. 221; 16 Cox, C. C. 554; 53 J. P. 70.

5. Game.

Disqualification.]—The holder of a licence to sell beer under 26 & 27 Vict. c. 33, s. 1, is disqualified from holding a licence to deal in game under 1 & 2 Will. 4, c. 32, being a person "licensed to sell beer by retail" within the meaning of s. 18 of the last-mentioned act. *Shoolbred* v. *St. Pancras JJ.*, 59 L. J., M. C. 63; 24 Q. B. D. 346; 62 L. T. 287; 38 W. R. 399; 54 J. P. 231.

Dealer's Licence—Foreign Game.]—A person

who did not hold an excise licence under 23 & 24 Vict. c. 90, s. 14, exposed for sale in his shop and sold a hare and black game killed abroad and imported into this country for sale:—Held, that the hare and black game having been killed abroad, it was not necessary to hold the excise licence. *Pudney* v. *Eccles*, 62 L. J., M. C. 27; [1893] 1 Q. B. 52; 5 R. 52; 67 L. T. 713; 41 W. R. 125; 17 Cox, C. C. 594; 57 J. P. 38.

—— **Breeding Pheasants.**]—M., a pheasant-breeder for many years, set pheasants' eggs under barn-door hens in coops, cutting one wing of each bird to prevent escape and facilitate identification. He sold two cock pheasants on 5th February for 1*l.* to one of the public:—Held, that he was subject to the penalty under the 23 & 24 Vict. c. 90, and 24 & 25 Vict. c. 91, s. 17, for dealing in game without a licence. *Harnett* v. *Miles*, 48 J. P. 455.

Licensed Dealer—Close Time—Foreign Game.]—A person licensed to deal in game by virtue of the Game Act, 1831 (1 & 2 Will. 4, c. 32), was convicted under s. 4 of knowingly having in his shop game during the close season, as defined in s. 3. It appeared that game was exposed for sale in his shop during the close season, but that it had been killed abroad:—Held, that the act did not apply to birds killed abroad, and that the conviction was wrong. *Guyer* v. *Reg.*, 58 L. J., M. C. 81; 23 Q. B. D. 100; 60 L. T. 824; 37 W. R. 586; 16 Cox, C. C. 657; 53 J. P. 436.

A person licensed to deal in game under 1 & 2 Will. 4, c. 32, s. 4, is guilty of an offence if he has in his possession live pheasants after the time mentioned in the act. *Loome* v. *Bailey*, 3 El. & El. 444; 30 L. J., M. C. 31; 6 Jur. (N.S.) 1299; 3 L. T. 406; 9 W. R. 119.

6. Gun Licence.

Orchard not a Curtilage.]—An orchard behind the dwelling-house and its outhouses is not within the curtilage, and therefore the occupier who uses a gun there is not exempt from gun licence duty. *Asquith* v. *Griffin*, 48 J. P. 724.

7. Male Servants.

Hotel Waiter.]—Every person employed by an hotel keeper as a waiter in his hotel, if only for two or three weeks together, in addition to his ordinary permanent number of licensed servants, is a male servant, within 32 & 33 Vict. c. 14, ss. 18 and 19, for whom the hotel keeper is bound to pay the duty, and take out the licence prescribed by the provisions of that act, and is not an occasional waiter, and exempt as such within the meaning of the printed notice or direction given to taxpayers by the commissioners of inland revenue. *Spencer* v. *Sheerman*, 23 L. T. 873.

Exemption—Groom and Labourer.]—H. was employed in the yard of a farmer to feed cows and horses, chop hay, and do miscellaneous work; also to groom the horse and drive his master to and from the railway station. The farmer being charged with keeping a male servant without a licence, the justices found that H. was bonâ fide employed as a groom and bonâ fide employed as a yardman, and was exempt under 39 Vict. c. 16, s. 5:—Held, that the justices were wrong, as the exemption only applied to one occasionally and partially employed as a groom, and this was not found. *Yelland* v. *Vincent*, 47 J. P. 230.

If a manservant is employed partially as a groom, but substantially in some other capacity, his employer is exempted by 39 Vict. c. 16, s. 5, from the tax imposed by 32 & 33 Vict. c. 14, s. 19. *Yelland* v. *Winter*, 53 L. T. 912; 34 W. R. 121; 50 J. P. 38.

H. was employed by W., a farmer, to attend to the bullocks in his yard and to work on the land, and also to feed W.'s pony. He also cleaned the harness and washed the trap when necessary, and occasionally drove with his master to and from the railway station. W. occasionally attended to the harnessing, unharnessing, and grooming of the pony himself:—Held, that H. was only occasionally and partially employed as a groom, and that W. was exempt from the tax. *Ib.*

Gardener—Employment for Portion of Day.]—A gardener was employed by A. at weekly wages; he did not reside in A.'s house; he worked on an average seven hours per day, but was not bound to serve A. for particular hours; he was also at liberty to work for other persons, but he had no employer other than A.:—Held, that A. was chargeable with duty for employing a male servant. *Schulze* v. *Steele*, 54 J. P. 232.

8. Medicines.

Holding out—Penalty.]—Any person distributing gratis a price list of medicines sold by him, which are not within the "special exemptions" in the schedule to the Medicine Stamp Act, 1812, "holds out" such medicines to the public within the meaning of the act, and thereby makes himself liable to the penalty imposed by the act. *Smith* v. *Mason*, 63 L. J., M. C. 201; [1894] 2 Q. B. 363; 10 R. 459; 70 L. T. 909; 58 J. P. 432.

Mineral Waters.]—The defendant sold a powder to be used for the purpose of making an effervescing draught, which he advertised as beneficial for a variety of disorders. The draught as made contained a salt of soda, chlorate of potash, and carbonic acid gas:—Held, that the composition came within the head of "Artificial Mineral Waters," &c., in the schedule of 52 Geo. 3, c. 150, the tax on which head was repealed by 3 & 4 Will. 4, c. 97, s. 20; and was not at any time taxable under the "tail" of the schedule of 52 Geo. 3, c. 150. *Att.-Gen.* v. *Lamplough*, 47 L. J., Ex. 555; 3 Ex. D. 214; 38 L. T. 87; 26 W. R. 323—C. A.

9. Paper.

Before the duty was repealed by 24 & 25 Vict. c. 20, where a party having reduced to pulp, in a paper mill, the fibrous portion of hides, which he took up and dried and pressed into sheets by a process similar to that of the manufacture of paper, produced an article resembling parchment, and applicable to ordinary purposes for which paper is employed:—Held, that such article was liable to duty as paper by 2 & 3 Vict. c. 23, ss. 1, 56, and that, not having taken out a licence as a paper maker, he was liable to penalties by 6 Geo. 4, c. 81, s. 26. *Att.-Gen.* v. *Barry*, 4 H. & N. 470; 28 L. J., Ex. 211; 7 W. R. 488.

10. PAWNBROKERS.

Exemption to Pawnbrokers Licensed on 31st Dec. 1872.]—By s. 37 of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), every pawnbroker is required to take a separate yearly licence for each pawnbroker's shop kept by him; and by s. 39 it is provided that no licence shall be granted to any person except upon production of a certificate granted under the act, "save that it shall not be necessary for any person being at the commencement of this act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such certificate": —Held, that the above exception was not confined to the premises in which the licensed pawnbroker was carrying on business at the commencement of the act, but conferred upon him the privilege of opening new premises at any time with a licence without procuring a certificate, and that this privilege was also given to the pawnbroker's assigns and successors. *Reg.* v. *Inland Revenue Commissioners*, 60 L. J., Q. B. 376; [1891] 1 Q. B. 485; 64 L. T. 57; 39 W. R. 317; 55 J. P. 117.

11. GOLD AND SILVER PLATE.

When Necessary.]—One, not a general trader in silver plate, who sold a piece of plate in a particular instance for a price above the value of old silver, was not therefore a vendor of plate within 31 Geo. 2, c. 32, s. 6, which enacted that all persons using the trade of selling plate shall be deemed traders in, sellers or vendors of plate, and shall take out a licence. *Rex* v. *Buckle*, 4 East, 346; 1 Smith, 49.

A person who had taken out a licence to deal in plate, under 30 & 31 Vict. c. 90, at the lower rate of duty, 2*l.* 6*s.*, which, by the terms of the act, does not extend to the sale of an article, composed wholly or in part of gold, "where the gold shall be of the weight of two ounces or upwards," sold, as a gold chain, a chain weighing more than two ounces, but containing less than two ounces of pure gold:—Held, under 30 & 31 Vict. c. 90, ss. 1, 3, 5, that he had dealt in plate without a proper licence, inasmuch as the act did not mean, by "gold" of the weight of two ounces or upwards, pure gold. *Young* v. *Cook*, 47 L. J., M. C. 28; 3 Ex. D. 101; 37 L. T. 536; 26 W. R. 100.

—— **Soliciting Orders without Licence — Penalty.**]—An agent who solicits persons to contribute money to a fund which is applied by way of payment for plate supplied by the principal to such of the contributors as are determined by ballot, "solicits, takes, or receives" orders within the meaning of s. 17 of the Revenue Act, 1867. Where such an agent solicits orders only at the place where he resides he is not a bonâ fide traveller within the meaning of the section, and is therefore, if unlicensed, liable to the penalty imposed by s. 3 of the act, even though the principal is a duly licensed person. *Killick* v. *Graham*, 65 L. J., M. C. 180; [1896] 2 Q. B. 196; 75 L. T. 29; 44 W. R. 669; 18 Cox, C. C. 376; 60 J. P. 534.

The appellant, who held a pedlar's licence, was employed by a London firm of watchmakers, as their saleswoman in the Gateshead district, for the sale of their silver watches on the hire-purchase system. The employers held a licence for dealing in plate, but the appellant had no such licence, and she having sold to a person a watch and chain under a hiring agreement, was charged with having dealt in plate without having a licence so to do. The justices found as a fact that she was not a bonâ fide traveller within the meaning of s. 17 of the Revenue Act, 1867, and convicted her:—Held, that the appeal from this conviction should be dismissed, Grantham, J., holding that the justices had arrived at a right conclusion, and Wright, J., that the case stated raised no question of law. *Hepple* v. *Brumby*, 60 J. P. 792.

Within what Time Action Brought.] — An action by one of the officers of the company of goldsmiths mentioned in the 7 & 8 Vict. c. 22, for penalties under s. 3 of that act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within 3 & 4 Will. 4, c. 42, s. 3, and consequently can be brought more than two years after the cause of action accrued. *Robinson* v. *Curry*, 50 L. J., Q. B. 561; 7 Q. B. D. 465; 45 L. T. 368; 30 W. R. 39—C. A.

12. REFRESHMENT HOUSE.

Public Dancing-room.] — A public dancing-room, in which any visitor can consume beer fetched for him from a public-house, is not a place kept open for public refreshment, resort and entertainment, under 23 & 24 Vict. c. 27, s. 6. *Taylor* v. *Oram*, 1 H. & C. 370; 31 L. J., M. C. 252; 8 Jur. (N.S.) 748; 7 L. T. 68; 10 W. R. 800.

No Intoxicants sold.]—M. kept a refreshment hotel without any licence under 23 & 24 Vict. c. 27, s. 9, but no intoxicating liquors were sold. At 11 p.m. two revenue officers, disguised as travellers, were admitted and were served with chops, coffee, and a liquor called non-intoxicating pale ale, for which they paid 5*s.* The house was a temperance hotel of a large size. The justices found that the house was an inn, but was not a refreshment-house within the meaning of the act:—Held, that they were wrong, and that they ought to have held it to be a refreshment-house. *Kelleway* v. *Macdougal*, 45 J. P. 207.

The resident occupier of a house called the Café, in Lower Temple Street, Birmingham, in which were found, between eleven and twelve o'clock at night, seventeen women and twenty gentlemen, who paid for and were supplied with cigars, coffee, and ginger-beer, which they consumed there, was convicted of keeping open such house without taking out a licence, under 23 & 24 Vict. c. 27, s. 6, to keep a refreshment-house:—Held, that such house was "kept open for public refreshment, resort and entertainment," and required such a licence under 23 & 24 Vict. c. 27, s. 6, and that the conviction was right. *Muir* v. *Keay*, 44 L. J., M. C. 143; L. R. 10 Q. B. 594; 23 W. R. 700.

By 23 & 24 Vict. c. 27, s. 6, all houses, rooms, shops, or buildings kept open for public refreshment, resort and entertainment during certain hours of the night are to be deemed refreshment-houses and require a licence. By s. 9 a penalty is imposed upon keeping unlicensed refreshment-houses. During the prohibited hours the occupier kept open, without a licence, a shop for the sale of ginger-beer and lemonade; it consisted of one room only, open in front without seats.

He was convicted of keeping an unlicensed refreshment-house :—Held, that the shop in question was kept open for public refreshment, resort and entertainment within the meaning of the foregoing enactment, and that the conviction was right. *Howes* v. *Inland Revenue Commissioners*, 46 L. J., M. C. 15 ; 1 Ex. D. 385 ; 35 L. T. 584 ; 24 W. R. 897—C. A.

13. SPIRITS.

Annual Value.]—L.'s shop formed part of a tenement of four flats. It was on the ground floor. His dwelling house was on the second flat, the intervening flat between the house and the shop was occupied by other tenants. There was no internal communication between the house and the shop, access to the house was by a staircase, common to tenants of other flats under the same roof :—Held, that the licence duty was chargeable on the annual value of the shop only. *Lawrence* v. *Lord Advocate*, 53 J. P. 167.

Retail Dealer—Spirit Merchant's Traveller.]—A traveller for a fully-licensed firm of wine and spirit merchants at B. occupied an office and premises at C., where he resided, and where amongst other places he solicited and obtained orders which he forwarded to his employers at B., who delivered the goods so ordered direct to the purchaser. The firm neither rented nor occupied any premises at all at C., nor did they store goods upon their traveller's premises. Upon information being exhibited by an inland revenue officer against the traveller under s. 26 of 6 Geo. 4, c. 81, and s. 17 of 30 & 31 Vict. c. 90, charging him with taking an order for spirits at his office at C. without having in force a proper licence authorising him so to do, it was held, that he was a bonâ fide traveller taking orders for his employers who were duly licensed to sell spirits, &c., and therefore not liable to take out a licence. *Stuchbery* v. *Spencer*, 55 L. J., M. C. 141 ; 51 J. P. 181.

Quantity to be Consumed on Premises.]—The 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts, to be consumed on the premises. The 6 & 7 Will. 4, c. 38 (Ir.), s. 38, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence should be granted to grocers :—Held, that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time ; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons. *Dickson* v. *Reg.*, 11 H. L. Cas. 175 ; 12 L. T. 405.

Spirits—What are.]—A person who distils spirits, for the purpose of making, by the addition of nitric acid, sweet spirits of nitre for sale, was a distiller of spirits within 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise licence, and liable to the penalties imposed on persons having any private or concealed still for making or distilling low wines or spirits. *Att.-Gen.* v. *Bailey*, 16 M. & W. 74 ; 16 L. J., Ex. 63.

Sweet spirits of nitre are not spirits within 6 Geo. 4, c. 80, ss. 107, 133 ; 7 & 8 Geo. 4, c. 53, s. 32 ; and 2 Will. 4, c. 16, s. 10. *Att.-Gen.* v. *Bailey*, 1 Ex. 281 ; 17 L. J., Ex. 9.

The term "spirits," in those acts, signifies an inflammable liquid, produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce, not known in common parlance under the general appellation of "spirits." *Ib.*

Sweet spirits of nitre are not "spirits" for the removal of which a permit is required by 6 Geo. 4, c. 80, s. 115, and 2 & 3 Will. 4. c. 16, ss. 10, 11. Nor are they within ss. 6 and 7 of 6 Geo. 4, c. 80, by which penalties are imposed for distilling spirits without a licence, or within 7 & 8 Geo. 4, c. 53, s. 32, which enacts forfeiture of excisable goods deposited in any place with intent to defraud the revenue. *Bailey* v. *Harris*, 12 Q. B. 905 ; 18 L. J., Q. B. 115 ; 13 Jur. 341.

14. WINES.

Foreign Wine—"Best Pale Sherry, British."]—B., the respondent, was the holder of a licence to retail sweets and made wines, but he was not licensed for the sale of foreign wine. The appellant, an officer of inland revenue, visited B.'s shop, and asked for a bottle of the best sherry, and was supplied with a bottle which was labelled "Best Pale Sherry, British," for which he paid 2*s*. The cork of the bottle was sealed and bore upon the seal the word "Sherry." B. was summoned, under s. 19 of 23 Vict. c. 27, for "selling foreign wine by retail without a proper licence." The justices dismissed the information :—Held, that B. had committed the offence, under s. 19 of the act, of selling "foreign wine by retail without a proper licence," because the "Best Pale Sherry" is a foreign wine, and that character is not taken away from it by putting the word "British" underneath it. *Richards* v. *Banks*, 58 L. T. 634 ; 52 J. P. 23.

Sweets or made Wines.]—Since 4 & 5 Will. 4, c. 77, sweets or made wines are no longer exciseable liquors, within 9 Geo. 4, c. 61, for which a licence to sell is necessary. *Reg.* v. *Lancashire*. 7 El. & Bl. 839 ; 3 Jur. (N.S.) 1095 ; 5 W. R. 658. *S. C.*, nom. *Lancashire* v. *Staffordshire JJ.*, 26 L. J., M. C. 171.

Contract to Defeat the Law—Validity.]—The plaintiff, N., and the defendant, entered into an agreement, whereby the plaintiff agreed to let N. carry on the business of the tap attached to an hotel, in the same room as was then used for a tap, at a weekly payment ; and N. agreed to carry on the business, and to pay the weekly sum ; and the defendant became surety for N. To an action upon this agreement the defendant pleaded, "that the agreement was entered into with the express object of enabling N. to have possession of the room, in order to sell therein, for his own use and benefit, exciseable liquors without a licence :—Held, that the plea disclosed a good defence to the action. *Ritchie* v. *Smith*, 6 C. B. 462 ; 18 L. J., C. P. 9 ; 13 Jur. 63.

See also CONTRACT.

Liability to Duty — Legatee or Executor.]—A legatee under a bequest of wines, which arrived in the port of London in a ship before

the death of the testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of the testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Sewart* v. *Denton*, 2 Chit. 456; 4 Dougl. 219.

—— **Foreign Ambassador — Privilege.**]—Where a foreign ambassador, on the termination of his embassy and departure from this country, employed an agent to dispose of certain wines by auction, which he had imported duty free, and such agent employed a broker and an auctioneer, who effected the sale:—Held, that the latter was personally liable to pay the duties in respect of such wines, although he had, from time to time, as he received the proceeds of the sale, paid over the net amount to his immediate employer, the agent. *Att.-Gen.* v. *Thornton*, 13 Price, 805; 1 M'Clel. 600.

The ambassador's privilege ceased to protect the wines from duty when so sold to a purchaser. *Ib.*

Evidence of Market Value of Wine at Time of Importation.]—The plaintiffs, who are wine-merchants, imported sparkling wines in bottles, and produced to the commissioners of customs evidence of the purchase price, and contended that such wines were under the value of 15*s.* per gallon, and consequently were only liable to the duty of 1*s.* per gallon, under s. 3 of the Customs (Wine Duty) Act, 1888 (51 & 52 Vict. c. 14). The commissioners, however, required evidence satisfying them of the selling price of the wine, relying upon s. 3 of the act, which enacts that, "Where it is proved to the satisfaction of the commissioners of customs that the market value of any such wine, imported in bottle, does not exceed 15*s.* the gallon, the duty imposed by this act shall be reduced to 1*s.* the gallon." By s. 5 "the proof required under this act shall be based upon, and supported by, such evidence, from certificates or customs documents, or trade documents or accounts, and such declarations, statutory or otherwise, as the said commissioners may in any case require or prescribe." By s. 8 the "market value" (as between the commissioners and the wine merchants) is defined as "the price which it would realise if sold in bond at the port of importation in reputed quart bottles of six to the gallon." No further evidence being offered by the plaintiffs, the commissioners refused to allow the wine to pass the custom house, unless the higher duty was paid. The plaintiffs paid the same under protest, and brought this action to recover the amount they considered they had overpaid:—Held, that the onus of proof being on the wine-merchant, evidence of the cost price plus the price of freight is not such evidence as to reasonably satisfy the commissioners of the market value of the wine. *Leakey* v. *Dunglinsor*, 65 L. T. 152.

II. PERMITS.

Public-house—To Lessee.]—A. purchased the lease of a public-house from B. and entered into occupation of it, the licence being continued in the name of B. The plaintiff furnished spirits to A., and sent them to the public-house, with a permit made out in the name of B. There was no evidence to show that the permit was contradictory to the request note, or that it did not comply with the regulations of the excise:—Held, that the fact of its being made out in the name of B. did not invalidate the permit. *Nicholson* v. *Hood*, 9 M. & W. 365; 12 L. J., Ex. 114.

Time of — Construction.]—A permit for the removing of wine from one place to another, under 26 Geo. 3, c. 59, dated nine o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of A., and two days more for delivering it into the stock of B., expired at ten in the morning of the second day after it was granted. *Cooke* v. *Sholl*, 5 Term Rep. 255.

Necessity for—Manufacture in Jersey.]—Spirits manufactured in Jersey, partly from materials not the produce of the United Kingdom, were imported, and the proper duty paid for them, under 3 & 4 Will. 4, c. 52, s. 40:—Held, that they were subject to the regulations of excise, in the same manner as spirits manufactured in England and that the importer must deliver a request note, under 2 Will. 4, c. 16, ss. 5 and 6, for obtaining a permit. *Reg.* v. *Excise Commissioners*, 6 Q. B. 975; 14 L. J., Q. B. 179; 9 Jur. 618.

III. PENALTIES.

Metropolitan Magistrate—Jurisdiction.]—By 15 & 16 Vict. c. 61, s. 1, an information "for the recovery of any penalty imposed by any act or acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such act or acts," may be heard and determined, if the offence has been committed within the limits of the chief office of inland revenue in London, before a metropolitan police magistrate:—Held, that the provisions of the section applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the act, and therefore, that a metropolitan police magistrate had jurisdiction to hear and determine an information for the recovery of the penalty imposed by s. 4 of the Customs and Inland Revenue Act, 1887, in respect of the new excise offence created by that section. *Reg.* v. *Ingham*, 57 L. J., M. C. 87; 21 Q. B. D. 47; 59 L. T. 62; 36 W. R. 811; 16 Cox, C. C. 505; 52 J. P. 550.

Prosecution—Right of Supervisor to conduct.]—In prosecutions for taking game without a licence the inland revenue supervisor for the district has a right to conduct the case although the prosecution is not in his name, and a general authority given to him by the commissioners is sufficient compliance with 53 & 54 Vict. c. 21, s. 27. *Reg.* v. *Turner*, 58 J. P. 320.

—— **Evidence of Authority.**]—In a prosecution for pursuing game without a licence, the information alleged that it was by order of the commissioners of inland revenue. Objection was taken that no evidence thereof was given:—Held, that the justices were wrong in allowing such an objection, and in ignoring 7 & 8 Geo. 4, c. 53, s. 71. *Hargreaves* v. *Hilliam*, 58 J. P. 655.

In an inland revenue information for the recovery of a penalty, an averment that the commissioners of inland revenue have ordered such

prosecution, is sufficient proof of such order. Section 71 of the Excise Act, 1827, has not been repealed by section 21, sub-section 1, and section 24, sub-section 2, of the Inland Revenue Regulation Act, 1890. *Dyer* v. *Tulley*, 63 L. J., M. C. 272; [1894] 2 Q. B. 794; 10 R. 319; 43 W. R. 61; 58 J. P. 656.

Evidence—Acts of Wife—Husband's Authority.]—Evidence of the acts of a wife who in her husband's absence commits an offence against the excise is admissible against her husband, if she acts under his authority. *Att.-Gen.* v. *Riddle*, 2 C. & J. 493; 2 Tyr. 523; 1 L. J., Ex. 182.

Appeal against Conviction—Notice of Appeal.]—Notice of appeal from the judgment of justices under the Excise Act (7 & 8 Geo. 4, c. 53), should now be given, in accordance with the provisions of section 31 of the Summary Jurisdiction Act, 1879, within seven days after the day on which the said judgment was given. *Reg.* v. *Glamorganshire JJ.*, 58 L. J., M. C. 93; 22 Q. B. D. 628; 60 L. T. 536; 37 W. R. 493; 16 Cox, C. C. 593; 53 J. P. 294.

Costs of Crown.]—Where on an information the crown is entitled to full costs, such costs are the same as in an ordinary suit between subject and subject, though the crown solicitor is employed at an annual salary. *Att.-Gen.* v. *Shillibeer*, 4 Ex. 606; 19 L. J., Ex. 115.

When one count of an information charges several penalties, the crown on establishing a right to one penalty, is only entitled to the costs of proving that penalty. *Ib.*

Tobacco—Effect of Liability on Contract.]—The 6 Geo. 4, c. 81, ss. 2 and 26 (which subject to penalties any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises in manner therein mentioned, or who shall manufacture, deal in, retail or sell tobacco, without taking out the licence required for that purpose), do not avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections; their effect is merely to impose a penalty on the offending party, for the benefit of the revenue. *Smith* v. *Mawhood*, 16 M. & W. 452; 15 L. J., Ex. 149.

See also CONTRACT.

—— **Adulterated—Innocent Purchaser.**]—A dealer in and retailer of tobacco is liable to the penalty of 200*l.*, imposed by 5 & 6 Vict. c. 93, s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was so. *Reg.* v. *Woodrow*, 15 M. & W. 404; 16 L. J., M. C. 122.

Malt.]—By 7 & 8 Geo. 4, c. 52, s. 33, a maltster is liable to a penalty for treading or forcing together in the couch-frame any grain making into malt. By the 1 Vict. c. 49, s. 5, any excise officer, upon suspicion of the grain having been trodden or forced together, may throw the grain out of the couch-frame, and return it and lay it level in the couch-frame; and if any increase in the gauge of the grain shall be found, exceeding a certain proportion, then the increase so found shall be taken as conclusive evidence that the grain has been trodden or forced together, and the maltster shall thereupon be convicted in a penalty. Upon an information before justices against the defendant for the penalty, it appeared that the excise officer had, in pursuance of an order of the commissioners of excise, returned the grain by piling it in a cone in the centre of the couch, and then distributing it equally to all parts of the couch. The increase in the grain, when thus returned, having exceeded that allowed by the act, the defendant was convicted:—Held, that the increase in the grain found by such a mode of returning it was conclusive evidence of the offence, within 7 & 8 Geo. 4, c. 52, s. 33, as it did not appear that the mode of proceeding was unfair or improper, and, consequently, the conviction was right; and that the officer has some, if not an absolute, discretion to exercise in the matter, provided he does not use it improperly. *Reg.* v. *Speller*, 1 Ex. 401; 17 L. J., M. C. 9.

—— **Liability to Seizure.**]—A writ of extent having issued against A., a maltster, for a debt due to the crown from him for duties on malt, a cargo of malt was seized under it, in the hands of the defendant. The defendant being allowed to plead to the extent, in order to state his interest in the goods, alleged, by his plea, that the malt, after being manufactured, had had the duty charged upon it, and that such duty was paid; that it was then deposited by A., the maltster, with the defendant, upon a contract with him, that he was to accept bills of exchange drawn by A., and that the malt was to be held by him as a pledge for the payment of them, and in case the bills were not paid, he was to be at liberty to sell the malt; that the bills first accepted were renewed, but before the renewed bill became due the malt was seized:—Held, that the malt was seizable in the hands of the defendant, under 28 Geo. 3, c. 37, s. 21, as goods in the custody or possession of a person in trust for the maltster, chargeable with duties of excise in arrear and owing from such maltster, such goods having been, whilst in the hands of A., liable, not only for the specific duties chargeable upon them (which had been paid), but for other duties, for which A. was responsible at that time, and remaining so at the time of the seizure. *Att.-Gen.* v. *Trueman*, 11 M. & W. 694; 13 L. J., Ex. 70.

Tradesmen's Returns.]—A tradesman kept, at his private residence, articles liable to duties under 43 Geo. 3, c. 161. He carried on his business in two shops in different districts, one in the parish of St. B., the other in the parish of M. in London, but made no return of the articles at either shop:—Held, that he was bound to make a return at his shop in St. B., although he never slept there. *Att.-Gen.* v. *M'Lean*, 1 H. & C. 750; 32 L. J., Ex. 101; 9 Jur. (N.S.) 338; 8 L. T. 113; 11 W. R. 292.

But one penalty only is incurred by the omission in any one year to return several lists, and to make the return in several places. *Ib.*

A tradesman's place of business is a place where he resides, or is within 43 Geo. 3, c. 161, s. 27. *Ib.*

Fraudulent Import Entries.]—By 22 & 23 Vict. c. 37, s. 6, any person who shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination shall be liable to a penalty. By s. 8, the word "importer" in any act relating to the customs is

to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported:—Held, that the interpretation of the word "importer" in s. 8, is not to be applied to the phrase, "cause to be imported," in s. 6; but that these latter words are only applicable to a person who has ordered the goods, or otherwise, in fact, caused them to be imported. *Budenberg* v. *Roberts*, 35 L. J., M. C. 235; L. R. 1 C. P. 575; 15 L. T. 387; 14 W. R. 992.

Held, also, that to constitute the above offence, it was not necessary that the goods of either denomination should be subject to duty on importation. *Ib.*

—— **Forfeiture.**]—The Customs Duties Act, 1871 (New South Wales), s. 8. only supersedes the mode of ascertaining the value of goods in which ad valorem duties are payable under the Customs Regulations Act, 1845, by a new system of verification; and does not otherwise repeal the last-mentioned act. An erroneous declaration under s. 8 is a ground of forfeiture, for such declaration contains the entry referred to by ss. 13 and 18 of the former act. *Prince* v. *Duncan*, 43 L. J., P. C. 14; L. R. 5 P. C. 1; 30 L. T. 276; 22 W. R. 270.

Where certain goods contained in a package have been omitted from such declaration of value, the whole package is subject to forfeiture; such omission amounting to a misdescription under s. 13. *Ib.*

A libel or an information in which both the above statutes are mentioned, and facts and charges are alleged in a manner to support a case under either statute, is sufficient although it does not distinctly allege the law under which the goods are to be forfeited. *Ib.*

IV. SMUGGLING.

1. Acts of.

Transfer from Foreign Vessel.]—On an information for penalties on 6 Geo. 4, c. 108, s. 45, it was proved, that about two miles from shore, but within the limits of the port of Dover, as set out by commissioners under 13 & 14 Car. 2, c. 11, s. 14, goods were transferred from a foreign vessel without payment of duties, to boats, which conveyed them within the low-water mark:—Held, that whether or not the transfer from the vessel to the boats was or was not within the United Kingdom, there was an illegal unshipment within the statute. *Att.-Gen.* v. *Tomsett*, 2 C. M. & R. 170; 5 Tyr. 514; 1 Gale, 147; 4 L. J., Ex. 171.

Fraudulent Landing under Bill of Sight.]—Where customable goods were landed by bill of sight under 3 & 4 Will. 4, c. 52, s. 24, and were afterwards removed without payment of duties, and without a perfect entry having been made of them pursuant to that statute, they were in the situation, for all purposes, of goods illegally unshipped; and all persons who assisted in removing or harbouring them, knowing due entry not to have been made, were liable to the penalties imposed by 3 & 4 Will. 4, c. 53, s. 44. *Att.-Gen.* v. *Hurel*, 11 M. & W. 585; 12 L. J., Ex. 413.

Where goods are landed fraudulently under a bill of sight, it is no protection against penalties. *Att.-Gen.* v. *Hawkes*, 1 C. & J. 121; 1 Tyr. 3; 9 L. J. (o.s.) Ex. 17.

Evidence of being concerned in.]—The master of a homeward-bound vessel coming up the Thames, proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass, lying on the sands on the Essex coast, to be landed at Woolwich, which they found and brought as far as Gravesend, where the whole was seized by the custom-house officers:—Held, sufficient evidence of being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. *Att.-Gen.* v. *Towns*, 6 Price, 198.

An owner of a vessel, who knowingly let it for the purpose of fetching goods to be landed without payment of duty, was, if the goods were so landed, liable to penalties under 8 & 9 Vict. c. 87, s. 46, as a person concerned in the illegal unshipping of goods. *Att.-Gen.* v. *Robson*, 5 Ex. 790; 20 L. J., Ex. 188.

Delivery out of Warehouse.]—The king's warehouse was a warehouse within 3 & 4 Will. 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited. *Lowe* v. *Att.-Gen.*, 2 C. M. & R. 544; 1 Gale, 249; 5 Tyr. 1133; 4 L. J., Ex. 336. S. P., *Att.-Gen.* v. *Voudiere*, infra.

An importer of goods from a foreign country is liable, on the importation, to the duties of customs payable thereon, and this liability is not affected by 3 & 4 Will. 4, c. 57, the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption. *Att.-Gen.* v. *Ansted*, 12 M. & W. 520; 13 L. J., Ex. 101.

If a merchant has obtained goods from a bonded warehouse without making any entry for home consumption, and without the duties having been paid, he is liable to an information for the duties; and it is no answer to it that a custom-house agent, employed by him to make the entry and pay the duties, misappropriated the money, and fraudulently obtained the goods. *Ib.*

Manner of Package.]—By 22 & 23 Vict. c. 37, s. 6, any person who shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination shall be liable to a penalty. By s. 8, the word "importer" in any act relating to the customs is to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported:—Held, that the interpretation of the word "importer," in s. 8, is not to be applied to the phrase, "cause to be imported," in s. 6; but that these latter words are only applicable to a person who has ordered the goods, or otherwise, in fact, caused them to be imported. *Budenberg* v. *Roberts*, 35 L. J., M. C. 235; L. R. 1 C. P. 575; 15 L. T. 387; 14 W. R. 992.

Nature of Goods.]—Held, also, that to constitute the above offence it was not necessary that the goods of either denomination should be subject to duty on importation. *Ib.*

The 6 Geo. 4, c. 107, s. 52, provides that certain spirits and tobacco shall be absolutely pro-

hibited to be imported, unless, if spirits, in casks of not less than forty gallons, or in cases of not less than three dozen quart bottles; and, if tobacco, and from the East Indies, in hogsheads, &c. of 100 lbs., and from other places in hogsheads, &c. of 436 lbs. each; and by s. 128, all such goods whose importation is thus restricted on account of the packages shall be deemed prohibited goods. A count stating that the defendant imported spirits and tobacco in casks and cases of less than the legal size, and harboured and concealed the same, knowing no duty had been paid or secured thereon, was bad, for the prohibition of such import was absolute. *Att.-Gen.* v. *Bell*, 1 C. & J. 237; 1 Tyr. 52; 9 L. J. (O.S.) Ex. 12.

On an information under 6 Geo. 4, c. 108, s. 45, for penalties for harbouring foreign spirits and tobacco, liable to payment of duty on importation, and which had been imported, the duties not having been first paid or secured; the jury found that the goods were imported in smaller packages and casks than allowed by law, and not in order to be warehoused; and, also, that the defendant harboured them, knowing the duties thereon not to have been paid:—Held, that they were goods prohibited to be imported, and were therefore improperly described in the information. *Att.-Gen.* v. *Key*, 2 Tyr. 65; 2 C. & J. 2; 1 C. & J. 159; 1 L. J., Ex. 49.

Liability for Acts for Servant—Concealment.]—Where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of his servant done in the conduct of the business with a view to protect the smuggled goods, though he is absent at the time, and the act is done by the servant upon the exigency of the occasion when the goods are discovered. *Att.-Gen.* v. *Siddon*, 1 C. & J. 220; 1 Tyr. 41; 9 L. J. (O.S.) Ex. 7.

2. Forfeiture.

Vessel Hired by Admiralty.]—A vessel hired by the lords commissioners of the admiralty, and employed to cruise against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the board, is forfeitable for an act of smuggling committed on board by such admiralty captain as well as by the owner's master and crew. *Blewitt* v. *Hill*, 13 East, 13.

From what Time.]—A vessel is forfeited from the time of an act of smuggling, so as to avoid any alienation after that time, though before the condemnation. *Lockyer* v. *Offley*, 1 Term Rep. 260; 1 R. R. 194.

If a foreign vessel, having on board goods, spirits, &c., which she had unshipped at more than a league from the shore, during the same voyage appeared within one league, she was liable to forfeiture by 3 & 4 Will. 4, c. 53, s. 2. But she incurred the forfeiture in such case only by coming within the distance during the same voyage, and not by doing so in any subsequent and distinct voyages. *Att.-Gen.* v. *Schiers*, 2 C. M. & R. 286; 1 Gale, 223; 5 Tyr. 1029; 4 L. J., Ex. 324.

Of Goods.]—By 3 & 4 Will. 4, c. 52, s. 20, goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited. The king's warehouse at the custom house is included in the terms of this prohibition. *Att.-Gen.* v. *Voudiere*, 1 C. M. & R. 570; 5 Tyr. 206; 4 L. J., Ex. 41. See *Lowe* v. *Att.-Gen.*, supra.

Seizure of Goods.]—Contraband goods may be seized in the river before they are landed or offered for sale. *Smyth* v. *Reynolds*, 2 Wils. 257.

3. Contracts for Smuggled Goods.

Illegality of.]—Upon a contract for smuggled goods, though they are received, the money cannot be recovered. *Thomson* v. *Thomson*, 7 Ves. 473; 6 R. R. 151.

See also Contract, vol. iv. p. 223.

Prohibited Goods sold Abroad—Delivery Complete.]—An action will lie for goods sold abroad which are prohibited here, if the delivery of them is complete abroad, though the vendor knows they are to be smuggled into England. *Holman* v. *Johnson*, Cowp. 341.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country. *Pellecat* v. *Angell*, 2 C. M. & R. 311; 1 Gale, 187; 5 Tyr. 945; 4 L. J., Ex. 326.

An inhabitant of Guernsey cannot recover in the courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into England, and gave him assistance for that purpose. *Clugas* v. *Penaluna*, 4 Term Rep. 466; 2 R. R. 442.

An action will not lie for smuggled goods sold abroad, if the vendor is to deliver them in England, or if they are only to be paid for in case the vendee succeeds in landing them. *Clarke* v. *Shee*, Cowp. 334; 2 Dougl. 698, n.

Nor can the vendor of goods abroad, who has packed them in a particular manner by the order of the buyer, for the purpose of smuggling them into this country, and knew at the time that they were to be smuggled, recover the value against the buyer, although he was not concerned in the risk of the importation. *Waymell* v. *Reed*, 5 Term Rep. 599; 2 R. R. 675. S. P., *Bernard* v. *Reed*, 1 Esp. 91.

Record of Condemnation.]—A record of condemnation of goods in the exchequer for being smuggled is a good defence to an action for goods sold and delivered for the same goods. *Thomas* v. *Withers*, 5 Term Rep. 117. And see *Hennel* v. *Perry*, 5 Term Rep. 117; 2 R. R. 561.

Action against Carriers.]—In an action against carriers for the loss of goods delivered to them in Ireland to be conveyed to England, the question was, whether the importation of the goods was illegal unless they had been entered at the custom-house:—Held, that, as illegality can never be presumed, it lay upon the carriers, who raised the question, to prove that the goods had not been entered. *Sissons* v. *Dixon*, 8 D. & R. 526; 5 B. & C. 785; 4 L. J. (O.S.) K. B. 299.

In an action for not accounting for goods delivered in this country to the master of a ship to be sold by him abroad, it is no defence that they were exported without paying the duties, unless it is shown that the evasion formed part of the agreement. *Catlin* v. *Bell*, 4 Camp. 183.

Bill of Exchange.]—If the importation of

certain goods is prohibited and the plaintiff sells such goods to A., who indorses a bill of exchange to him in payment, he cannot recover on that bill against the acceptor, although there was no evidence that he was the importer of the prohibited goods. *Billard* v. *Hayden*, 2 Car. & P. 472.

4. PROCEEDINGS.

Jurisdiction—Condemnation of Ship.]—Under the 18 & 19 Vict. c. 96, s. 28, which imposes a penalty of 100*l.* on every person found on board a ship "liable to forfeiture" under the customs act, the condemnation of the ship by a court of competent jurisdiction is not a condition precedent to a magistrate's power to convict in the penalty. *Weale* v. *Brown*, 4 H. & C. 705; 15 L. T. 228.

—— **Position of Vessel.**]—Where two persons were found and apprehended on board a smuggling boat, under 57 Geo. 3, c. 87, s. 5, whilst afloat in the harbour of F., which had an exclusive local jurisdiction; and, after being taken on shore and detained two days there, were carried on board again, and conveyed to the port of D. where they were convicted by two justices of that town, pursuant to 45 Geo. 3, c. 12, s. 7; 57 Geo. 3, c. 87; and 3 Geo. 4, c. 110:—Held, that such conviction was illegal. *Kite, Ex parte*, 2 D. & R. 212. *S. C.*, nom. *Kite and Lane's case*, 1 B. & C. 101.

A vessel liable to forfeiture under 6 Geo. 4, c. 108, s. 3, was seized on the river Orwell, where the justices of Ipswich had jurisdiction, and a person found on board of the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture:—Held, that the justices of Harwich, being justices at the first place on land to which the parties were carried, had jurisdiction to try the offence. *Nunn, In re*, 8 B. & C. 644; 3 M. & Ry. 75.

When the vessel was first boarded, she was just entering the harbour of Harwich:—Held, that, in the absence of all other evidence, a person then found on board might properly be found to have been on board on the high seas. *Ib.*

Penalties—Liability—Partners.]—The 3 & 4 Will. 4, c. 53, s. 44, enacts, that every person who shall be concerned in the unshipping of the goods the duties for which have not been paid shall forfeit either the treble value thereof, or be liable to the penalty of 100*l.* The defendant and his partner having been separately convicted of the same offences:—Held, that each was liable to the penalties imposed by the act. *Reg.* v. *Dean*, 12 M. & W. 39; 13 L. J., Ex. 33.

—— **Power of Mitigation.**]—The power of mitigating the penalty imposed upon an offender against the customs acts, given to the magistrate by the 16 & 17 Vict. c. 107, ss. 263, 280, does not apply to the case of a person who has been detained, and taken before a magistrate, under 18 & 19 Vict. c. 96, s. 28, for "having been found or discovered to have been on board a ship, having contraband goods on board"; and in such case, upon the confession of the offender, or proof upon oath of the offence, the magistrate is bound to convict him in the full penalty of 100*l.* imposed by s. 28, and the offender must thereupon immediately pay the same without any mitigation under 16 & 17 Vict. c. 107, s. 281, or be committed to gaol in default. *Bond* v. *Jackson*, 20 L. T. 327.

Detention of Persons—Habeas Corpus.]—A prisoner in custody of an officer of customs, on a charge of smuggling, and brought up by habeas corpus at common law, may controvert the truth of the return of the writ, on affidavit, by virtue of 56 Geo. 3, c. 100, s. 4. *Beeching, Ex parte*, 6 D. & R. 209; 4 B. & C. 136; 28 R. R. 224.

—— **Without Warrant.**]—Where several persons were taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, and of which the prisoners were the crew, and were delivered on board a king's ship, and detained for fourteen days on suspicion of murder, but without any warrant, and were afterwards brought up by habeas corpus to be discharged; and it appeared from the return that there was cause to suspect them of felony: the court refused to discharge them, but directed them to be committed to the custody of the marshal of the Marshalsea, in order that they might be taken before a competent tribunal, to be examined touching the matters contained in the return, and to be further dealt with according to law. *Krans, Ex parte*, 2 D. & R. 411; 1 B. & C. 258; 25 R. R. 389.

Information.]—An information under 8 & 9 Vict. c. 87, ss. 82, 83, 107, might be laid before one justice of the peace. *Reg.* v. *Russell*, 3 New Sess. Cas. 368; 13 Q. B. 237; 18 L. J., M. C. 106; 13 Jur. 259.

Goods, the importation of which was prohibited when coming from particular places, might, under 3 & 4 Will. 4, c. 53, s. 30, be described in an information for penalties, as goods liable to, and unshipped without, payment of duty, and the defendant might be charged with having been concerned in the unshipping, the duties not having been first paid or secured, although it appeared that they were in fact imported from a place to which the prohibition applied. *Att.-Gen.* v. *Greares*, 2 C. M. & R. 669; 1 Tyr. & G. 48; 5 L. J., Ex. 56.

—— **Bribery.**]—An information stating that H. was a person employed in the service of the customs, that it was his duty, as such person so employed, to seize certain goods, and that the defendant offered to bribe H. to violate such duty, is bad in arrest of judgment, for not stating the facts out of which the legal duty arose. *Rex* v. *Everett*, 2 M. & Ry. 35; 8 B. & C. 114; 6 L. J. (o.s.) M. C. 83.

Evidence—Trial for Obstruction of Officer.]—Upon the trial of an information for obstructing a custom-house officer in the execution of his duty in seizing smuggled goods, the defendant was not allowed to inquire the name of the informer, or dispute the fact of the goods being smuggled. *Rex* v. *Akers*, 6 Esp. 125, n.

—— **Being Concerned in Unshipping Goods.**]—An information under 3 & 4 Will. 4, c. 53, s. 44, charged a defendant with being concerned in the unshipping of goods, the duties on which had not been paid; with knowingly harbouring goods imported and illegally unshipped without payment of duties; and with other offences under that section. It appeared, at the trial

that a practice had prevailed at the custom-house of allowing the owners of imported goods to take them away without payment of duty at the time, an entry of them having been previously made in a book kept by the officers; and that the fraud complained of had been effected by a clerk of the defendant removing some of the leaves from the custom-house book, and substituting others containing false entries of the quantity of goods imported. There was no direct proof that this fact was known to the defendant, but he derived benefit from the fraudulent transactions:—Held, that the jury might infer that the defendant was privy to the fraud. *Reg.* v. *Dean*, 12 M. & W. 39; 13 L. J., Ex. 33.

Convictions—Evidence.]—In a conviction under 8 & 9 Vict. c. 87, s. 50, for being found in a vessel liable to forfeiture under s. 2, as having on board prohibited goods, it was necessary to negative the exemptions in s. 4. *Van Boven, In re*, 2 New Sess. Cas. 492; 9 Q. B. 669; 16 L. J., M. C. 4; 11 Jur. 119.

Indictment.]—The being concerned in unshipping goods prohibited to be imported into the United Kingdom; and the being concerned in importing foreign goods, contrary to statute, are not indictable offences. *Att.-Gen.* v. *Radloff*, 10 Ex. 84; 2 C. L. R. 1116; 23 L. J., Ex. 240; 18 Jur. 555; 2 W. R. 566.

Costs—Crown.]—On an information against two for smuggling, each was charged severally in various counts; a verdict by consent was taken against both on all the counts for the full penalties with an arrangement that execution should issue against each for a portion only. On taxation against one under s. 263 of 16 & 17 Vict. c. 107, the crown was allowed costs on the whole record and a review of taxation was refused. *Att.-Gen.* v. *Roberts*, 1 Jur. (N.S.) 1024; 4 W. R. 7.

V. CONDEMNATION OF GOODS.

Condemnation of goods seized and condemned for want of claim set aside with liberty to defendant to enter and perfect his claim thereto upon payment of costs occasioned to the crown by proceeding to condemnation. *Att.-Gen.* v. *Cullen*, 8 Price, 668.

VI. OFFICERS OF CUSTOMS AND EXCISE.

Appointment.]—It is part of the ancient prerogative of the crown, as incident to the duty of customs, to appoint officers to gauge all gaugeable articles imported into the kingdom for sale or otherwise. *London Corporation* v. *Long*, 1 Camp. 24; 10 R. R. 618.

—— **Reduction in Rank.**]—A supervisor of inland revenue was appointed in 1881 to hold office "during the pleasure of the commissioners of inland revenue." By s. 4, sub-s. 3, of the the Inland Revenue Regulation Act, 1890, the commissioners have power to reduce or discharge any such officer as they see cause. The commissioners directed the supervisor to collect statistics for the board of agriculture. The supervisor refused to comply with the order as being one which did not concern his duties as an official of inland revenue. The commissioners thereupon reduced him in rank. In an action against the commissioners to recover damages:—Held, that no cause of action was shown, and that, in the exercise of the inherent jurisdiction of the court, the action should be stayed. *Worthington* v. *Robinson*, 75 L. T. 446—C. A.

Duties of—Arrest and Detention.]—Under 7 & 8 Geo. 4, c. 53, officers of excise may do all that is reasonable by way of arrest and detention for the purpose of having the matter adjudicated upon by a justice of the peace. *Evans* v. *M'Loughlan*, 4 Macq. H. L. 89; 7 Jur. (N.S.) 1253; 4 L. T. 31.

Seizure.]—The plaintiff's wheat was seized as a distress for an excise penalty, which he then paid. There was no evidence that he demanded the wheat back; but after ten days the officers brought it back in an open cart damaged, and part lost:—Held, that the officers were not bound to re-deliver the wheat without being requested, and that they were not liable for the negligence in bringing it back, as no count in the declaration alleged that particular misfeasance. *Hutchins* v. *Morris*, 6 B. & C. 464; 9 D. & R. 499; 5 L. J. (O.S.) M. C. 144.

A custom-house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs. *Rex* v. *Barfoot*, 13 East, 506.

Search.]—Excise officers went with a search warrant, and, at the desire of the party, gave it him to pursue, when he refused to return it:—Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rex* v. *Mitton*, 3 Car. & P. 31; M. & M. 107.

A writ of assistance was addressed to certain officers therein mentioned, and to all other his majesty's officers, ministers, and subjects in England and Wales; it set out the commission of the officers of the customs, which empowered them to enter and search any house, shop, &c., where smuggled goods were or were suspected to be concealed, to appoint officers, &c., and to do all other things necessary for his majesty's service in such cases, and according to law; and it commanded the several persons to whom it was directed to permit and suffer the commissioners of customs, their deputies, servants and officers, to enter and search the houses, shops, &c., where smuggled goods were or were suspected to be concealed, and to do all things which ought to be done in that behalf, according to the commission and to the laws of the realm; and all persons addressed by the writ were to assist in the execution of the premises:—Held, that this writ did not confer a general and absolute authority to enter and search houses for smuggled goods, but that entry and search must be justified by reference to the event, or to probable cause. *Rex* v. *Watts*, 1 B. & Ad. 166; 8 L. J., (O.S.) K. B. 381.

In searches by excisemen, where the presence of a peace officer is required, an officer by reputation attending the rotation justices is not sufficient. *Hill* v. *Barnes*, 2 W. Bl. 1135.

Entries.]—The practice of making prime and post entries at the custom-house is legal and valid. *Timson* v. *Nodin*, 2 W. Bl. 963.

Actions against.]—An action for money had and received does not lie against a revenue officer to recover an over-payment. *Whitebread* v. *Brookshank*, Cowp. 69; Lofft, 529.

Nor will it lie against a person who receives money as a collector in a legal office, or as an exciseman or a custom-house officer, and duly pays it over. *Ib.*

Nor against an excise officer to recover duties received by him after the act imposing them is repealed, if he has paid them over to his superior. *Greenway* v. *Hurd*, 4 Term Rep. 553.

But if a consignee, for the purpose of getting his goods delivered to him pays more than the net weight amounts to, he may recover back the surplus. *Geraldes* v. *Donisan*, Holt, N. P. 346; 17 R. R. 645.

A suggestion that the defendant defends by A. B., "who has been appointed solicitor on behalf of his majesty, and acts as such in this behalf," is a sufficient disclosure to the court that A. B. has authority to act under the 9 Geo. 4, c. 25; and the plaintiff cannot treat the plea as a nullity, although, otherwise than by such a suggestion, the record does not show that the cause concerns matters of revenue. *West* v. *Taunton*, 6 Bing. 404; 4 M. & P. 79; 8 L. J. (O.S.) C. P. 129.

—— **Wrongful Act—Excessive Fees.**]—If exorbitant fees were taken by a custom-house officer from the master of a vessel, upon his taking out a cocquet and bond pursuant to 13 & 14 Car. 2, c. 11, s. 7; though the statute imposed the duty on the master personally, the owners might recover the excess as money had and received. *Stevenson* v. *Mortimer*, Cowp. 805.

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference. *Rex* v. *Higgins*, 4 Car. & P. 247.

—— **Non-feasance.**]—A collector of customs, appointed by the commissioners under 3 & 4 Will. 4, c. 51, s. 6, to collect duties on articles coming into the kingdom, and on payment sign bills of entry, which are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and an immediate officer of the crown; and his functions as collector are ministerial. Therefore, he is liable in an action for non-feasance in the exercise of his office, as for refusing to sign such bill of entry without payment of an excessive duty. *Barry* v. *Arnaud*, 10 A. & E. 646; 2 P. & D. 633; 9 L. J., Q. B. 226.

—— **Refusal to Sign Bill of Entry—Measure of Damages.**]—In an action against a collector of customs for refusing to sign a bill of entry for landing a cargo of foreign wheat, on which no duty was payable by law, the proper measure of damages is the amount of loss sustained by plaintiff by reason of a subsequent fall in the price of wheat. *Barrow* v. *Arnaud*, 8 Q. B. 595; 10 Jur. 319—Ex. Ch.

Trespass.]—An action of trespass lies against an officer of excise for an unsuccessful search after run goods under the usual warrant of two commissioners, obtained on his own information. *Bostock* v. *Saunders*, 2 W. Bl. 912; 2 Wils. 434.

Condemnation of goods in the exchequer is so conclusive, and so alters their property, that trespass will not lie against the officer who seized them to try the point of forfeiture again. *Scott* v. *Shearman*, 2 W. Bl. 977.

The plaintiff having landed goods liable to duty at the custom-house, they were taken possession of by custom-house officers, for the purpose of examination, and detained by them, upon a misapprehension that they were prohibited, and liable to forfeiture. They were afterwards returned to the plaintiff:—Held, that the officers were not liable in trespass. *Jacobson* v. *Blake*, 6 Man. & G. 919; 7 Scott (N.R.) 772; 13 L. J., C. P. 89; 8 Jur. 272.

When a custom-house officer takes forfeitable goods by force from a passenger landing from a vessel without making any previous demand he is not liable in trespass. *De Gondouin* v. *Lewis*, 10 Ad. & E. 117; 2 P. & D. 283; 9 L. J., Q. B. 148.

An excise officer is not liable to an action for breaking and entering a house to search for run goods under a warrant from the commissioners, though no goods are found. *Cooper* v. *Booth*, 3 Esp. 135; 4 Dougl. 339; 1 Term Rep. 535, n.

—— **Evidence.**]—Upon not guilty in trespass, excise officers executing a body warrant, issued by the commissioners, may give the special matter in evidence. *Wood* v. *Chessel*, 2 W. Bl. 1254.

—— **Justification.**]—In order to show that the defendant, an excise officer, entered the plaintiff's house, the defendant's affidavit was put in, by which he stated that he entered the house, by virtue of a magistrate's warrant, to search for malt that had not paid duty:—Held, that the putting in of this affidavit by the plaintiff did not make out a defence for the defendant, as the affidavit did not state that the warrant was granted upon oath made by an officer of excise, as required by 7 & 8 Geo. 4, c. 53, s. 34. *Davis* v. *Moseley*, 1 Car. & K. 710.

Surety's Bond.]—A bill by a surety of an officer of commissioners of excise, after being sued upon his bond for an account, alleging the officer had over-paid; the commissioners must be parties. *Makepeace* v. *Needler*, Bunb. 291.

Annuity Fund — Interest of Subscriber—"Nominee."]—On the construction of the act 56 Geo. 3, c. 73, by which the customs annuity and benevolent fund was established, and of the rules made under the authority of that act:—Held, that in appointing a "nominee" of a subscriber's interest in the fund the directors ought to be informed for what purpose the nominee is appointed and to whom the money is to be paid. This may be done by the instrument appointing the nominee or by some other instrument signed by the subscriber, or by his will. Semble, a "nominee" may be a person who is intended to take as a trustee for others. *Urquhart* v. *Butterfield*, 57 L. J., Ch. 521; 37

Ch. D. 357; 57 L. T. 780; 36 W. R. 376—C. A.

A subscriber to the fund became lunatic while in Scotland, where he died. He made a will before he became insane giving his property to legatees, but making no allusion to his interest in the fund. A curator was appointed by the Scotch court of session, and proved the will. The court of session made an order appointing the curator nominee of the subscriber's interest in the fund, "for behoof of the legatees under his will," and the directors of the fund admitted him on those terms. The directors admitted that the order had the same effect as if the subscriber, being sane, had made the nomination:—Held, that the order was a sufficient appointment of the nominee, and a declaration of the persons for whose benefit the sum insured was to be paid; and that the directors were bound to pay the money to the curator. *Ib.*

—— **Covenant in Settlement.**]—The customs annuity and benevolent fund is established by act of parliament. A subscriber to the fund has a right to nominate a person who shall at his decease be entitled to his interest; in default of any such nomination his interest goes according to the provisions of the act. A subscriber, on the marriage of one of his daughters, executed a deed of covenant by way of settlement, referring to all his property, real and personal, but not specifying his interest in the fund:—Held, that it was not affected by the covenant. *Powell's Trust, In re*, 2 Jur. (N.S.) 799.

C. STAMPS.

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I. AFFIDAVITS.

Affidavits to be used for a purpose other than that for which they have originally been sworn, must be resworn with a fresh stamp upon them. *Chitty* v. *Bishop*, 4 Moore, 413.

Before 4 & 5 Vict. c. 34, s. 1, which repeals the duty, affidavits used in answer to an application to set aside an award pursuant to a submission to arbitration, by deed, required to be stamped, because they were not used in any action or suit. *Templeman, In re*, 9 D. P. C. 962; 5 Jur. 400.

II. AGREEMENTS.

1. When Stamping Necessary.

Nature of Instrument.]—For the purposes of stamp duty it is requisite to ascertain the legal effect and meaning of an instrument, and the description of it given by the parties thereto is immaterial, and there can be no estoppel. *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners*, 41 L. J., Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.

Where an instrument is capable of being viewed in two different aspects, in one of which it is liable to stamp duty at one rate, and in the other of which it is liable to stamp duty at a different rate, such instrument may be admitted in evidence, where it is relied upon in the aspect in which it is properly stamped, although it is not duly stamped in the other aspect. *Buck* v. *Robson* (3 Q. B. D. 686), *Bryce* v. *Bannister* (3 Q. B. D. 569), and *Fisher* v. *Calvert* (27 W. R. 301), observed upon. *Adams* v. *Morgan*, 12 L. R. Ir. 1. Affirmed on other grounds, 14 L. R., Ir. 140—C. A.

An "agreement, minute, or memorandum of agreement," is liable to be stamped only where the instrument is per se binding on the parties to it. *Rex* v. *St. Martin, Leicester*, 4 N. & M. 202; 2 A. & E. 210; 4 L. J., M. C. 25.

An agreement signed by the plaintiff only is, as against him, valid in point of law as an agreement, and must therefore be stamped. *Hughes* v. *Budd*, 8 D. P. C. 478; 4 Jur. 654.

—— **Primary Object.**]—Where a document has several objects, of which some are merely auxiliary to the main one, the amount of stamp duty is to be measured by the principal object. *Walker* v. *Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588. See *Pratt* v. *Thomas*, 4 Car. & P. 554.

A letter from a principal to his factor, containing bills of exchange drawn upon the latter,

and in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession, or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, and does not come within the exception in the stamp acts as a letter for or relating to the sale of goods: the primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods. *Smith* v. *Cator*, 2 B. & Ald. 778.

Note subsequent to Contract.]—In the morning of a day A. gave B. a verbal order for fifty shares in a railway company. In the afternoon of the same day, A. signed a memorandum that he had bought of B. fifty shares in the company, at 10*l.* a share; which memorandum was handed to B.:—Held, that it required an agreement stamp. *Knight* v. *Barber*, 2 Car. & K. 333; 16 M. & W. 66; 16 L. J., Ex. 18; 10 Jur. 929.

A document which is not intended to operate as a binding contract, but is only used as evidence of a previous contract, is not within the statute, which imposes a stamp upon an agreement, whether used as evidence of a contract, or as obligatory upon the parties from its being a written instrument. *Beeching* v. *Westbrook*, 1 D. (N.S.) 18; 8 M. & W. 411; 10 L. J., Ex. 464.

No Contract.]—A letter of allotment differing in some terms from the application for shares does not require an agreement stamp as there is no contract formed by the documents. *Vollans* v. *Fletcher*, 1 Ex. 20; 16 L. J., Ex. 173. S. P., *Moore* v. *Garwood*, 4 Ex. 681; 19 L. J., Ex. 15. *Ward* v. *Londesborough*, 12 C. B. 252. *Londesborough* v. *Mowatt*, 3 El. & Bl. 307; 23 L. J., Q. B. 177. *Willey* v. *Parratt*, 3 Ex. 211; 18 L. J., Ex. 82.

Duty Implied by Law.]—An undertaking to perform a duty which the law implies, e.g. of a solicitor to recover the value of bills handed over to him by a client need not be stamped. *Langdon* v. *Wilson*, 7 B. & C. 640, n; 2 M. & Ry. 10; 6 L. J. (O.S.) K. B. 177. S. P., *De Porquet* v. *Page*, 15 Q. B. 1073; 20 L. J., Q. B. 28; 15 Jur. 148.

A paper stating that the party signing it has received certain bills in his hands, which he has "to get discounted or return on demand" does not require an agreement stamp. *Mullett* v. *Hutchinson*, 1 M. & Ry. 522; 7 B. & C. 639; 3 Car. & P. 92; 6 L. J. (O.S.) K. B. 176.

Draft Approved but never Executed.]—A company of which the plaintiff and the defendant were both directors, occupied a house belonging to the plaintiff. A draft agreement, prepared by the plaintiff's attorney, was submitted to the solicitors of the company, and by them approved and returned; and at a subsequent meeting of the directors a resolution was made, empowering the solicitors to sign the agreement on behalf of the company. The agreement, however, was never executed. In an action for use and occupation, the plaintiff offered the draft, not as an agreement binding per se (it being neither dated, stamped, nor signed), but for the purpose of showing that the occupation of the premises was to be by the other directors, exclusive of himself:—Held, that the draft was inadmissible for want of a stamp, inasmuch as it could only be relied on as a proof of the special agreement, the plaintiff's position precluding him from maintaining an action against a co-director upon an implied contract. *Chadwick* v. *Clarke*, 1 C. B. 700; 14 L. J., C. P. 233; 9 Jur. 539. S. P., *Cavaleiro* v. *Puget*, 4 F. & F. 537; contra, *Doe* d. *Lambourn* v. *Pedgriph*, 4 Car. & P. 312.

In an action by the indorsee against the drawer of a bill of exchange, the defence was that time had been given to the acceptor. To meet the defence, a copy of a paper that the defendant had promised to sign was offered. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice to his right to recover from the defendant as drawer:—Held, that this paper did not require a stamp. *Hill* v. *Johnson*, 3 Car. & P. 456.

Two Agreements in one Instrument.]—A contract in writing, by which, after reciting that A. had purchased a piece of ground, with four messuages thereon built, in one of which the plaintiff resided, it was agreed that the plaintiff should continue to reside therein during the residue of A.'s term therein, provided the plaintiff should so long live, paying the rent of 1*s.*; and in the event of the plaintiff's dying during the term, leaving his wife him surviving, A. agreed to allow her to reside therein on the same terms; and A. further agreed to assign all his interest in the premises so purchased to the plaintiff, on payment within seven years of 140*l.*, together with all expenses:—Held, in an action by the plaintiff for breach of the agreement to assign the premises, that a lease stamp was not sufficient, and that an agreement stamp was also necessary. *Lovelock* v. *Franklyn*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246.

By a written agreement, not under seal, it was agreed that A. should rent of B. a ferry for 6*l.* 6*s.* per annum. The same document contained the following memorandum: "Be it also known, that A. has this day bought of B. the great ferry-boat, for 20*l.*," to be paid by four yearly instalments of 5*l.* each:—Held, that the document did not require a stamp. *Mayfield* v. *Robinson*, 7 Q. B. 486; 14 L. J., Q. B. 265; 9 Jur. 826.

——**Where one Agreement Fulfilled.**]—Where, in an action to recover a stake of 100*l.*, due upon a horse-race, a document was put in evidence, bearing one stamp, but two agreements, one of which had been fulfilled, the other being that upon which the action was brought:—Held, that the stamp must be taken to apply to the latter. *Evans* v. *Pratt*, 4 Scott (N.R.) 378; 1 D. (N.S.) 505; 3 Man. & G. 759; 11 L. J., C. P. 87; 6 Jur. 652.

Made Abroad.]—An agreement made between two persons residing in Calcutta, relating to property in Calcutta, need not necessarily be written on stamped paper. *Gilchrist* v. *Herbert*, 26 L. T. 381; 20 W. R. 348. *And see Cases*, post, col. 348.

Conveyance not by Deed.]—An instrument, which in terms purported to be a conveyance of land, but which, not being by deed, could not operate as such, contained a stipulation not to disturb the party intending to take the premises:—Held, to operate as an agreement, and to require an agreement stamp. *Rex* v. *Ridgwell*, 6 B. & C. 655; 9 D. & R. 678; 5 L. J. (O.S.) M. C. 67.

For Indemnity.]—An agreement of indemnity given by an execution creditor to the sheriff requires a stamp. *Shepherd* v. *Wheble*, 8 Car. & P. 34.

An undertaking whereby a party describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp. *Cox* v. *Bailey*, 6 Scott (N.R.) 798; 6 Man. & G. 193.

Agreement to Present to Living.]—Where A. by writing, not under seal, agreed in consideration of 9,000*l.* to present the nominee of B. to a rectory, and to furnish an abstract to and execute a conveyance of the next presentation to B., such writing is only an agreement, not a conveyance, and does not require an ad valorem stamp. *Wilmot* v. *Wilkinson*, 9 D. & R. 620; 6 B. & C. 506; 5 L. J. (O.S.) K. B. 196; 30 R. R. 405.

I O U]—An I O U does not require a stamp. *Childers* v. *Boulnois*, D. & R., N. P. C. 8. S. P., *Fisher* v. *Leslie*, 1 Esp. 426.

An I O U with the words for value received does not require a stamp. *Gould* v. *Coombs*, 1 C. B. 543; 14 L. J., C. P. 175; 9 Jur. 494.

An I O U containing special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, requires an agreement stamp. *Evans* v. *Phillpotts*, 9 Car. & P. 270.

—— **Promise to Pay Third Party.**]—The following document does not require a stamp, either as an agreement or as a promissory note: —"1839, Nov. 11, I O U 45*l.* 13*s.*, which I borrowed of Mrs. M., and to pay her five per cent. till paid. R. T." *Melanotte* v. *Teasdale*, 13 M. & W. 216; 13 L. J., Ex. 358. S. P., *Taylor* v. *Steele*, 16 M. & W. 665; 16 L. J., Ex. 177; 11 Jur. 806.

Agreement in Form of Promissory Note.]—In 1842, W. and S., type-founders, were indebted to G., the plaintiff's testator, in 6,000*l.*, previously to and after which time they supplied the defendant with type, being paid by him quarterly. W. and S. being applied to by G. for payment, delivered to him the following order, signed by them, and directed to the defendant—"24th September, 1842. Dear Sir,—We hereby authorise you to pay, on our account, to the order of G., 6,000*l.*, at the following periods, deducting the amount from the quarterly accounts for type furnished to you, and to Messrs. E. and S., viz. 11th November, 1843, 1,000*l.*; 11th November, 1844, 1,000*l.*; 11th November, 1845, 1,000*l.*; 11th November, 1846, 1,500*l.*; and 11th November, 1847, 1,500*l.*—6,000*l.* Yours, W. and S." The defendant returned the following answer—"To W. G. Dear Sir,—Having received the foregoing authority from W. and S., I undertake to make you the payments as above stated. A. S., 24th September, 1842." The first two instalments, up to November, 1844, were duly paid to G. Type continued to be furnished by W. and S. to the defendant up to December, 1845, quarterly payments for which were duly made by the defendant to W. and S. The quarterly account for type, up to the 31st December, 1845, amounting to 651*l.* 0*s.* 9*d.*, was also paid by the defendant to W. and S., but the 1,000*l.* instalment, due on the 11th November, 1845, was not paid to G. In December, 1845, the defendant stated that he considered himself bound to see all the amounts due from himself to W. and S. applied to the discharge of their debt due to G.:—Held, that the document of the 24th December, 1842, required an agreement, and not a promissory note or a bill, stamp. *Hamilton* v. *Spottiswoode*, 4 Ex. 200; 18 L. J., Ex. 393.

An agreement, bearing a half-crown stamp, under 14 & 15 Vict. c. 97, for the sale of a lease, concluded with the following clause, signed by both parties:—"The plaintiff doth, at the same time and place, lend to the defendant 84*l.* in cash, to be repaid by instalments":—Held, not a note, and that the stamp was sufficient. *Mitchell* v. *Westover*, 14 Jur. 816. S. P., *Follett* v. *Moore*, 4 Ex. 410; 19 L. J., Ex. 6.

"I owe B. 6*l.*, which is to be paid by instalments, for rent. Signed R. J. M.," is an agreement, and not a note. *Moffat* v. *Edwards*, Car. & M. 16.

"Borrowed this day of J. 100*l.* for one or two months; cheque 100*l.* on the Naval Bank. Signed, J. D.," does not require stamping as an agreement or promissory note. *Hyne* v. *Dewdney*, 21 L. J., Q. B. 278.

In an action by indorsee against payee upon the following instrument—"On demand I promise to pay W. T. H., or order, 500*l.* for value received, with interest; and I have lodged with W. T. H. counterpart leases as a collateral security for the 500*l.* and interest":—Held, that the latter part was not an agreement or contract within 55 Geo. 3, c. 184, and, therefore, that the instrument required only to be stamped as a promissory note. *Fancourt* v. *Thorne*, 9 Q. B. 312; 15 L. J., Q. B. 344; 10 Jur. 639.

A document, in the form of a joint and several promissory note by a principal debtor and a surety of 5*l.* payable by instalments, with the proviso that, in case of default in payment of any one of the instalments, the whole amount remaining unpaid should become due, concluded with the following clause—namely, "Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another":—Held, that the document was not by reason of such a clause an agreement requiring to be stamped as an agreement, but a good promissory note. And per Hawkins, J.—Even if the clause in question amounts to an agreement, it is by the Stamp Act of 1870 exempted from stamp duty, the subject-matter not exceeding 5*l.* *Yates* v. *Evans*, 61 L. J., Q. B. 446; 66 L. T. 532; 56 J. P. 565.

At the trial of an action to recover money alleged to be due under an agreement, the plaintiff put in evidence (inter alia) the following document:—"I, J. Dawe, promise to pay J. Yeo on his signing a lease . . . . the sum of 150*l.*—J. Dawe." The document was stamped as an agreement. The plaintiff alleged that it embodied the result of previous negotiations in reference to a lease. The defendant alleged that the document was a promissory note within s. 49 of the Stamp Act, 1870. A verdict was given for the plaintiff, and it being doubtful whether there was evidence of the agreement, he was left to move for judgment:—Held (diss. Bowen, L. J.), that the document was not a promissory note within the meaning of s. 49 of the Stamp Act, 1870, inasmuch as that act does not apply to a document which is neither given nor accepted as a promissory note, and is not in fact such a note. *Yeo* v. *Dawe*, 53 L. T. 125; 33 W. R. 739—C. A.

In order that a document may be a promissory note within s. 49 of the Stamp Act, 1870, it must substantially contain a promise to pay a definite sum of money and nothing more. A document containing a promise to pay money as part of a contract containing other stipulations would not be a promissory note within the act. By an instrument, described as a policy of insurance, after reciting that E. was desirous of being insured with the appellant corporati n, and that there had been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium for each assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1967; provided that, if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on May 18 last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—Held, that this instrument was liable to stamp duty as an agreement, and not as a promissory note within s. 49 of the Stamp Act, 1870. *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners*, 57 L. J., Q. B. 630; 21 Q. B. D. 352; 36 W. R. 833—C. A Affirming 58 L. T. 766. *See also Cases* sub tit. BILLS OF EXCHANGE.

Admission or Acknowledgment.]—The following instrument, as being evidence of a contract, requires a stamp:—"I hereby acknowledge that I have held the estate called, &c., as tenant to F., at a yearly rental of 50*l.*, from the 4th July, 1837, the rent to be paid quarterly; and I further acknowledge to owe F. 60*l.* for the first year's rent, which was due on the 4th July instant. I have, on the signing hereof, paid the attorney of F. 6*d.* in part of the rent so due to him as aforesaid. A. B." *Doe* d. *Frankis* v. *Frankis*, 3 P. & D. 565; 11 A. & E. 792; 9 L. J., Q. B. 177. S. P., *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95; 6 N. & M. 633; 2 H. & W. 139; 5 L. J., K. B. 238; *Doe* d. *Wright* v. *Smith*, 8 A. & E. 255; 3 N. & P. 335; 7 L. J., Q. B. 158; 2 Jur. 854.

"Memorandum.—I have this day received of Mr. F. P. a bill for 27*l.* 10*s.*, at eighteen months' date, on condition that Mr. S. D. accepts the partnership beyond two years; but should Mr. D. give notice at the expiration of eighteen months, and not afterwards rescind the same, the bill to be null and void,"—is admissible without a stamp, not being an agreement, or any minute or memorandum of an agreement, or evidence of a contract within 55 Geo. 3, c. 184; first, because it was only evidence of the contract as a subsequent admission; and, secondly, because it only expressed the same consequences which the law would imply. *De Porquet* v. *Page*, 15 Q. B. 1073; 20 L. J., Q. B. 28; 15 Jur. 148.

A letter, in which the defendant, who was proprietor of a theatre, wrote to a third person, saying, "F. must be satisfied with his salary until I know what turn the season takes," is not an agreement, and does not require a stamp. *Frazer* v. *Bunn*, 8 Car. & P. 704.

An acknowledgment that a bill has been accepted for the purpose of accommodation does not require a stamp. *Notley* v. *Webb*, 5 C. B. 834.

A document used as an acknowledgment to take the case out of the statute of limitations need not be stamped. *Morris* v. *Dixon*, 4 A. & E. 845; 6 N. & M. 438; 2 H. & W. 57; 5 L. J., K. B. 155.

Unless it be a promissory note improperly stamped. *Jones* v. *Ryder*, 4 M. & W. 32; 1 H. & H. 256; 7 L. J., Ex. 216. S. P., *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L. J., Ch. 508; 3 L. T. 799.

The following document signed by the defendant requires no stamp:—"H. (the plaintiff) has advanced me 12*l.* on furniture delivered to him at Stratford." *Huxley* v. *O'Connor*, 8 Car. & P. 204.

An agreement used as evidence of an acknowledgment is admissible without a stamp. *Wheldon* v. *Matthews*, 2 Chit. 399.

An acknowledgment in this form:—"Sept. 15, 1824. Mr. T. has left in my hands 200*l.*, J. A.," does not require a stamp. *Tomkins* v. *Ashby*, 6 B. & C. 541; 9 D. & R. 543; 5 L. J. (o.s.) K. B. 246. Cp. *Barry* v. *Goodman*, 2 M. & W. 768; M. & H. 108; 6 L. J., Ex. 188.

—— **When in Form of Receipt.**]—*See* post, RECEIPT, col. 366.

Consideration not Expressed.]—The following document, given by a plaintiff to a defendant, requires a stamp as an agreement:—"August 2, according to Mr. H.'s (the defendant) request, the land at B. under Mr. E., I will be bound for till next Lady-day—Rent, 48*l.*" *Glover* v. *Hackett*, 2 H. & N. 487; 26 L. J., Ex. 416; 3 Jur. (N.S.) 1083; 5 W. R. 881.

Deposit by Plaintiff—Memorandum by Defendant.]—The plaintiff deposited with the defendant 500*l.* for a speculation in foreign stock, and the defendant signed the following memorandum:—"Bristol. August 14th, 1843. Memorandum. Mr. S. has this day deposited with me 500*l.* on the sale of 10,300*l.*, 3*l.* per cent. Spanish, to be returned on demand":—Held, that this was not a promissory note, and did not require a stamp as such. *Sibree* v. *Tripp*, 15 M. & W. 23; 15 L. J., Ex. 318. S. P., *Funcourt* v. *Thorne*, 9 Q. B. 312; 15 L. J., Q. B. 344; 10 Jur. 639.

Terms of Delivery.]—A memorandum given by carriers at Dover, on the receipt of goods, in the following terms, viz.:—Received of L. & Co. a paper parcel, directed to Messrs. H. B. & Co., 62, Lombard Street, value 260*l.*, which we agree to deliver to them to-morrow, fire and robbery excepted—carriage paid here," and signed by them, is admissible without a stamp, although it was contended that it was an agreement, the subject-matter of which exceeded 20*l.* *Latham* v. *Rutley*, R. & M. 13.

A memorandum by a wharfinger of the receipt of goods, to be shipped and forwarded to the plaintiff in a particular manner, may be given in evidence for the purpose of showing the terms on which they were received, without a stamp, although the value of the goods was above 20*l.*, the wharfage being of a less amount. *Chadwick* v. *Sills*, R. & M. 15.

In an action on a contract to re-deliver, on request, wine which had been placed in the defendant's care, the plaintiff offered in evidence a writing, signed by the defendant (a wine merchant), in substance as follows:—"This is to certify, that M. has in his cellar belonging to H. (under whom the plaintiff claimed), that is paid for, twelve dozen of port wine." "March

5th, 1823. Received from H. five bottles of port," &c., "making in the whole," &c., "all the above wine paid for" :—Held, that such writing was admissible without a stamp, not being an agreement, nor any minute or memorandum of an agreement, nor evidence of a contract, within the statute. *Blackwell* v. *M'Naughtan*, 1 Q. B. 127.

An instrument as follows:—"You will be pleased to receive the register of the brig 'Gratitude,' which I enclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the vessel since she has been in this port, and which I hope will be satisfactory to you," is not receivable in an action by the writer to recover possession of the register, without an agreement stamp. *Bowen* v. *Fox*, 2 M. & Ry. 167; 6 L. J., (o.s.) K. B. 235.

Authority to Honour Acceptance.]—The plaintiff sold goods to B., taking his acceptances for the price, and sent them to the defendant as B.'s agent, who consigned them to his partners abroad for sale. While these acceptances were running, the plaintiff doubting B.'s solvency, required additional security, whereupon B. wrote the following letter:—"Mr. W." (the plaintiff) "holding my acceptances for 1,100*l.* or thereabouts, for goods consigned by him, on my account, to your firms at Rio de Janeiro and Bahia, I hereby authorise and direct you, from and out of the remittances that you may receive against net proceeds of any consignments made by me to either of your firms, subsequent to the 1st May last, to pay such acceptances upon and as they become due, or afterwards, if previously to the receipt of such net proceeds of such consigments, the bills are not honoured by me" :—Held, that this letter did not require a stamp, either as an inland bill or as an agreement. *Walker* v. *Rostron*, 9 M. & W. 411; 11 L. J., Ex. 173.

Specific Performance—Notice to Treat.]—Specific performance having been decreed against a railway company, founded on the ordinary notice to treat and assessment of value by a jury, the notice to treat need not be stamped as an agreement. *Rawlings* v. *Metropolitan Ry.*, 18 L. T. 870.

Order to Pay over.]—A. having goods at the wharf of B., which C. had conveyed there by ship, gave B. a paper by which he authorised him to sell the goods, and out of the proceeds to pay C. the balance due to him for freight, mentioning the sum: B. sold the goods and received the proceeds:—Held, in an action by C. against B. for the sum mentioned in the paper, that the paper did not require a stamp. *Humphreys* v. *Briant*, 4 Car. & P. 157.

A.'s attorney gives B. a written authority to pay money for A. This authority does not require a stamp, either as an agreement or as a power of attorney. *Parker* v. *Dubois*, 7 Car. & P. 406; 1 M. & W. 30; 1 Gale, 366; 5 L. J., Ex. 90.

Request to Landlord's Bailiff.]—The following document does not require an agreement stamp:—"I, N. F., do hereby request S. B., bailiff to my landlord, who, on the 4th November, 1848, having distrained my goods on the premises which I now hold, for 1000*l.*, as rent due to S. B., and I request him to forbear the sale thereof until the 2nd February, 1849, to enable me to discharge the rent; and I hereby request, agree, and consent, that the goods so distrained shall remain at my proper cost in his possession upon the premises until the 2nd February, 1849, and I undertake to give up the same goods and not to replevy the same, and that this distress shall remain in full force during that time; and I undertake to give up peaceable possession of the premises and effects distrained on the 2nd February, 1849, and pay all costs and charges attending this distress." *Fishwick* v. *Milnes*, 4 Ex. 825; 19 L. J. Ex. 153. S. P., *Hill* v. *Ransom*, 6 Scott (N.R.) 571; 5 Man. & G. 789; 12 L. J., C. P. 275.

Note by Broker to his Principal.]—A note sent by a broker to his principal, of a purchase he had made, did not require a stamp, as a minute or memorandum or an agreement, although the subject of the purchase was above 20*l.* value, and not within any exemption from stamp duty. *Josephs* v. *Pebrer*, 1 Car. & P. 341. S. P., *Tomkins* v. *Savory*, 9 B. & C. 704; 4 M. & Ry. 538; 7 L. J. (o.s.) K. B. 334.

Letter to Prove Contract of Marriage.]—A letter read to prove a contract of marriage need not be stamped. *Orford* v. *Cole*, 2 Stark. 351.

Dissolution of Partnership.]—When a notice of dissolution of partnership stated that the parties had agreed to dissolve, it is not admissible unless stamped as an agreement. *May* v. *Smith*, 1 Esp. 283. See *Jenkins* v. *Blizard*, 1 Stark. 418; 18 R. R. 792.

Revocable Agreement to Grant Permission for Erection of Jetty.]—By an instrument not under seal the conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment yearly so long as the jetty was allowed by the conservators to remain:—Held, that the instrument was not chargeable with stamp duty under 33 & 34 Vict. c. 97 (the Stamp Act, 1870), either as a "conveyance on sale" within s. 70, or as an instrument whereby any property was transferred to or vested in any person, within s. 78, or as a "lease or tack," or "bond, covenant, or instrument of any kind whatsoever," within the schedule, but only as an "agreement." *Thames Conservators* v. *Inland Revenue Commissioners*, 56 L. J., Q. B. 181; 18 Q. B. D. 279; 56 L. T. 198; 35 W. R. 274.

Auction—Memorandum by Auctioneer.]—A written paper signed by the auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped. *Ramsbottom* v. *Mortley*, 2 M. & S. 445; 15 R. R. 304.

But a similar paper, not signed by the auctioneer or any of the parties, was not such a minute of the agreement as was required to be stamped, nor such a writing as would exclude parol evidence. *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; 15 R. R. 302.

Resolution of Company.]—A resolution of a company or an association, for the appointment of a clerk or a secretary, at a certain salary, is not an agreement, nor a minute, nor a memorandum of an agreement, that need be stamped.

Vaughton v. *Brine*, 1 Scott (N.R.) 258; 1 Man. & G. 359; 9 L. J., C. P. 326.

A minute of a resolution entered in the books of a joint-stock company, for the acceptance of a tender for work to be done for the company, is not a minute nor a memorandum of an agreement that need be stamped. *Lucas* v. *Beach*, 1 Scott (N.R.) 350; 1 Man. & G. 417.

But a minute of a resolution, which purported, on the face of it, to be an agreement that the plaintiff should have an additional sum for the extra trouble imposed on him by a deviation from the original line of road, and which was read over to the plaintiff, and was assented to by him, required an agreement stamp—per Rolfe, B., at nisi prius. *Lucas* v. *Beach*, 1 Scott (N.R.) 350; 1 Man. & G. 417.

Agreement to Pay Uncertain Amount.]—An instrument by which a party promises to pay 65*l*., and also all such other sums as by reference to his books he owed to another, with interest, requires an agreement stamp. *Smith* v. *Nightingale*, 2 Stark. 375; 20 R. R. 694.

Extra Work.]—Where work has been done under a written contract, the plaintiff cannot recover for extras unless the contract is stamped. *Vincent* v. *Cole*, 7 L. J. (O.S.) K. B. 130.

Debenture or Promissory Note—Not under Seal—Payable to Order.]—An instrument issued by a company incorporated under the Joint Stock Companies Acts, 1856 and 1862, purporting upon the face of it to be a "debenture," with coupons for the payment of interest half-yearly attached to it, and containing an engagement on the part of the company to pay "the amount of this indenture" to A. B. or order on a given day, with interest at five per cent., is under the Stamp Act, 1870, chargeable with a debenture stamp of 2*s*. 6*d*., and not with a promissory-note stamp. *British India Steam Navigation Co.* v. *Inland Revenue Commissioners*, 50 L. J., Q. B. 517; 7 Q. B. D. 165; 44 L. T. 378; 29 W. R. 610.

Approval of Draft.]—A draft agreement had on the back of it the following memorandum:—"We approve of this draft," and this was signed by the parties:—Held, that it did not require any stamp. *Doe* d. *Lambourn* v. *Pedgriph*, 4 Car. & P. 312.

Proposals and Acceptances.]—Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed by parol that B. should have the land upon the terms proposed:—Held, that the original proposal was receivable without a stamp. *Drant* v. *Brown*, 5 D. & R. 582; 3 B. & C. 665; 3 L. J. (O.S.) K. B. 111. And see *Edgar* v. *Blick*, 1 Stark. 464; 18 R. R. 809; *Turner* v. *Ford*, M. & M. 131; 7 B. & C. 625; 6 L. J. (O.S.) K. B. 122; *Chaplin* v. *Clark*, 4 Ex. 407; *Doe* d. *Bingham* v. *Cartwright*, 3 B. & Ald. 326.

Where a proposal made orally is assented to in writing, the latter being evidence of an agreement, is not admissible without a stamp; as, where it is written by the defendant and signed by the plaintiff. *Hegarty* v. *Milne*, 14 C. B. 627; 2 C. L. R. 779; 23 L. J., C. P. 151; 18 Jur. 496; 2 W. R. 373.

If, after two parties have orally agreed to certain terms, one of them desires that they shall be put into writing, and the other writes them out in the form of a proposal, which is orally accepted, this does not require a stamp as an agreement. *Laing* v. *Smith*, 3 F. & F. 97.

In an action for work and labour, the defendant offered in evidence a proposal on his part, which was not finally acceded to, containing an estimate of the amount of the work:—Held, that it being a mere proposal and estimate, it might be read, although it was not stamped. *Penniford* v. *Hamilton*, 2 Stark. 475.

No document requires an agreement stamp unless it amounts to an agreement of itself or to a memorandum of an agreement already made; and therefore a written or printed offer not accepted in writing does not require a stamp. *Carlill* v. *Carbolic Smoke Ball Co.*, 61 L. J., Q. B. 696; [1892] 2 Q. B. 484; 56 J. P. 665.

The following document is not a mere proposal but requires an agreement stamp:—"I agree to build up eight cabins on board of the 'American Lass' for 40*l*. in cash." *Hegarty* v. *Milne*, 2 C. L. R. 779; 23 L. J., C. P. 151; 18 Jur. 496; 2 W. R. 373.

The defendant directed the plaintiff, who was possessed of a patent for furnaces, to send him "a licence to use two of his patent furnaces, to be applied to a single plate, &c., for 25*l*., as agreed; the engineers' or furnace-builders' time, to superintend or fix the above order, to be paid six shillings a day":—Held, an agreement, and not a mere proposal. *Chanter* v. *Dickenson*, 2 D. (N.S.) 838; 6 Scott (N.R.) 182; 5 Man. & G. 253; 12 L. J., C. P., 147; 7 Jur. 89.

A manager of a theatre wrote to an actor, offering him an engagement, at a weekly salary of 2*l*. Some months afterwards the manager wrote to the actor, stating that his services would be no longer required, unless he would accept 30*s*. a week only, for the summer season. The manager, however, subsequently wrote to the actor as follows:—"I have received your letter, and, on reconsideration, will give you the same terms (2*l*.) per week for the summer season." In an action for the amount of his salary as an actor at the theatre:—Held, that the letters were only proposals, and did not require a stamp. *Hudspeth* v. *Yarnold*, 9 C. B. 625; 19 L. J., C. P. 321; 14 Jur. 578.

Pending a negotiation for a tenancy, the terms of which were arranged by parol, the landlord signed and delivered to the tenant the following memorandum:—"I shall be happy to allow Mr. B. to leave the apartments without any notice, if he finds anything which may at all lead him to suspect that there is any embarrassment in his landlord":—Held, that this was not such an agreement, or a minute of an agreement, as to require a stamp. *Bethell* v. *Blencowe*, 3 Scott (N.R.) 568; 3 Man. & G. 119; 10 L. J., C. P. 243.

Rules for Government of School—Signed by Master.]—The trustees of a free school drew up rules for the government of the school, prescribing also the terms upon which the master should hold or be dismissed from his office. These were signed by the trustees and by the master, who was already in office, and were produced by the trustees on the trial of a cause between them and the master (then dismissed), as "rules agreed upon at a meeting of the trustees":—Held, admissible without being stamped as an agreement. *Browne* v. *Dawson*, 4 P. & D. 355; 12 A. & E. 624; 10 L. J., Q. B. 7.

Appointment to Office.]—The appointment in

writing of a treasurer to the guardians of the poor of Birmingham, under a local act, at a yearly salary, requires a stamp. *Reg.* v. *Welch*, 2 Car. & K. 296 ; 1 Den. C. C. 199.

Two persons, who had been appointed common-keepers in a manor, appointed their deputy, by the following writing signed by them :—"We, the undersigned, having been appointed common-keepers, hereby nominate and appoint you our deputy for the lower common, and authorise you to act for us in that behalf in all things pertaining to the rights and privileges of the lord and the tenants of the manor, with the same powers and in the same manner as it would be our duty to act." It then went on to state what were the rights of common, and in what manner the duties of common-keeper should be exercised :—Held, that this document did not require to be stamped, as being a "grant or appointment of or to an office or employment," with 55 Geo. 3, c. 184. *Roberts* v. *Elliott*, 11 M. & W. 527.

Prospectus.]—In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of the defendant's sons from school, it appeared that the defendant's agent, having expressed a wish to place the defendant's sons under the plaintiff's care, received from the latter a prospectus, which stated that the terms were 60 guineas per annum, and that three months' notice, or payment, was required previously to the removal of a pupil. The plaintiff, at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of 50 guineas per annum each. The boys were thereupon sent to the plaintiff's, and were taken away without the stipulated notice :—Held, that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. *Clay* v. *Crofts*, 20 L. J., Ex. 361.

Where the agreement on which the action is brought is contained in a prospectus of terms delivered by the plaintiff to the defendant, it is necessary to get that identical copy stamped which has been delivered. *Williams* v. *Stoughton*, 2 Stark. 292.

But in a somewhat similar case a prospectus was allowed to be read to show what the terms were although it was not stamped. *Edgar* v. *Blick*, 1 Stark. 464 ; 18 R. R. 809.

Letters of Traders.]—A letter written by a son who managed his mother's trade for her, to a creditor of hers, containing a promise to pay her debt, need not be stamped, and was exempted under 32 Geo. 3, c. 51. *Mackenzie* v. *Banks*, 5 Term Rep. 176.

Several Documents.]—B. wrote to an association to insure a vessel, and agreed to abide by their rules ; the policy did not mention the rules :—Held, one contract, and that the letter was admissible without a stamp, as the policy was stamped. *Albert Average Association, In re, Blyth's case*, L. R. 13 Eq. 529 ; 20 W. R. 504.

Where a contract is contained in letters, it is sufficient if one of the letters bears a stamp, although on the part of one of the contracting parties the letters are written and signed by an agent. *Grant* v. *Maddox*, 15 M. & W. 737 ; 15 L. J., Ex. 104.

Where A., by letter, entered into an agreement with B., who became a party to the engagement by writing a memorandum at the bottom of the copy of the letter, and C. afterwards became guarantee for B. to A. by an indorsement on the back of the copy of the same letter, in which reference was made to the terms of the agreement on the other side of such copy :—Held, that only one stamp was necessary. *Stead* v. *Liddard*, 8 Moore, 2 ; 1 Bing. 196 ; 1 L. J. (O.S.) C. P. 52.

The defendant having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer requesting him to send the key, and stating that his auctioneer was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, and disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of the plaintiffs, and valued to the defendant. The umpire made a valuation, and appraised the fixtures at a certain sum, and returned the inventory with an appraisement duly stamped. The defendant by letter afterwards requested the plaintiffs' auctioneer to remove the fixtures, which was done, and on the following day the defendant wrote to the plaintiffs that he would attend at the house and pay them the amount of the fixtures as settled by the appraiser. The first and last letters were signed by the defendant, but the first only was stamped : —Held, that one stamp was sufficient. *Hemming* v. *Perry*, 2 M. & P. 375.

A letter put in was stamped with a 30*s.* stamp ; a second letter was offered by the defendant to show that the contract was for a yearly tenancy. This letter was unstamped and was rejected :—Held, the rejection was proper, as if it was a separate agreement it required an agreement stamp ; and if it was a portion of the same agreement, a stamp was necessary upon one of the letters. *Atherstone* v. *Bostock*, 2 Scott (N.R.) 637 ; 2 Man. & G. 511 ; 1 Drink. 96 ; 10 L. J., C. P. 113.

D., being the holder of several bills of exchange, and being indebted to the plaintiff, and also to R. and G., the plaintiff's agents, addressed to the latter as such agents a letter, wherein he proposed to hand over to them certain of these bills on receiving from them bills of lading for a cargo of wheat shipped on his order and for his account by the plaintiff. R. and G. received two of the bills of exchange, and wrote a letter to D., varying the terms of his proposal, and consenting to receive the bills generally on account when cashed. The first letter was stamped ; the second was not stamped :—Held, that the first letter was the only evidence of the contract upon which the bills were delivered to R. and G., and therefore properly stamped. *Schultz* v. *Astley*, 2 Scott, 815 ; 2 Bing. (N.C.) 544 ; 5 L. J., C. P. 130.

Reference to other Document—Only one Agreement.]—Where an agreement refers to another document, so that the two papers, in fact, form, only one agreement, it is sufficient if one of the papers only bears an agreement stamp. *Peate* v. *Dickin*, 1 C., M. & R. 422 ; 5 Tyr. 116 ; 4 L. J., Ex. 28.

The following memorandum, signed by the plaintiff, was offered in evidence :—

"Total value of wheat grown, &c.	£94	10	8
Rent due to Mr. A. . . .	53	10	0
Balance due to Mrs. M. .	£41	0	8

and secured by the joint and several note of certain persons. This note is to be subject to the revised valuation of C. and D., and will be

more or less than 41*l.* 0*s.* 8*d.*, according as they value the corn. The note was given up to me this 20th August, 1844" :—Held, that the agreement to which the memorandum referred being already in evidence, the memorandum itself was admissible without a stamp. *Marshall* v. *Powell*, 9 Q. B. 779 ; 16 L. J., Q. B. 5 ; 11 Jur. 61.

Stamped Instrument — Reference to Unstamped.]—An instrument legally stamped is not vitiated by referring to instruments which are not stamped. *Duck* v. *Braddyll*, M'Clel. 217 ; 13 Price, 455.

Specification—Not Annexed.]—A specification referred to in an agreement, but not annexed thereto, may be stamped as a separate instrument. *Briggs* v. *Peel*, 11 Jur. 611.

A specification of works signed by the parties to an agreement for their execution, and referred to in such agreement, but not annexed to or indorsed upon it, should be stamped separately from the agreement. *Instan* v. *Yates*, 1 W. R. 24.

Demise—Covenants in Expired Lease—Schedule.]—By an agreement of demise, the land was to be farmed according to covenants contained in an expired lease. The expired lease being produced in an action brought for not farming the land according to those covenants : —Held, that it was not a schedule, catalogue or inventory containing the conditions or regulations for the management of a farm, and therefore did not require a stamp. *Strutt* v. *Robinson*, 3 B. & Ad. 395.

Alteration of Instrument.]—If an agreement has a penal clause added after the signature of one party, it may, nevertheless, under circumstances, only constitute one instrument, and so no new stamp be necessary. *Knight* v. *Crockford*, 1 Esp. 190 ; 5 R. R. 729.

Where the terms of a properly-stamped agreement were altered by a subsequent agreement, which was not stamped :—Held, that the latter agreement could not be read in evidence, nor could the plaintiff recover on the counts on the first agreement only. *Reed* v. *Deere*, 7 B. & C. 261 ; 2 Car. & P. 624 ; 31 R. R. 190.

The alteration of an agreement to give up a farm by adding the words "house and premises," after the instrument is complete, does not render a fresh stamp necessary. *Doe* d. *Waters* v. *Houghton*, 1 M. & Ry. 208 ; 6 L. J. (O.S.) K. B. 86.

An agreement altered by the parties before the date mentioned for performances requires a fresh stamp. *Bacon* v. *Simpson*, 3 M. & W. 78 ; 7 L. J., Ex. 34.

By memorandum A. and B. agreed to refer a dispute to an impartial surveyor ; by a further memorandum written on the same paper on a subsequent day it was agreed that the question should be settled by one C. :—Held, that the two memoranda required only one stamp. *Taylor* v. *Parry*, 1 Man. & G. 604 ; 1 Scott (N.R.) 576 ; 9 L. J., C. P. 298.

Cognovit or Warrant of Attorney.]—A mere cognovit need not be stamped. *Ames* v. *Hill*, 2 Bos. & P. 150. S. P., *Clarke* v. *Jones*, 3 D. P. C. 277 ; *Bray* v. *Manson*, 8 M. & W. 668, 670 ; 10 L. J., Ex. 468 ; 5 Jur. 635.

Unless it contains some terms of agreement, and the money to be paid exceeds 20*l.* (now 5*l.*, by 23 Vict. c. 15), in which case the same stamp is required as on an agreement. *Reardon* v. *Swaby*, 4 East, 187.

A cognovit which merely gives the defendant time does not require an agreement stamp. *Jay* v. *Warren*, 1 Car. & P. 532.

Although the plaintiff, at the time of its execution, undertakes on a separate paper to give the defendant time. *Morley* v. *Hall*, 2 D. P. C. 494.

Though containing a stipulation not to take advantage of its being before declaration. *Green* v. *Gray*, 1 D. P. C. 350.

But a cognovit containing terms of agreement must be stamped. *Rose* v. *Tomlinson*, 3 D. P. C. 49.

A defeasance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney. *Cawthorne* v. *Holben*, 1 Bos. & P. (N.R.) 279.

—— **Amount Necessary.**]—A warrant of attorney, dated 9th November, 1840, to secure 1,000*l.* principal, and interest at 5*l.* per cent., from the 1st July, 1840, required only an ad valorem stamp of 5*l.*, which only covered the principal sum secured of 1,000*l.*, the interest already accrued from July till November not being considered by the court to be a sum of such a nature as to raise the principal above 1,000*l.* *Pierpoint* v. *Gower*, 5 Scott (N.R.) 605 ; 2 D. (N.S.) 652 ; 4 Man. & G. 795 ; 12 L. J., C. P. 55 ; 6 Jur. 952.

Sale by Auction—Several Lots.]—If, on a sale by auction, the same person is declared the highest bidder for several lots, a distinct contract arises for each lot. *Emmerson* v. *Heelis*, 2 Taunt. 38 ; 11 R. R. 520.

Leasehold and copyhold premises were put up to auction in two separate lots, which were knocked down to the purchaser, and he signed the following memorandum :—"I hereby acknowledge that I have this day purchased by public auction Lots 1 and 2 of the estates mentioned in the annexed particulars, at 245*l.* (150*l.* for Lot 1, and 95*l.* for Lot 2)." Upon refusal of the purchaser to complete the purchase, the premises were resold, and an action was brought to recover the difference of the price :—Held, that the memorandum required two stamps. *Watling* v. *Horwood*, 12 Jur. 48.

Semble, that if parties choose to divide their contracts, so as to lessen the amount of stamps, they may legally do so. *Hawkins* v. *Clutterbuck*, 2 Car. & K. 810.

The same paper, containing two different contracts for the purchase of different lots by different persons, having one stamp affixed on that part of the paper which contains the contract of sale with the defendant, and to which the stamp officer's receipt for one penalty refers, is sufficient to legalise the evidence of such contract. *Powell* v. *Edmunds*, 12 East, 6 ; 11 R. R. 316.

Several Parties.]—The several underwriters of the same policy have such a community of interest in the subject insured, that if they all agree to refer the demand of the assured on that policy, one stamp for the agreement to refer and one stamp for the award are sufficient. *Goodson* v. *Forbes*, 6 Taunt. 171 ; 1 Marsh. 525.

An agreement by several for a subscription to one common fund, such as for making a wet dock at Bristol, though several as to each subscriber, only requires one stamp. *Davis* v. *Williams*, 13 East, 232.

By a written agreement three persons bound themselves, that, in consideration of A. discharging a debt due from B. to C., amounting to 200*l.*, with the costs thereupon, each of the three would severally pay 50*l.*, and one-fourth part of such costs, and give a bond, bill, or note, for his own proportion :—Held, that the agreement required only one stamp. *Ramsbottom* v. *Davis*, 4 M. & W. 584 ; 7 D. P. C. 173 ; 8 L. J., Ex. 80.

A cargo of goods, part of which belonged to T. separately, and part to T. and W. as partners, being in the hands of the consignee, T., on application for both parcels, signed an undertaking in the name of T. and W. to pay freight for them, but commencing with, "I hereby engage to pay," and the goods were delivered to him. On an action against T. for the freight of his own parcel, the agreement was produced, with a single stamp impressed, and held admissible, because, although the agreement related to the goods of the partnership as well as his own, he could not bind his partner as to the latter, but had made himself personally liable for the whole, and therefore the agreement was entire. *Shipton* v. *Thornton*, 1 P. & D. 216 ; 9 A. & E. 314 ; 8 L. J., Q. B. 73.

Where several parties contract to do respectively different kinds of work set forth in a specification :—Held, that the contract is several, and that part of the specification only which relates to the work to be done by any one of the contractors, is part of the agreement of such contractor, and that the agreement may be stamped accordingly by him. *Briggs* v. *Peel*, 11 Jur. 611.

2. Statutory Exemptions.

a. Not of the Value of £5.

Apparent Value.]—On appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish with the assent of his master, produced a written paper, purporting to certify that the father of the pauper agreed to give his master eight shillings for the term of his apprenticeship :—Held, that there being nothing to show that the value of the subject-matter of the agreement was 20*l.* (now 5*l.*), it did not require a stamp. *Rex* v. *Enderby*, 2 B. & Ad. 205 ; 9 L. J. (o.s.) M. C. 80.

An agreement of reference, of all matters in difference in a cause, does not require a stamp when it does not appear that the matter of the agreement is of the value of 20*l.* *Lloyd* v. *Mansell*, 1 L. M. & P. 130 ; 19 L. J., Q. B. 192.

A memorandum does not require a stamp, if it does not appear affirmatively that it relates to a matter amounting in value to 20*l.* *Feltham* v. *Cartwright*, 7 Scott, 695.

Several Matters.]—A memorandum signed by a bidder after his name had been marked against several lots at an auction, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being at that price. *Roots* v. *Dormer* (*Lord*), 4 B. & Ad. 77 ; 1 N. & M. 667.

An instrument as follows :—"Memorandum.—Mr. B. has left in the cellar at &c. seventy-two barrels containing ale, in Mr. H.'s casks, which I agree to allow Mr. H. to take from my cellar at any time within three months from this date, by receiving one day's notice ; and if left in the cellar beyond that time, Mr. B. or Mr. H., or whom it may concern, to pay rent or warehouse-room for the same. Dated this 4th day of August, 1842. J. S.," is admissible without a stamp, although the value of the goods exceeded 20*l.*, the amount of rent (if any) being less. *Baldwin* v. *Alsager*, 13 M. & W. 365 ; 14 L. J., Ex. 34.

Limited Interest.]—Where the subject-matter of an agreement is a limited interest, worth less than 20*l.* a year, in a thing worth more than 20*l.*, the agreement does not require a stamp. *Doe* d. *Morgan* v. *Amos*, 2 M. & Ry. 180 ; 6 L. J. (o.s.) K. B. 226.

Agreement to confess Judgment.]—An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, was not an agreement for payment of more than 20*l.* within 23 Geo. 3, c. 58, s. 4, and therefore need not be stamped. *Ames* v. *Hill*, 2 Bos. & P. 150.

Lease of Ferry and Sale of Boat.]—Agreement in April, 1804, not under seal, between A. and B., that B. shall rent of A. a ferry called D. for 6*l.* 6*s.* per annum, to be paid half-yearly, for which A. is to have the sole use of the ferry, and whatever profit may accrue from it, for the time he holds the same. "Be it also remembered, that A. has this day bought of B. the great ferry-boat for 20*l.*, to be paid by instalments of 5*l.* yearly, on April 6th, the first in 1805" :—Held, that, as the instrument purporting to convey an incorporeal hereditament was not a lease, because not under seal, it did not require a lease stamp, and that, if the rent only was considered, the subject-matter of the agreement was not of the value of 20*l.*, and, therefore, no stamp was necessary. *Mayfield* v. *Robinson*, 7 Q. B. 486 ; 14 L. J., Q. B. 265.

—— **Memorandum of Sale not ancillary to Lease.**]—Held, also, that the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct and separate memorandum of a bygone purchase of goods, and, in itself, subject to no stamp duty. *Ib.*

Distress—Value not Apparent—Agreement for Withdrawal.]—A landlord having distrained the goods of his tenant, withdrew from possession upon the tenant's signing the following memorandum :—"In consideration of your withdrawing the distraint upon the premises I hold of you, for one year's rent, due, &c., at the rate of 44*l.* per annum, and giving time for the payment of the rent until the 1st February next, I hereby authorise and empower you, on default being made by me in such payment, to re-enter and distrain for the rent, notwithstanding the withdrawal of the distraint now made by you ; and I hereby declare your withdrawing the present distraint shall in no ways lessen, abridge, or prevent your again distraining upon the premises" : —Held, not an agreement, or a minute or memorandum of an agreement, requiring a stamp ; and that, if it was, it did not appear to be an agreement the subject-matter whereof was of the value of 20*l.* *Hill* v. *Ransom*, 6 Scott (N.R.) 571 ; 5 Man. & G. 789 ; 12 L. J., C. P. 275.

An indemnity, given on the withdrawal of a distress for 24*s.* rent, is receivable without a

stamp, although the sum sought to be recovered under it exceeds 20*l*. *Cox* v. *Bailey*, 6 Scott (N.R.) 798 ; 6 Man. & G. 193.

Landlord and Tenant—Agreement to Re-occupy—Right of Occupation.]—An instrument as follows ; "I, J. T., agree with W. M. to retake of him two acres of land from the 10th October, 1840, at which time my tenancy expires, until the 25th March, 1841, for 10*l*." Signed by J. T. only, and acted on by W. M., who allowed him to remain in possession according to its terms :—Held, not to be an agreement, whereof the matter was of the value of 20*l*., within 55 Geo. 3, c. 184, as the value of the subject-matter in such cases is not the value of the premises to be occupied, but the value of the right of occupation. *Doe* d. *Marlow* v. *Wiggins*, 3 G. & D. 504 ; 4 Q. B. 367 ; 12 L. J., Q. B. 177 ; 7 Jur. 529. S. P., *Marlow* v. *Thompson*, 1 D. (N.S.) 575 ; 11 L. J., Q. B. 150 ; 6 Jur. 300.

To give up Goodwill for £7—Penalty £20.]—An agreement to give up a house and the goodwill of a business for 7*l*., and not to open a shop in the same line of business within one mile of the house, under a forfeiture of 20*l*., does not require a stamp, as being for a subject-matter of the value of 20*l*. *Pemberton* v. *Vaughan*, 10 Q. B. 87 ; 16 L. J., Q. B. 161 ; 11 Jur. 411. S. P., *Emmerson* v. *Heelis*, 2 Taunt. 38 ; 11 R. R. 520.

Agreement to do Work.]—The plaintiff agreed, in writing, with the defendant, to do the brickwork of a building for 1*l*. 14*s*. per rod, the defendant to find all materials :—Held, that the agreement did not require a stamp, it not appearing at the time of making it, that its value amounted to 20*l*., though the work done ultimately exceeded that amount. *Liddiard* v. *Gale*, 4 Ex. 816 ; 19 L. J., Ex. 160.

A written undertaking by a builder to do works for "a sum to be fixed by the architect," the value not appearing on the face of it, does not require a stamp. *Rowland* v. *Lazarus*, 1 F. & F. 466.

Interest on Bill of Exchange.]—"In consideration of your discounting for me a bill of exchange of 100*l*., drawn by J. R. on E. U., dated the 5th August instant, payable at one month after date, I hereby undertake and agree, that if the bill is not paid at maturity, to pay you interest at the rate of 1*s*. in the pound per month, till the whole is fully paid and satisfied" :—Held, admissible without a stamp, the subject-matter of it being the payment of interest of less value than 20*l*. *Semple* v. *Steinau*, 8 Ex. 622 ; 22 L. J., Ex. 224 ; 17 Jur. 628.

Agreements for Payment of Money—I O U.]—A paper as follows : "Memorandum : I., J. R., consent to take 10*s*. per month from W. H. H., in discharge of 32*l*., W. H. H. intends giving him ; and upon the said sum being paid, he engages giving a receipt in full of all demands" : signed by J. R., and dated, requires a stamp, as an agreement, whereof the matter is of the value of 20*l*. *Remar* v. *Hayward*, 2 A. & E. 666 ; 4 L. J., K. B. 64. *Tebbutt* v. *Ambler*, 9 Car. & P. 60.

An instrument in the following form, "11th October, 1831, I O U 20*l*., to be paid on the 22nd inst. W. B."—requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of 20*l*. *Brooks* v. *Elkins*, 2 M. & W. 74 ; 2 Gale, 200 ; 6 L. J., Ex. 6.

An I O U which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relates to an amount under 20*l*. *Evans* v. *Philpotts*, 9 Car. & P. 270.

Growing Fruit.]—An agreement for the sale of growing fruit and vegetables, to a greater amount than 20*l*., requires a stamp. *Rodwell* v. *Phillips*, 9 M. & W. 501 ; 1 D. (N.S.) 885 ; 11 L. J., Ex. 217. S. P., *Emmerson* v. *Heelis*, 2 Taunt. 38 ; 11 R. R. 520.

Indemnity—All Costs, Charges, Damages, &c.]—An agreement to indemnify A. from all costs, charges, damages, or other expenses which he may incur as bail for B., requires an agreement stamp, the arrest of B., and consequently the liability of A., being for more than 20*l*., though the costs incurred do not amount to that sum. *Wrigley* v. *Smith*, 3 N. & M. 181 ; 5 B. & Ad. 1117 ; 3 L. J., K. B. 116.

b. Sale of Goods.

Nature of Order.]—In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may be read without a stamp. *Ingram* v. *Lea*, 2 Camp. 521.

When under Seal.]—A contract under seal, relating to the sale of goods, is not exempt from duty. *Clayton* v. *Burtenshaw*, 7 D. & R. 800 ; 5 B. & C. 41.

Receipt.]—A receipt for the price of a horse with a warranty of soundness may be received as evidence of the warranty without an agreement stamp. *Shrine* v. *Elmore*, 2 Camp. 407 ; 11 R. R. 754.

Containing Stipulations.]—An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment and other things. *Heron* v. *Granger*, 5 Esp. 269.

A written memorandum for the purchase of goods is an agreement, although it contains a stipulation for payment to be made at a future day ; and therefore does not require a promissory note stamp. *Ellis* v. *Ellis*, Gow, 216.

To Supply a House with Water by Pipes.]—An agreement to supply a house and buildings with water by means of pipes, to be laid in a certain manner and to a certain height, is an agreement relating to the sale of goods, and need not be stamped. *West Middlesex Waterworks* v. *Suwerkropp*, M. & M. 408 ; 4 Car. & P. 87.

Railway Scrip.]—A contract for the sale of railway scrip is not a contract for the sale of goods. *Knight* v. *Barber*, 16 M. & W. 66 ; 2 Car. & K. 333 ; 16 L. J., Ex. 18 ; 10 Jur. 929.

To take Half Share in Goods—Joint Account.]—The defendant agreed in writing to take one-half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss,

and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills:—Held, that this was an agreement relating to the sale of goods, and did not require a stamp. *Venning* v. *Leckie*, 13 East, 7; 12 R. R. 292.

Sale of Ship.]—An agreement that A. will sell a ship to B.; that part of the price shall be secured by mortgage of the ship; that A. will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to A. as part of the price; that at the end of the voyage the mortgage shall close; is an agreement for and relating to the sale of goods, and requires no stamp. *Meering* v. *Duke*, 2 M. & Ry. 121; 6 L. J. (O.S.) K. B. 211.

Share in Adventure.]—An agreement between merchants, that one shall take a share in the outfit of a ship and the adventure, is not an agreement for the sale of goods. *Leigh* v. *Banner*, 1 Esp. 403.

Work and Labour.]—An agreement for work and labour is not within the exception of a sale of goods. *Fielder* v. *Ray*, 4 Car. & P. 63.

If an agreement cannot be read for want of a stamp, the plaintiff cannot recover the value of the work and labour, although the defendant may have had the benefit of it. *Hughes* v. *Budd*, 8 D. P. C. 478.

Part of Things Sold not "Goods."]—The following memorandum requires a stamp:—"A. B. agrees to take the two flys of C. D. at 60*l.*; 5*l.* to be paid down, and the remainder of the money at three months from the above date. Harness and goodwill included in the above agreement." *South* v. *Finch*, 3 Bing. (N.C.) 506; 4 Scott, 293.

Goods not Made.]—Where a man agreed to sell a quantity of oil, not having at the time the oil ready made, but only the raw materials for making it:—Held, that this was a contract for the sale of goods, wares, and merchandise. *Wilks* v. *Atkinson*, 1 Marsh. 412; 6 Taunt. 11.

To Finish Goods.]—If a written paper contains a specification of goods, and the vendor by it agrees "to finish the goods in a tradesmanlike manner": this agreement does not require any stamp, as it is an agreement for the sale of goods and not for the doing of work. *Hughes* v. *Breeds*, 2 Car. & P. 159.

To Make and Deliver Goods.]—A contract to make a chattel and deliver it within a certain time, is a contract relating to the sale of goods. *Pinner* v. *Arnold*, 2 C. M. & R. 613; 1 Tyr. & G. 1; 1 Gale, 271; 5 L. J., Ex. 1.

To deliver Manure and take Loads of Straw.]—The following agreement is a contract relating to the sale of goods: "I agree to take all manure at 4*d.* each horse, a week, for forty-five horses by the year, and to keep it cleared away every week; and likewise to let the few gardeners have a few loads at the same price, and serve them; and to let me have during the year sixty loads of straw, at 1*l.* 9*s.* per load; begun the year 23rd of July, 1853, and ends 23rd of July, 1855." *Gurr* v. *Scudds*, 11 Ex. 190; 3 W. R. 457.

Second Agreement — Alteration of First.]—After breach of a contract for the sale and delivery of goods, the defendant entered into a fresh agreement in writing to cancel the former agreement, and for the future sale of the goods upon different terms; the second agreement relates to the sale of goods, and does not require an agreement stamp. *Whitworth* v. *Crockett*, 2 Stark. 431.

For Future Crops.]—A written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, must be stamped with an agreement stamp. *Waddington* v. *Bristow*, 2 Bos. & P. 452.

Auction—Sale by Auctioneer.]—An agreement with an auctioneer, in a letter to him employing him to sell goods in consideration of an advance obtained by him, is exempt as relating to the sale of goods. *Topping* v. *Bull*, 2 F. & F. 408.

The following memorandum was handed by a trader to an auctioneer:—"Memorandum of 107*l.* had by me of S. (the plaintiff), being an advance on books sent in for immediate sale by auction": signed by the defendant. The books were sold, and an action having been brought by the auctioneer for a balance due to him on the sale:—Held, that the memorandum related to the sale of goods, and therefore was admissible without a stamp. *Southgate* v. *Bohn*, 16 M. & W. 34; 16 L. J., Ex. 50.

Agreement for Licence to use Patent.]—A memorandum as follows:—"Send me a licence to use two of A.'s patent furnaces to be applied to a single plate, for which I agree to pay, as agreed, 25*l.*, as a patent right, and which is to include iron works, fire-bricks, and labour; engineers' or furnace-builders' time to superintend or fix the above order to be paid 6*s.* per day,"—is not within the exemption in 55 Geo. 3, c. 184, as relating to the sale of goods, wares, or merchandise, as either the primary object of the agreement is the licence, or it is an agreement for the erection of fixtures. *Chanter* v. *Dickenson*, 5 Man. & G. 253; 6 Scott (N.R.) 182; 2 D. (N.S.) 838; 12 L. J., C. P. 147; 7 Jur. 89.

Fixtures.]—On a sale of fixtures by an outgoing to an incoming tenant, the following memorandum was given by the broker employed by the former:—"Received of Mr. H. 3*l.* for letting a house to him for a term of seven years, Mr. H. to take the fixtures at a valuation if he be accepted as tenant, and in the event of his not being accepted as tenant, then the 3*l.* to be returned":—Held, that fixtures are not goods, wares, or merchandise, and therefore that the memorandum, being part of the contract between the parties, could not be received without a stamp. *Wick* v. *Hodgson*, 12 Moore, 213; 5 L. J. (O.S.) C. P. 55.

The word "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold. A transfer of "fixtures" is therefore, at least, the transfer of a right of severance, and is a conveyance within the words of the 55 Geo. 3, c. 184, which includes the "transfer of any right," and as fixtures are not goods, wares, or merchandise, it is not within the exemption. *Horsfall* v. *Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Sale of Horse with Collateral Arrangements.]—The following agreement relates to the sale of goods, wares or merchandise, and is therefore admissible, without a stamp, to show a partnership between A. and B. :—"Memorandum of agreement between A. and B., which is, the horse to be 34*l.*, B. to have half at 17*l.*, and to pay half of the horse's expenses being with C. At the same time agreed for the horse to go to Newcastle to be entered for the handicap and silver cup." *Marson* v. *Short*, 2 Scott, 243 ; 2 Bing. (N.C.) 118 ; 1 Hodges, 260 ; 4 L. J., C. P. 270.

Under Guarantees.] — A broker, when he bought goods for his principal, agreed for half per cent. to indemnify him from any loss on the re-sale : the agreement, if reduced to writing, need not be stamped, because it is a contract relating to the sale of goods. *Curry* v. *Edensor*, 3 Term Rep. 524.

The defendant was indebted to the plaintiff in 47*l.* ; and C. and W. were indebted to the defendant in 48*l.* By agreement between C. and W., the plaintiff and the defendant, the following document was delivered to the plaintiff : "To C. and W., I request you will supply Mr. C." (the plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48*l.*, and charge to the amount standing with you to my credit. R. C." (the defendant). Under this was written, "To Mr. C. On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of 48*l.* C. and W." :—Held, that this was an agreement relating to the sale of goods, and therefore did not require a stamp. *Chatfield* v. *Cox*, 18 Q. B. 321 ; 21 L. J., Q. B. 279 ; 16 Jur. 594.

A guarantee in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is a contract for or relating to the sale of goods, and need not be stamped. *Warrington* v. *Furbor*, 8 East, 242 ; 6 Esp. 89. S. P., *Watkins* v. *Vince*, 2 Stark. 368.

The following document : "Gentlemen, in consideration of your consigning to my friends, Messrs. H. & Co., of Calcutta, sixteen casks of sherry wine, and engaging to pay me one per cent. on the amount of the proceeds, I hereby agree to guarantee you the proper sale of the wines, and the payment of the proceeds in due time. J. J.," is a contract relating to the sale of goods. *Sadler* v. *Johnson*, 16 M. & W. 775 ; 16 L. J., Ex. 178.

"In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you to the amount of 60*l.* ; should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you" :—Held, that, as to all the debts guaranteed, it was an agreement relating to the sale of goods. *Martin* v. *Wright*, 6 Q. B. 917 ; 14 L. J., Q. B. 142 ; 9 Jur. 178.

c. Hire of Labourers, etc.

When Required.]—An overseer in a printing-office is an artificer within the exemption in the 55 Geo. 3, c. 184, and a contract of hiring does not require to be stamped. *Bishop* v. *Letts*, 1 F. & F. 401.

A. entered into the following agreement with B. :—"A. engages to take charge of the glebe lands of B., his wife undertaking the dairy and poultry, at 15*s.* per week till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit, after all expenses of rent and rates, labour and interest on capital are paid, on a fair valuation made from Michaelmas to Michaelmas, three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by A., who occupies it as bailiff, in addition to his salary :—Held, that this agreement constituted the relation of master and servant between B. and A., and not that of partners ; that A was not a menial servant but a labourer, and that the agreement was admissible, though unstamped, as it fell within the exemption in 55 Geo. 3, c. 184, as an agreement for the hire of a labourer. *Reg.* v. *Wortley*, 2 Den. C. C. 333 ; T. & M. 636 ; 21 L. J., M. C. 44 ; 15 Jur. 1137 ; 5 Cox, C. C. 382.

The plaintiff and defendant being resident in England, and P. at Havana, and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant on behalf and representation of P. of Havana, that the plaintiff would proceed as fireman and stoker on board a steamer about to leave London for Havana, calling at intermediate ports, to be placed in the service of P. and would faithfully do the work of fireman or stoker on board the steamer, and obey the orders of the engineers. In consideration of the service the plaintiff was to receive wages at 5*l.* per month, payable monthly, and 2*l.* per month for providing himself in provisions. During the outward passage rations were to be served out to the plaintiff on account of P. The contract to be understood to be in force for one year certain from the date, and should the plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home ; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge the plaintiff and to find him his passage back to England. The wages to be payable up to the day of the plaintiff's arrival in England, unless he should be discharged for misconduct ; one month's pay to be advanced for the plaintiff's outfit for the voyage :—Held, that the agreement did not require a stamp, being within the exemption of a memorandum or agreement for the hire of any labourer in 55 Geo. 3, c. 184 : *Wilson* v. *Zulueta*, 14 Q. B. 405 ; 19 L. J., Q. B. 49 ; 14 Jur. 366.

III. APPOINTMENT OF NEW TRUSTEES.

An order of the charity commissioners appointing new trustees of a charity, and vesting the trust property in them is an instrument relating to two separate and distinct matters within s. 8, of the Stamp Act, 1870, and must be stamped both as a conveyance and as an appointment of new trustees. *Hadgett* v. *Inland Revenue Commissioners*, 3 Ex. D. 46 ; 37 L. T. 612 ; 26 W. R. 115.

IV. APPRAISEMENT AND VALUATION.

An agreement to take stock, &c., at a valuation, there being no written valuation, or an inventory of the things valued, requires no stamp. *Banyard* v. *Seabrook*, 1 F. & F. 321.

Nothing being referred to appraisers except the mere value of the goods and of repairs, an appraisement stamp upon the written valuation is sufficient, and an award stamp is not neces-

sary. *Leeds* v. *Burrows*, 12 East, 1. S. P., *Perkins* v. *Potts*, 2 Chit. 399.

If a broker is called to prove the value of goods, he need not produce an inventory written on an appraisement stamp. *Stafford* v. *Clarke*, 1 Car. & P. 225.

A valuation for the information of parties, and not binding on them, is not liable to an appraisement stamp though an agreement is founded on its date. *Jackson* v. *Shepherd*, 2 C. & M. 361; 4 Tyr. 330; 3 L. J., Ex. 95. S. P., *Atkinson* v. *Fell*, 5 M. & S. 240.

Where an objection that a valuation of houses was an appraisement under the 46 Geo. 3, c. 43, s. 9, and should have been stamped, was not made at the trial, although that section of the act was brought under the notice of the judge who tried the cause, for another purpose, the court held it could not be taken advantage of for a new trial. *Jakes* v. *Gardiner*, 7 Jur. 513.

V. APPRENTICESHIP DEEDS.—*See* APPRENTICE.

VI. AWARD.—*See* ARBITRATION.

VII. BANK NOTES.

Duty on.]—The intention to impose a charge upon the subject must be shown by clear and unambiguous language. Where by an act of the Cape Colony (No. 6, 1864), "for imposing a duty upon bank notes," which act was assumed to have been validly extended to the province of Griqualand West, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that act; it was held, that the appellant bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province, was not liable, according to the true construction of the act, to make any return to the respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch. *Oriental Bank Corporation* v. *Wright*, 50 L. J., P. C. 1; 5 App. Cas. 842; 43 L. T. 177—P. C.

See also BANKER.

VIII. BILLS OF EXCHANGE.

"For the Sole Purpose of remitting Money to be Placed to any Account of Public Revenue"—Banker's Order to Bank of England to transfer Money from Banker's Account to Account of Commissioners of Customs.]—The first part of s. 32 of the Stamp Act, 1891, contains a definition of bills of exchange generally for the purposes of the act, both those payable on demand, and those that are not; and the latter part of the section explains that a "bill of exchange payable on demand" includes the documents mentioned in sub-ss. (*a*) and (*b*). *London Clearing Bankers* v. *Inland Revenue Commissioners*, 65 L. J., Q. B. 372; [1896] 1 Q. B. 542; 74 L. T. 209; 44 W. R. 516; 60 J. P. 404—C. A.

A banker's written order to the Bank of England to transfer a sum of money from his account with the Bank of England to the account of the commissioners of customs with the Bank of England, whether given by the banker to a customer in exchange for his cheque for an amount of customs duty on goods, and given by the customer to the commissioners of customs, or given by the banker to an officer of customs in exchange for the customer's cheque for an amount of duty, is a "bill of exchange payable on demand" within the meaning of s. 32 of the Stamp Act, 1891, and is not a bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to an account of public revenue within the meaning of exemption 10 under the head "Bill of Exchange" in schedule 1 of the act. It is consequently chargeable with a stamp duty of one penny. *Ib.*

And see BILLS OF EXCHANGE.

IX. BILLS OF SALE.

Horses substituted—Names indorsed on Bill.]—A bill of sale, assigning certain horses as a security, and also such other horses as might be substituted for them in the business of the assignor, provided the names and descriptions of such substituted horses were indorsed:—Held, that the indorsements did not require an additional stamp, being only for the purpose of identification. *Barker* v. *Aston*, 1 F. & F. 192.

When Unstamped.]—The registration of a bill of sale is not avoided because the stamp is insufficient at the time of registration. The defect may be cured by having the proper stamp affixed afterwards. *Bellamy* v. *Saull*, 4 B. & S. 265; 32 L. J., Q. B. 366; 8 L. T. 534; 11 W. R. 800.

Authority to Act under.]—A mere authority to act under a particular bill of sale, semble, does not require to be stamped as a letter or power of attorney. *Baker* v. *Dale*, 1 F. & F. 271.

X. BOND, COVENANT, OR INSTRUMENT.

Securing Principal and Interest.]—A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent.:—Held, that a stamp covering the amount of the principal was sufficient. *Dixon* v. *Robinson*, 1 M. & Rob. 115; 5 Car. & P. 96. S. P., *Foreman* v. *Jeyes*, 5 Car. & P. 419; *Barker* v. *Smark*, 7 M. & W. 590; 9 D. P. C. 211; 10 L. J., Ex. 200.

A., B. and C. bound themselves in the penal sum of 600*l.* to a company. The bond, after reciting that A. and B. had agreed to join with C., as his sureties, in consideration of the company advancing C. 300*l.*, contained the following conditions: that if any of the parties should pay to the company the principal sum of 300*l.*, by three equal yearly payments of 100*l.* each, or so much of the payments as should be owing on the decease of C., which should first happen, and should in the meantime, until the principal should so become due, and be all paid, pay the company interest at the rate of 5*l.* per cent. upon the principal, in equal half-yearly payments, and should also in the meantime, and until the principal should become due, and until the same, with interest, should be fully paid, pay the annual premiums which should, during the continuance of the loan, become payable on a policy of assurance, whereby the funds of the company were, on payment by C., or his assigns, during

his life, of the annual premiums of 23*l.* 14*s.* 7*d.*, made liable to pay C.'s executors, after his decease, 499*l.* 10*s.*; which instrument had been deposited as a collateral security for the payment of the principal and interest, and of the premiums which might be due and unpaid; and if C. should not, during the continuance of the loan, do any act by which the policy might be avoided, or should forthwith pay upon demand the principal and interest, or so much as should be due, then the bond was to be void, otherwise it was to remain in full force; and if default should be made in payment of the interest, or of either of the instalments, or of the premiums, according to the stipulations, the whole of the principal should thereupon become payable:—Held, per Pollock, C.B., Alderson, B., and Platt, B., that the bond secured the payment of the principal, with interest only; and that the bond was rightly stamped with a stamp, which covered the principal. Per Parke, B., that the bond secured the payment of the premiums also. *Prudential Mutual Assurance Association* v. *Curzon*, 8 Ex. 97; 22 L. J., Ex. 85.

Amount Uncertain.]—Any bond for securing money already advanced and to be in future advanced on an account current (although the obligation was under a penalty in a sum certain, less however than 20,000*l.*) could not be received in evidence, unless it bore a 20*l.* stamp, being held, notwithstanding the penalty, to be a bond for the security of money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, was uncertain and without limit in the words of 48 Geo. 3, c. 149. *Scott* v. *Alsop*, 2 Price, 20.

Payment of Rent Reserved by Lease.]—A bond conditioned for the quarterly payment of an annual rent reserved in an indenture of lease of market-tolls was not within either of the clauses in Sched., Part 1, of 55 Geo. 3, c. 184, which imposed an ad valorem duty on bonds given as a security for the payment of any definite and certain sum of money; and on bonds given as a security for the payment of any sum or sums of money at stated periods (not being rent reserved or payable upon any lease), for any definite and certain term, so that the total amount of the money to be paid could be previously ascertained. *Attree* v. *Anscombe* (2 M. & S. 88) overruled. *Winchester Corn Exchange Co.* v. *Gillingham*, 3 G. & D. 567; 4 Q. B. 475; 12 L. J., Q. B. 159; 7 Jur. 326.

A bond conditioned for the payment of rent (the rent reserved being 650*l.* per annum), and the due performance of all covenants in an indenture of lease of tolls, stamped with a 35*s.* stamp, was not sufficiently stamped. *Toovey* v. *Simons*, 3 Jur. 1173.

Conditions—Vendors of House.]—A bond for securing certain conditions to be performed by the vendor of a house required a 20*s.* stamp only. *Hughes* v. *King*, 1 Stark. 119.

Agreement for Weekly Payments — "Sum Periodically Payable."]—Where an instrument which is a security for sums of money contemplates a weekly payment for an indefinite period, the amount of the weekly payment is the "sum periodically payable" under the head "Bond, covenant, or instrument," in the first schedule to the Stamp Act, 1891; and the stamp duty of 2*s.* 6*d.* imposed thereby must be assessed upon the amount of one single weekly payment, and not upon the aggregate amount of the weekly payments during a year. *Jones* v. *Inland Revenue Commissioners* (64 L. J., Q. B. 84; [1895] 1 Q. B. 484) approved of and distinguished. *Clifford* v. *Inland Revenue Commissioners*, 65 L. J., Q. B. 582; [1896] 2 Q B. 187; 74 L. T. 699; 45 W. R. 14.

Agreement for Placing Automatic Delivery Machines at Railway Stations—Agreement to Supply Telephonic Communication—Lease.]—A railway company agreed by a document under seal to permit machines for the automatic delivery of sweetmeats to be placed at their stations, in consideration of a yearly rent, payable quarterly. The machines were to be placed in such positions as should not interfere with the traffic, and might be moved for the purpose of repairing the stations. The agreement might be terminated by the railway company or the owner of the machines giving three months' notice in writing. By an agreement under seal a telephone company agreed to supply to a person therein called "the lessee," telephonic communication from the lessee's head office to his London branches, and also to various theatres and other places, by means of metallic circuits, including telephone instruments at the head office; and also to maintain the same. Payment was to be made by quarterly instalments, in advance, to the company of a fixed annual sum per line (the minimum amount payable being calculated on the rent of 45 lines). The agreement was to continue for ten years, and thereafter from year to year, determinable by either party giving to the other not less than three months' previous notice in writing:—Held, that neither of these documents was a lease, and that they were chargeable with ad valorem duty under the head "bond, covenant, or instrument of any kind whatsoever," in the 1st schedule to the Stamp Act, 1891. *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (L. R. 7 Ex. 211) followed. *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners*, 64 L. J., Q. B. 84; [1895] 1 Q. B. 484; 15 R. 136; 71 L. T. 763; 43 W. R. 318.

Stamping after Obligor's Death.]—A bond is valid though not duly stamped until after the death of the obligor. *Hanaley* v. ——, 8 L. J. (o.s.) Ch. 49.

Deeds of even Date.]—A bond and a mortgage executed on the same day, for securing the same sum of money, but bearing different dates, required an ad valorem stamp on each instrument. *Wood* v. *Norton*, 4 M. & Ry. 673; 9 B. & C. 885; 8 L. J. (o.s.) K. B. 72.

A bond, conditioned for payment of a sum of money to the obligee on a day named, according to a proviso contained in a conditional surrender of even date, whereby A. (not the obligor in the bond) surrendered to the obligee copyhold lands for securing payment of the same sum—required a 1*l.* stamp only, although it bore no stamp denoting the payment of the ad valorem duty on the surrender. *Quin* v. *King*, 1 M. & W. 42; 4 D. P. C. 736; 1 Gale, 407; 5 L. J., Ex. 140.

Where a bond is conditioned for the payment of money, which is declared to be the same

money as that secured to be paid by an indenture of even date, it must, to dispense with the ad valorem stamp on such bond, appear by recital, on production of the indenture, that the latter was an indenture requiring an ad valorem stamp. *Walmesley* v. *Brierly*, 1 M. & Rob. 529.

A bond made in 1812 conditioned for the replacing stock of the value of 792*l.*, and for paying the amount of the dividends in the meantime, stamped with a 3*l.* ad valorem bond stamp was sufficient, under 48 Geo. 3, c. 149, although there was of even date with the bond an insufficiently stamped agreement (accompanied with a deposit of title-deeds), for a mortgage of the estate comprised in the title-deeds as a security for a replacement of the stock and payment of the sums in lieu of dividends. *Blair* v. *Ormond*, 14 Q. B. 732; 19 L. J., Q. B. 228; 14 Jur. 191—Ex. Ch.

A deed of partition stated on its face only a nominal consideration for the conveyance of land in severalty to one of the co-tenants, and was stamped accordingly. In fact, he agreed to pay 600*l.* for equality of partition, and had given a bond to secure that sum:—Held, that neither the deed nor the bond was void, by reason of the improper stamp. *Henniker* v. *Henniker*, 1 El. & Bl. 54; 22 L. J., Q. B. 94; 17 Jur. 436.

Several Parties.]—If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, such bond requires only one stamp. *Bowen* v. *Ashley*, 1 Bos. & P. (N.R.) 274.

The addition of another obligor to a bail bond after its execution but before its acceptance by the sheriff, with the consent of the sheriff and the prior obligors, does not render another stamp necessary. *Matson* v. *Booth*, 5 M. & S. 223.

Collateral Matters.]—A bond conditioned for the payment of money and interest, and also for the performance of collateral acts, required only the ad valorem stamp appropriated to the principal, where that stamp exceeded the 1*l.* 15*s.* which the collateral matter would require if it stood alone. *Dearden* v. *Binns*, 1 M. & Ry. 130; 31 R. R. 303.

Guarantees.]—A bond conditioned to secure a London banker from the balance arising from paying bills, &c., for a country banker, a stipulation being inserted in the condition, that the whole amount of moneys to be ultimately recoverable should not exceed 1,000*l.*, did not require a 25*l.* stamp. *Lloyd* v. *Heathcote*, 1 C. & M. 336; 3 Tyr. 309; 2 L. J., Ex. 162.

A bond conditioned to secure the plaintiffs to the extent of 5,000*l.*, which was held to guarantee a running account which they had with a third person, and not to be discharged by the first payment of 5,000*l.*, only required a 9*l.* stamp, and not a 25*l.*, as a security of an unlimited extent, under 55 Geo. 3, c. 184. *Williams* v. *Rawlinson*, 3 Bing. 71; R. & M. 233; 11 Moore, 362; 3 L. J. (O.S.) C. P. 164; 28 R. R. 584.

By a bond, A., as principal, and B., as surety, were jointly and severally bound to pay to the creditors of C. 14*s.* in the pound on the amount of their debts; and A. was bound to indemnify B. against all loss by reason of his becoming surety:—Held, that a stamp of 1*l.* 15*s.* was sufficient in amount for this instrument, and that it did not require a second stamp on account of its obligation to indemnify B., the whole being one transaction. *Annandale* v. *Pattison*, 9 B. & C. 919; 8 L. J. (O.S.) K. B. 66.

A bond for 2,000*l.* conditioned for payment by the obligor to a banking company of all such sums, not exceeding in the whole 1,000*l.*, which from time to time should be owing from him to the company, on the balance of his account current, together with such interest and commission as should be due to the company, was sufficiently stamped with an ad valorem stamp of 6*l.*, and did not come within the clause in the schedule to the 55 Geo. 3, c. 184, Part 1, which imposed a stamp of 25*l.* on all bonds for repayment of money lent, advanced or paid, or which might become due on an account current, where the total amount of the money secured was uncertain and without limit. *Dickson* v. *Cass* (1 B. & Ad. 343) overruled. *Frith* v. *Rotherham*, 14 M. & W. 39; 15 L. J., Ex. 133; 10 Jur. 208.

Maintenance.]—A bond in 100*l.* conditioned to indemnify a parish against expenses of maintenance, from time to time, of an expected bastard child, required a stamp of 1*l.* 15*s.* as being a bond "not otherwise charged" under 55 Geo. 3, c. 184, and not 25*l.* as a bond to secure the repayment of money to be advanced, or which might become due on an account current, and to an amount "uncertain, and without any limits." *Downes* v. *Marsh*, 10 Q. B. 787; 16 L. J., Q. B. 36; 10 Jur. 905.

Damages.]—A bond to secure the damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first action, was properly stamped with a 35*s.* stamp. *Lopes* v. *De Tastet*, 8 Taunt. 712.

XI. CERTIFICATE.

Solicitor.]—M., a solicitor, who practised and had an office in Birmingham, and whose certificate bore a 3*l.* stamp (M. being under three years' standing), attended a taxation of a bill of costs at the central office in London on behalf of a client. M. having proceeded to tax his own bill, it was objected that his certificate did not admit of his practising in London:—Held, that M. was entitled to tax his bill; what he had done did not alone constitute practising or carrying on business in London. *Horton, In re*, 51 L. J., Q. B. 309; 8 Q. B. D. 434; 45 L. T. 541; 30 W. R. 102; 46 J. P. 293.

A solicitor living entirely in the country, whose entire business was in the superior courts in Ireland, which was attended to by a town agent in Dublin, is liable to a city as distinguished from a country licence. *Keegan* v. *Mowlds*, 10 L. T. 822.

See further Cases, sub tit. SOLICITOR.

XII. CHARTER-PARTY.

In an action on a charter-party against the charterer, a copy signed by him or on his behalf, though signed by the shipowner, is admissible when unstamped, if there is any evidence that the original was stamped. *Smith* v. *Maguire*, 1 F. & F. 199.

A guarantee for the due performance of a charter-party need not be stamped as a charter-party. *Rein* v. *Lane*, 8 B. & S. 83; 36 L. J., Q. B. 81; L. R. 2 Q. B. 144; 15 L. T. 466; 15 W. R. 345.

Executed Abroad—Time.]—A charter-party executed entirely abroad, and stamped within two months after it had been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that act. *The Belfort*, 53 L. J., P. 88; 9 P. D. 215; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291.

XIII. CONTRACT NOTE.

Illegality — Penalty — Broker — Default in sending Contract Note—Right to Commission.]—Sect. 17 of the Customs and Inland Revenue Act, 1888, which imposes a penalty on a broker who fails to send a contract note to his principal does not render the contract between broker and principal illegal so as to preclude the broker from recovering commission or brokerage. *Learoyd* v. *Bracken*, 63 L. J., Q. B. 96; [1894] 1 Q. B. 114; 9 R. 92; 69 L. T. 668; 42 W. R. 196—C. A.

XIV. CONVEYANCE OR TRANSFER.

"Property," what is.]—The definition of "property" under the stamp laws is "that which belongs to a person exclusively of others, and which is the subject of bargain and sale to another." *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners*, 41 L. J., Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.

A judgment debt is not property within 55 Geo. 3, c. 184, Sched. Part 1, tit. Conveyance; and therefore an assignment by indenture of such a debt does not require an ad valorem stamp, but must have the ordinary deed stamp. *Warren* v. *Howe*, 3 D. & R. 494; 2 B. & C. 281; 2 L. J. (o.s.) K. B. 8.

"Conveyance on Sale"—Compulsory Sale—Compensation.]—The schedule of the Stamp Act of 1870 (33 & 34 Vict. c. 97), prescribes an ad valorem duty on every "conveyance or transfer on sale of any property." By s. 70 the term "conveyance on sale" includes every instrument whereby any property upon the sale thereof is transferred to or vested in the purchaser. By deed of conveyance S. & Co. conveyed business premises to a railway company. The deed stated that the jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, had found that S. & Co. were entitled to 28,586*l.* 2*s.* 1*d.*, as the value of the premises, which had been taken by the company under the powers of their special act; 14,572*l.* 16*s.* 3*d.* for the value of the buildings, &c., upon the premises, and 9,499*l.* 8*s.* 3*d.* as compensation for loss of business, and that the company had paid the three sums so assessed to S. & Co.:—Held, that the 9,499*l.* 8*s.* 3*d.* allowed by the jury as compensation for loss of business was part of the "consideration for the sale" of the premises, and liable to an ad valorem duty accordingly. *Inland Revenue Commissioners* v. *Glasgow and S. W. Ry.*, 56 L. J., P. C. 82; 12 App. Cas. 315; 57 L. T. 570; 36 W. R. 241—H. L. (Sc.)

—— **Equitable Mortgage — Foreclosure — Conveyance Pursuant to Order of Chancery Division.**]—A conveyance of real property made by a mortgagor to an equitable mortgagee pursuant to an order of the chancery division foreclosing the mortgagor on default in the payment of the mortgage debt and interest from all equity of redemption, and ordering him to execute an absolute conveyance to the equitable mortgagee, is a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891, and liable to the ad valorem stamp duty imposed under the heading "Conveyance on Sale" in the first schedule to the act. *Huntington* v. *Inland Revenue Commissioners*, 65 L. J., Q. B. 297; [1896] 1 Q. B. 422; 74 L. T. 28; 44 W. R. 300.

Where the value of the property is less than that of the mortgage debt, interest, and costs, the duty is not assessable upon a higher amount than the value of the property. *Ib.*

—— **Perpetual Annuity—Security for Payment of Annuity by way of Repayment of Loan.**]—An instrument made in pursuance of the powers of the Mersey Docks and Harbour Board Consolidation Act, 1858, granting a perpetual annuity in consideration of a sum of money paid, is, for the purpose of the Stamp Act, 1891, to be treated as a "conveyance on sale," and not as a security for the payment of any annuity by way of repayment of a loan, advance, or payment intended to be so repaid, within the meaning of s. 87, sub-s. 2, of the act. *Mersey Docks and Harbour Board* v. *Inland Revenue Commissioners*, 66 L. J., Q. B. 697; [1897] 2 Q. B. 316; 77 L. T. 120; 61 J. P. 628—C. A. Affirming 45 W. R. 448.

—— **Exchange of Shares.**]—A transaction whereby a certain number of shares in one limited company is conveyed by the holder of the shares in consideration of the transfer to him of a certain number of shares in another limited company, is not an exchange within the meaning of s. 73 of the Stamp Act, 1891, and an instrument carrying that transaction into effect amounts to a "conveyance on sale" within the meaning of ss. 54 and 55 of that act, and is chargeable as such with an ad valorem duty under Schedule I. of that act. *Coats, Lim.*, v. *Inland Revenue Commissioners*, 66 L. J., Q. B. 732; [1897] 2 Q. B. 423; 77 L. T. 270; 46 W. R. 1; 61 J. P. 693.—C. A.

—— **Agreement for Sale of Goodwill.**]—An agreement for the sale and purchase of a business with the goodwill is not a "conveyance on sale" within the meaning of s. 70 of the Stamp Act, 1870, and does not require an ad valorem duty stamp. *Inland Revenue Commissioners* v. *Angus*, 23 Q. B. D. 579; 61 L. T. 832; 38 W. R. 3—C. A. Affirming 53 J. P. 453. *See* 52 & 53 Vict. c. 7, s. 18.

—— **Amalgamation of Railway Companies.**]—By a special act of parliament it was provided that the undertaking of the A. railway should be amalgamated with, and form part of, the undertaking of the B. railway as from a certain date, that the A. railway should from that date be dissolved, and that the holders of shares in that railway should in lieu thereof become holders of consolidated stock of the B. railway in proportion to the shares held by them respectively. It was further provided that a Queen's printer's copy of the act should be chargeable with the same stamp duty as would be chargeable if the transaction were effected by an executed instrument in writing, and that copy were the instrument:—Held, that the transaction was a "conveyance or transfer on sale" within the

meaning of the Stamp Act, 1891, Schedule I., and that the copy of the act was chargeable with ad valorem duty on the value, at the date of amalgamation, of the consolidated stock of the B. railway, issued to the shareholders of the A. railway. *G. W. Ry.* v. *Inland Revenue Commissioners*, 63 L. J., Q. B. 405; [1894] 1 Q. B. 507; 9 R. 122; 70 L. T. 86; 42 W. R. 211; 58 J. P. 397—C. A. S. P., *Furness Ry.* v. *Inland Revenue Commissioners*, 2 H. & C. 855; 33 L. J., Ex. 173; 10 Jur. (N.S.) 1133; 10 L. T. 161; 13 W. R. 10.

——**Property of a Firm—Transfer to Company.**]—A deed executed by all the members of a partnership firm conveyed and assigned to a company (composed exclusively of all the partners) all the freehold and leasehold property and the trade-marks of the partnership; the whole of the capital of the company, consisting of shares and debenture stock, being allotted to the partners in proportion to their shares in the partnership property, is a "conveyance or transfer on sale" within the meaning of ss. 70 and 71 of the Stamp Act, 1870, and, consequently, is chargeable with an ad valorem duty in addition to the 10*s.* stamp. *Foster* v. *Inland Revenue Commissioners*, 63 L. J., Q. B. 173; [1894] 1 Q. B. 516; 9 R. 161; 69 L. T. 817; 42 W. R. 259; 58 J. P. 444—C. A.

—— **Land sold to Trustee—Reversion to Purchaser.**]—Land was conveyed upon a sale by an instrument, dated the 28th October, 1847, in the following manner: the land was first bargained and sold by the vendor to a trustee for the purchasers for a term of three months, and then the reversion conveyed to the purchaser. The instrument was twice executed by the vendor, once by a mere signature, and then immediately afterwards by his signing, sealing, and delivery: —Held, that two stamp duties were chargeable upon the instrument, as having two distinct operations, one as a lease, and the other as a conveyance on a sale. *Brightman* v. *Inland Revenue Commissioners*, 18 L. T. 412.

—— **Revocable Agreement to grant Permission for Erection of Jetty.**]—By an instrument not under seal the conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment yearly so long as the jetty was allowed by the conservators to remain:—Held, that the instrument was not chargeable with stamp duty under 33 & 34 Vict. c. 97 (the Stamp Act, 1870), either as a "conveyance on sale" within s. 70, or as an instrument whereby any property was transferred to or vested in any person, within s. 78, or as a "lease or tack," or "bond, covenant, or instrument of any kind whatsoever," within the schedule, but only as an "agreement." *Thames Conservators* v. *Inland Revenue Commissioners*, 56 L. J., Q. B. 181; 18 Q. B. D. 279; 56 L. T. 198; 35 W. R. 274.

"Conveyance."]—Any written instrument operating as the record of a transfer of property other than goods is a conveyance within the meaning of the 55 Geo. 3, c. 184. *Horsfall* v. *Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Assignment of Commission—Mortgage or Conveyance.]—A., an architect, employed to superintend the erection of certain buildings upon commission by deed, assigned to D., a creditor, all the commission to which he then was or might thereafter be entitled in respect of such superintendence, upon trust to pay C. a certain debt due from A., and to retain the residue towards satisfaction of a certain debt due from A. to D., and in which deed were contained a power of attorney to receive the commission, and covenants that A. would pay the debt due to D., would not receive the commission, or revoke the power thereby given, or do any act by which D. might be hindered in receiving payment; that he had a right to assign, had not encumbered, and for further assurance:—Held, that this deed was not a mortgage, but an absolute conveyance of the commission-money; and that a conveyance stamp calculated upon the amount of commission eventually received was sufficient. *Pooley* v. *Goodwin*, 5 N. & M. 466; 4 A. & E. 94.

Assignment of Goodwill.]—An assignment by deed of the goodwill of a trade is a conveyance of property within 13 & 14 Vict. c. 97, Sched., tit. Conveyance, and, as such, is liable to ad valorem duty. *Potter* v. *Inland Revenue Commissioners*, 10 Ex. 147; 23 L. J., Ex. 345; 18 Jur. 778; 2 W. R. 561.

Partnership—Conveyance of Estate and Interest.]—By an indenture reciting that a dissolution of partnership between two partners had taken place, and the share of the retiring partner in the assets of the firm had been found to be a certain specified sum, and an arrangement had been made, by which a portion of that sum was to be paid at once by the continuing partner, and the remainder secured by a mortgage of the partnership assets, the retiring partner conveyed to the continuing partner all his estate and interest in the partnership assets:—Held, that this indenture was a conveyance upon a sale within 13 & 14 Vict. c. 97, Sched., tit. Conveyance, and was chargeable with an ad valorem stamp duty upon the amount of the sum so found to be payable to the retiring partner. *Christie* v. *Inland Revenue Commissioners*, 4 H. & C. 664; 36 L. J., Ex. 11; L. R. 2 Ex. 66; 15 L. T. 282; 15 W. R. 258.

By a deed executed on a dissolution of partnership, which recited that the share of the retiring partner should be taken by those who remained in the firm, and that he should be allowed in account a certain sum of money as an equivalent for the value of his share, it was witnessed that the retiring partner, in consideration of that sum, "part of the moneys and assets of the dissolved co-partnership to the retiring partner so allowed in account, appropriated and paid as aforesaid," conveyed and assigned his share of the partnership assets to the other partners:—Held, that this deed was a conveyance, and therefore liable to an ad valorem duty. *Phillips* v. *Inland Revenue Commissioners*, 36 L. J., Ex. 199; L. R. 2 Ex. 839; 16 L. T. 839.

An assignment for money from one partner to another of his share of the partnership interest in contracts with government, was not a sale of property within 48 Geo. 3, c. 149, and did not require an ad valorem stamp. *Belcher* v. *Sykes*, 9 D. & R. 231; 6 B. & C. 234; 5 L. J. (O.S.) K. B. 93.

Order of Charity Commissioners.]—An order of the charity commissioners appointing new

trustees of a charity and vesting the trust property in them is an instrument relating to two separate and distinct matters within s. 8 of the Stamp Act, 1870, and must be stamped both as a conveyance and as an appointment of new trustees. *Hadgett* v. *Inland Revenue Commissioners*, 3 Ex. D. 46; 37 L. T. 612; 26 W. R. 115.

Concealing Consideration.]—A., being seised in fee of land, agreed with the defendant, a builder, to execute to him a lease of the land, and of a house which it was agreed the defendant should build thereon, for ninety-nine years, at a rent of 9*l.* 5*s.* The defendant was to lay out 600*l.* in building the house. The house having been built, B. contracted to buy for 850*l.* all the defendant's interest in the house and land. The defendant, in order to effect this contract, procured an indenture to be made between himself, A. and B., whereby A. leased the house and land to B. for ninety-nine years, at the rent of 9*l.* 5*s.*, payable to A. The purchase-money was not stated in the lease, which was the principal and only deed whereby the house and land were conveyed:—Held, that the lease to B. was a conveyance upon the sale of land within the schedule of the 55 Geo. 3, c. 184; that duty was payable thereon as upon a conveyance, and that the defendant and B. were liable to penalties for not truly inserting the consideration in the lease. *Att.-Gen.* v. *Brown*, 3 Ex. 662; 18 L. J., Ex. 336. See *Henniker* v. *Henniker*, 1 El. & Bl. 54; 22 L. J., Q. B. 94; 17 Jur. 436.

Sale of Coal in Mine.]—A paper, signed by the defendant, stated that the plaintiff agreed to sell to the defendant upper veins or beds of coal, containing by admeasurement sixteen acres, at the price of 77*l.* per acre, to be paid for as follows:—100*l.* on the day of the date thereof, and the remainder by equal quarterly payments of 25*l.* each. And it was stipulated that if the defendant should work more coal than in any year should exceed 100*l.*, at the rate of 77*l.* per acre, he should pay for such excess:—Held, that the instrument did not require an ad valorem stamp, as upon a conveyance under 55 Geo. 3, c. 184, and that a stamp of 35*s.* was sufficient. *Phillips* v. *Morrison*, 12 M. & W. 740; 13 L. J., Ex. 212; 8 Jur. 343.

Surrender of Copyhold.]—A copy of court roll admitting a surrenderee in trust for the grantee of an annuity there stated to be secured by the bond of the purchaser, and subject thereto, to the use of the purchaser, his executors, administrators and assigns, requires an ad valorem stamp in respect of the purchase money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity, whether the statement is taken to refer to an annuity already granted or to an annuity to be created in futuro. *Doe* d. *Chapman* v. *Reynolds*, 2 N. & M. 383.

Compulsory Redemption.]—By an indenture, between M. of the first part, G. of the second part, a dock company of the third part, and P. of the fourth part, reciting that M. had agreed to sell to the company land for 9,000*l.*, also reciting that G. had agreed to sell the company a pier, and that it was agreed that the consideration for such purchase should be 37,000*l.*, and that 10,000*l.* only should be paid in gross by the company to G., and that 15,000*l.* should be represented by an annual rent-charge of 750*l.*, redeemable on payment of 15,000*l.*, and that 12,000*l.* should be represented by an annual rent-charge of 600*l.*, redeemable on payment of 12,000*l.* (after stating the conveyance from M. to the company for 9,000*l.*), it was witnessed, that in consideration of the rent-charges of 750*l.* and 600*l.* payable to G., and in consideration of 10,000*l.* to G. paid by the company, G. conveyed the pier to P., to the use that G. should receive out of the rents a yearly rent-charge of 750*l.* and 600*l.* The indenture then provided that the company might at any time redeem the rent-charge of 750*l.*, upon payment of 15,000*l.*, after twelve months' notice, and that, after a time, G. might by notice require the company to redeem the rent-charge of 600*l.*, and pay him 12,000*l.* in redemption thereof; and that, if no such notice should be given by G., then that the company might redeem that rent-charge, on payment of 12,000*l.* The commissioners having required this deed to be stamped, under the 13 & 14 Vict. c. 97, Sched., tit. Conveyance, with an ad valorem duty of 230*l.*, as a conveyance upon the sale of property for 9,000*l.* and 27,000*l.*:—Held, that as G. might by his own act compel the company to redeem the rent-charge of 600*l.* by payment of 12,000*l.*, that sum was part of the purchase or consideration-money, within the meaning of the statute, and subject to the ad valorem duty, but that such duty was not payable on the 15,000*l.*, and therefore the stamp must be reduced from 230*l.* to 155*l.* *Gill, In re*, 8 Ex. 376. *S. C.*, nom. *Plymouth Great Western Dock Co.* v. *Inland Revenue Commissioners*, 22 L. J., Ex. 188.

Conveyance by Father to Son.]—Conveyance by a father to son of a freehold estate, reciting "that he (the father) was minded and had resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond or obligation in writing of 1,500*l.* in augmentation of the portions or fortunes of his eight sisters":—Held, that this was not a sale to the son, and that the conveyance did not require an ad valorem stamp. *Doe* d. *Manifold* v. *Diamond*, 6 D. & R. 328; 4 B. & C. 243; 3 L. J. (o.s.) K. B. 211; 28 R. R. 237.

Conveyance of Crops in Trust for Creditors.]—By a deed of assignment five persons conveyed all their crops, goods and effects to trustees, in trust to sell, and with the proceeds, to be produced by such sale, to discharge, first, debts due to the trustees, with interest from the date of the deed; then, debts due to other creditors; with a resulting trust as to the residue to the parties conveying:—Held, that such deed did not require an ad valorem stamp, as upon a conveyance or mortgage, as the former part of that clause operated only on actual sales between vendor and vendee; and that this deed fell within the exception in the latter part of the clause, viz. "where such conveyance shall be made for the benefit of creditors generally," and therefore that a common deed stamp was sufficient. *Coates* v. *Perry*, 6 Moore, 188; 3 Br. & B. 48. And see *Whitwell* v. *Dimsdale*, Peake, 224.

Fixtures.]—The word "fixtures" means the right of severance of chattels attached to the

soil, but not part of the freehold. A transfer of "fixtures" is, therefore, at least, the transfer of the right of severance; and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves or not, it is a conveyance within the words of the 55 Geo. 3, c. 184, which includes the "transfer of any right"; and as fixtures are not goods, wares and merchandise, it is not within the exemption. *Horsfall* v. *Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Sale of Annuity.]—A., being entitled during his life to the dividends of bank annuities, and B. being entitled to the stock at the death of A., it was agreed between them, that, in consideration of A.'s permitting B. to sell out the stock, the latter should pay to A., during his life, an annuity equivalent to five per cent. on the principal money produced by the sale of the stock, and that, as a security for the payment of the annuity, B. should assign to A. a policy of assurance on goods on a voyage to India. By a deed reciting these facts, and that the stock had been sold out and produced a given sum, which had been paid to B., the latter bargained, sold, and assigned to A. the policy, and covenanted that in case no money should be produced by the policy he would, within one month after his return from the voyage he was about to make to India, pay to A. a sum of money, which, when invested in stock, would produce an annuity equal in amount to five per cent. on the principal money produced by the sale of the stock:—Held, that the deed did not require an ad valorem stamp, the transaction described in it not being a sale of an annuity within the meaning of the words in the 55 Geo. 3, c. 184, Sched. Part 1, and the assignment of the policy not being a conveyance of property within the meaning of that word in the same statute. *Blandy* v. *Herbert*, 9 B. & C. 396; 7 L. J. (o.s.) K. B. 223.

By a marriage settlement, the defendant, in consideration of 4,000*l.* paid by the father of the intended wife as a marriage portion, and in consideration of the marriage, covenanted to pay an annuity of 800*l.* a year to the plaintiff, to the use of the intended husband and wife during their joint lives:—Held, that the deed did not require a 45*l.* ad valorem stamp as upon the sale of an annuity. *Massey* v. *Nanney*, 3 Bing. (N.C.) 478; 4 Scott, 258; 6 L. J., C. P. 185.

Partition Deed.]—The 48 Geo. 3, c. 149, s. 22, incorporated into 55 Geo. 3, c. 184, applied only to sales of lands, properly so called, and did not extend to a deed of partition between several members of a family, by which the entirety of lands is conveyed to one of the parties in lieu of his undivided share in those and other lands, and in consideration of a sum of money paid by him for equality of partition. *Henniker* v. *Henniker*, 1 El. & Bl. 54; 22 L. J., Q. B. 94; 17 Jur. 436.

"Property locally situate" Abroad — Exemption.]—Under an agreement made between the appellants and an American firm of soap manufacturers the appellants agreed to purchase the freehold works of the firm and all the furniture, machinery, and stock-in-trade, and also the goodwill of the business and all the trade marks and names used in connection therewith. The vendors were the owners of a trade mark relating to their soap. This trade mark, which was registered in England, they circulated extensively throughout the United Kingdom in newspapers and otherwise as part of pictorial advertisements, by means of which a considerable demand for the soap had been created. The vendors did not sell to retail dealers in England, but the greater part of their sales were made to a syndicate in England, who resold to retail vendors:—Held, that the trade mark and goodwill were not property "locally situate without the United Kingdom," within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that the agreement was therefore chargeable with ad valorem stamp duty with regard to them. *Brooke* v. *Inland Revenue Commissioners*, 65 L. J., Q. B. 657; [1896] 2 Q. B. 356; 44 W. R. 670.

A patent granted in New South Wales, and a sole licence to use in a district of that colony an invention protected by the patent, are respectively "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, but are not "locally situate out of the United Kingdom" within the exception contained in the subsection; and therefore an agreement made in England for the sale of such licence and a half-share in the patent is chargeable with the same ad valorem stamp duty as a conveyance of sale. *Smelting Co. of Australia* v. *Inland Revenue Commissioners*, 66 L. J., Q. B. 137; [1897] 1 Q. B. 175; 75 L. T. 534; 45 W. R. 203; 61 J. P. 116—C. A.

A conveyance executed in England upon a sale of land in Australia requires an ad valorem stamp. *Wright* v. *Inland Revenue Commissioners*, 11 Ex. 458; 25 L. J., Ex. 49.

Where no Property passed.]—By an indenture between a company and a licensee, in consideration of 7,500*l.*, of which the sum of 1,500*l.* was paid, and the remainder was to be paid in monthly instalments of 1,000*l.*, the company granted to the licensee "the sole and exclusive right, licence, and authority to carry on with the asphalte of or to be supplied by the company, but not with any other asphalte, the business of asphalte paving, and of therein and otherwise using, vending and dealing in asphalte, and of an asphalte company or asphalte business generally, within the counties of Lancaster and Chester," during the continuance of the company's concessions. The company covenanted to supply the licensee with asphalte, but was not to be bound to prevent the use or sale of asphalte within these counties by any other person, excepting only the use or sale of such asphalte as was agreed to be supplied under the contract, either by the company or by persons purchasing from the company; and the licensee agreed, during the continuance of the licence, not to use, sell, or deal within these counties in any other asphalte than that to be supplied by the company. The licensee covenanted to pay the remaining 6,000*l.* by six monthly instalments of 1,000*l.*, and if he should assign the licence, to pay the whole of the remaining instalments on the expiration of two months from the date of the assignment:—Held, first, that the deed was not chargeable as a conveyance on sale, no property being in fact conveyed by it. *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners*, 41 L. J., Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.

Held, also, that if it had been so chargeable one duty only could have been charged in respect of the 7,500*l.*, and not a second duty in respect of

the covenant to pay by instalments the 6,000*l.* remaining unpaid. *Ib.*

Assignment with Power of Sale.]—A warrant of attorney was given in November, 1840, to secure 1,000*l.* with interest. On the 13th October, 1841, the debtor executed, by way of further security, a deed of assignment of goods, with a power of sale, to secure the 1,000*l.* with interest, from the 30th November, 1840, being the day up to which the interest on the principal debt had been paid:—Held, that this assignment required a common deed stamp only. *Pierpoint* v. *Gower*, 5 Scott (N.R.) 605; 4 Man. & G. 795: 2 D. (N.S.) 652; 12 L. J., C. P. 55.

Transfer of Mortgage—Several Deeds.]—By 24 & 25 Vict. c. 91, s. 30, where there are several deeds upon the transfer of a mortgage from old to new trustees, if one of the deeds be stamped with the duty of 1*l.* 15*s.* it shall be sufficient that the others are stamped with the duty on a duplicate or counterpart, viz. 5*s.* The 28 & 29 Vict. c. 96, s. 17, after reciting that certain duties on the transfers of mortgages were imposed by 13 & 14 Vict. c. 97, enacts that in lieu thereof the duty of 6*d.* shall be payable on every 100*l.* or fractional part of 100*l.* transferred:—Held, that 24 & 25 Vict. c. 91, s. 30, was not repealed by 28 & 29 Vict. c. 96, s. 17, and that it was sufficient that one of the deeds was stamped with the duty of 1*l.* 15*s.* and the others with that of 5*s.* *Foley* (*Lord*) v. *Inland Revenue Commissioners*, 37 L. J., Ex. 109; L. R. 3 Ex. 263; 18 L. T. 725; 16 W. R. 1055. *See* infra, MORTGAGE.

Several Transferors and Objects.]—A deed executed by four persons entitled to personal estate under a will, purporting to operate as a transfer and release to each of the four (by two of them who were the executors, in pursuance of an agreement for partition) of shares in various railway companies forming part of a testator's estate is chargeable with only four stamp duties of 30*s.* each under 55 Geo. 3, c. 185, Sched. tit. Transfer, notwithstanding that the effect of the deed may be to vest in each of the four persons stock in eight or nine different companies. *Freeman* v. *Inland Revenue Commissioners*, 40 L. J., Ex. 85; L. R. 6 Ex. 101; 24 L. T. 323; 19 W. R. 590.

Joint Conveyance — Separate Interests.]—A deed, by which several persons jointly convey their separate interests in shares in an incorporated company, does not require several stamps, but one ad valorem stamp is sufficient. *Wills* v. *Bridge*, 4 Ex. 193; 18 L. J., Ex. 384.

Such a deed is not a deed of transfer, and is properly chargeable with one 35*s.* stamp duty only. *Ib.*

—— **Assignment of Prize-money.**]—An assignment of the prize-money of several seamen on board a privateer, being payable out of one fund, only requires one stamp. *Baker* v. *Jardine*, 13 East, 235, n.

Alteration of Name of Transferee.]—A deed transfer of shares was executed by A., the vendor, with the name of B. inserted as the purchaser; before any execution of the deed by B., it was arranged that C., instead of B., should be the purchaser; whereupon the name of B. being struck out and that of C. substituted, A. re-executed the altered deed:—Held, that the deed was so far completed as between A. and B. that it could not operate as a conveyance to C. without a new stamp. *L. B. & S. C. Ry.* v. *Fairclough*, 2 Man. & G. 674; 3 Scott (N.R.) 68; 2 Railw. Cas. 544; 10 L. J., C. P. 133.

XV. COPY OR EXTRACT.

"Copy."]—A stamp is only necessary on such copies as are evidence per se: "copy" meaning in the Stamp Act an authenticated copy receivable as evidence in the first instance. *Braythwaite* v. *Hitchcock*, 10 M. & W. 494; 2 D. (N.S.) 444; 12 L. J., Ex. 38; 6 Jur. 976.

Examined Copy of Court Rolls.]—An examined copy of court rolls is admissible to prove a surrender of copyhold lands without being stamped; the provision in 55 Geo. 3, c. 184, as to copies of court rolls, applying only to such copies as are given out and signed by the stewards. *Doe* d. *Burrows* v. *Freeman*, 12 M. & W. 844; 1 Car. & K. 386; 14 L. J., Ex. 142.

Attested Copy of Deed.]—An attested copy of a deed on a one-shilling stamp is admissible as secondary evidence. *Ditcher* v. *Kenrick*, 1 Car. & P. 161.

XVI. DEED.

Sufficiently Stamped under Act in Force at Date—Wrong Date.]—A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:—Held, on the construction of 33 & 34 Vict. c. 97, ss. 15—17, that the deed could not be admitted in evidence. *Clarke* v. *Roche*, 47 L. J., Q. B. 147; 3 Q. B. D. 170; 37 L. T. 633; 26 W. R. 112. See *Deakin* v. *Penniall*, 2 Ex. 320; 17 L. J., Ex. 217.

Improper Denomination.]—Articles of agreement under seal could not be given in evidence, unless stamped with a deed stamp, although the agreement stamp was of the same value, but differently formed. *Robinson* v. *Drybrough*, 6 Term Rep. 317; 1 Esp. 243. And see *Chamberlain* v. *Porter*, 1 Bos. & P. (N.R.) 34; *Farr* v. *Price*, 1 East, 55; 5 R. R. 515; *Taylor* v. *Hague*, 2 East, 414.

Not otherwise Charged.] — An instrument which is sealed, but which merely amounts to an agreement for a lease, required a 1*l.* 15*s.* stamp as a deed not otherwise charged, by 55 Geo. 3, c. 184. *Clayton* v. *Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

A lease at a rent of 50*l.* providing that the landlord should insure and that the premiums should be added to the rent and payable in the same manner as rent, is not a "deed not otherwise charged" and a lease stamp of 30*s.* is sufficient. *Wilson* v. *Smith*, 12 M. & W. 401; 1 D. & L. 633; 13 L. J., Ex. 113.

Articles of agreement by which one party agreed to pay the other a fixed salary, and they were mutually bound in a penalty of 600*l.* to perform the agreement, required only a 1*l.* 15*s.*

stamp. *Mounsey* v. *Stevenson*, 7 B. & C. 403; 6 L. J. (O.S.) K. B. 119.

A release to the surviving partners in a firm by the executors of a deceased partner, of all the freehold, copyhold, and leasehold property held by the firm, expressing no consideration for the conveyance upon the face of it, is sufficiently stamped with a common deed stamp. *Steer* v. *Crowley*, 14 C. B. (N.S.) 337; 32 L. J., C. P. 191; 9 Jur. (N.S.) 1292; 11 W. R. 861.

An assignment by indenture of a judgment debt does not require an ad valorem stamp, but must have the ordinary deed stamp. *Warren* v. *Howe*, 3 D. & R. 494; 2 B. & C. 281; 2 L. J. (O.S.) K. B. 8.

—— **Assignment of Lease.**]—See *Baker* v. *Gosling*, post, col. 352.

Licence to use Patent.]—The plaintiff, having agreed to sell to the defendant the permission to use a patent furnace, delivered to him the following document under his hand and seal: "I, J. C., patentee and proprietor of the invention known as 'Chanter and Co.'s Patent for Improvements in Furnaces,' do, by virtue of the King's letters-patent, in consideration of 33*l.* to be paid by J. & Co., give and grant to J. & Co. full and free licence, consent and permission to erect and use, upon and at certain premises, one patent furnace to a 30-horse steam boiler, for which the letters patent have been granted. As witness my hand at London, J. C." :—Held, that the licence was not a deed, and, therefore, did not require a stamp. *Chanter* v. *Johnson*, 14 M. & W. 408; 14 L. J., Ex. 289.

Alteration.]—Deeds altered by consent require restamping. —— v. *Lee*, 2 Eq. Abr. 414.

But where a deed is altered after execution by the grantor and before execution by the grantee, a new stamp is not necessary. *Jones* v. *Jones*, 1 C. & M. 721; 3 Tyr. 890; 2 L. J., Ex. 249. See *Spicer* v. *Burgess*, 1 C. M. & R. 129; 4 Tyr. 598; 3 L. J., Ex. 285.

Immaterial alterations do not require the document to be restamped. *Hartley* v. *Manson*, 4 Man. & G. 172; 1 D. (N.S.) 711; 11 L. J., C. P. 199.

Several Parties.] — One stamp as for one annuity is sufficient, though part of the consideration-money belonged to a third person, and was paid by the hands of the grantee's agent. *Cook* v. *Jones*, 15 East, 237.

By a deed, reciting that the parties of the first part had encroached upon a common, and were in possession of their several encroachments, and that they had agreed to relinquish, release and convey all and singular their several and respective estates and interests therein to the parties of the third part; it was witnessed, that in consideration of 10*s.* to each of them, paid by the parties of the third part, they and each and every of them granted, bargained, sold and assigned to the parties of the third part, the several premises, describing them:—Held, that, there being a community of interest in the subject-matter of the conveyance in all the conveying parties, one stamp only was necessary. *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; 2 C. L. R. 347; 23 L. J., C. P. 57; 18 Jur. 468.

An indenture, where several persons jointly convey their separate interests in certain shares in an incorporated company, does not require several stamps, but one ad valorem stamp is sufficient. *Wills* v. *Bridge*, 4 Ex. 193; 18 L. J., Ex. 384.

A deed in which several persons combine to effect a common purpose requires only a single stamp. *Allan* v. *Morrison*, 3 M. & Ry. 70; 8 B. & C. 565; 7 L. J. (O.S.) K. B. 106.

Two Considerations.]—A feoffment in consideration of natural affection, and also of 10*s.* does not, under 55 Geo. 3, c. 184, require two separate stamps of 1*l.* 15*s.* each. *Doe* d. *Wheeler* v. *Wheeler*, 4 N. & M. 10; 2 A. & E. 28; 4 L. J., K. B. 58.

Where an annuity was granted by deed, and the grantee contracted with various persons to advance a portion of the consideration, and to receive in return a proportionate part of the annuity:—Held, that the deed only required a stamp in respect of the aggregate sum paid for the annuity; and that it need not be the aggregate of the stamps required on each of the annuities into which it was divided. *Hogarth* v. *Penny*, 14 M. & W. 495; 14 L. J., Ex. 345.

Containing Collateral Matters.]—Where a document has a double object, and has an unappropriated stamp on it large enough for it in either sense, it is admissible when offered to establish one of its objects. *Walker* v. *Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588.

A deed of settlement of a company declared that all transfers of shares not made conformably thereto, and according to the regulations of the directors, should be invalid; and that every transferee should, if required by the directors, execute a deed whereby he would enter into covenants with the trustees to observe all the stipulations for the time being affecting the holders of shares. In pursuance of regulations by the directors, a transfer deed contained the following covenant by the transferee; "I., J. S. C., do hereby covenant with W. H., and also separately with the trustees of the company, that I will abide by and perform all the rules and regulations in respect of the same shares":—Held, that the deed did not require a further stamp duty, as a deed containing other matter besides what was incident to the sale and conveyance of the property sold, or relative to the title thereto, in pursuance of 55 Geo. 3, c. 184. *Wolseley* v. *Cox*, 2 Q. B. 321; 11 L. J., Q. B. 9; 6 Jur. 599.

A deed, conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds under 55 Geo. 3, c. 184; and one stamp is sufficient. *Doe* d. *Hartwright* v. *Fereday*, 4 P. & D. 287; 12 A. & E. 23; 11 L. J., Q. B. 19.

In proving title in ejectment, a deed in conveyance, duly stamped, was produced, which purported to have been executed by power of attorney, but no power of attorney was proved or produced. On the same parchment was a writing bearing a later date, which was a confirmation of the former instrument and also a substantive conveyance; this instrument was not properly stamped as a conveyance:—Held, that an additional conveyance stamp was not necessary. *Doe* d. *Priest* v. *Weston*, 1 G. & D. 524; 2 Q. B. 249; 11 L. J., Q. B. 17; 6 Jur. 601.

A party, having purchased an estate, agreed with the vendor, that such estate should be sur-

rendered to a third party, who had advanced a portion of the purchase money, such third party holding the estate by way of security for the amount of the loan :—Held, that a deed carrying out these objects only amounted to one deed, and was subject, therefore, only to one stamp. *Rushbrook* v. *Hood*, 5 C. B. 131 ; 17 L. J., C. P. 58 ; 11 Jur. 931.

Indorsements.]—A memorandum on the back of a deed, altering some of the terms therein contained, does not require to be stamped. *Herne* v. *Hale*, 3 Esp. 227.

But where an indorsement (not memorialised), containing a clause of redemption (bearing date after the deed), had not been made prior to the execution of it, it could not be received in evidence for want of being stamped. *Schumann* v. *Weatherhead*, 1 East, 537. And see *Lyburn* v. *Warrington*, 1 Stark. 162.

——**Progressive Duties.**]—The indorsement on a deed of exchange of the names of the executing parties, and the date, &c., is no part of the instrument itself, and therefore it was not to be taken into calculation with a view to the progressive stamp duty imposed by 55 Geo. 3, c. 184, schedule, part 1, tit. Exchange. *Winder* v. *Fearon*, 7 D. & R. 185 ; 4 B. & C. 663 ; 4 L. J. (o.s.) K. B. 37.

XVII. FOREIGN BONDS AND AGREEMENTS.

Bonds.]—A company incorporated in America and having its chief seat of business at New York, issued a parcel of their bonds at a certain price to a banking firm in that city, who contracted to purchase them. The bonds were transmitted by the firm to their agents in London with instructions, in pursuance of which the agents published a prospectus announcing the issue and inviting subscriptions for the bonds. One of the bonds having been afterwards allotted to an applicant in England :—Held, that, although thus disposed of on the English market by means of a prospectus, the bond was not a foreign security issued in the United Kingdom within 34 Vict. c. 4, s. 1, and was therefore not liable to the stamp duty imposed on such an instrument by 33 & 34 Vict. c. 97. *Grenfell* v. *Inland Revenue Commissioners*, 45 L. J., Ex. 465 ; 1 Ex. D. 242 ; 34 L. T. 426 ; 24 W. R. 582.

A bond for foreign stock signed in Paris, but issued in England, did not require an English stamp before the passing of 25 Vict. c. 22. *Yrisarri* v. *Clement*, 2 Car. & P. 223.

Coupons not attached to Original Security—Bill of Exchange — Exemptions.] — Foreign government bonds payable in London contained no time for repayment, but were provided with a talon and interest coupons for ten years, the talon stating that the government would deliver to the bearer at the end of that term another talon and new interest coupons. Such new coupons are liable to the payment of stamp duty of one penny applicable to bills of exchange payable on demand. *Rothschild* v. *Inland Revenue Commissioners*, [1894] 2 Q. B. 142 ; 10 R. 204 ; 70 L. T. 667 ; 42 W. R. 542 ; 58 J. P. 399.

Agreement.]—An agreement made between two persons residing in Calcutta, relating to property in Calcutta, need not necessarily be written on stamped paper. *Gilchrist* v. *Herbert*, 26 L. T. 381 ; 20 W. R. 348.

Articles of a foreign ship made abroad, regulating the wages of the sailors, even where the sailor had been hired in London, and which articles are lodged with the consul in London, may be given in evidence of the agreement for the hiring and wages to the sailor without being stamped. *Winbled* v. *Malmberg*, 1 Esp. 454.

Where a paper, purporting to be an agreement is entered into out of England, and an action brought on it, it need not be stamped. *Ximenes* v. *Jaques*, 1 Esp. 311 ; 6 Term Rep. 499.

A conveyance executed in England upon a sale of land in Australia, requires an ad valorem stamp. *Wright* v. *Inland Revenue Commissioners*, 11 Ex. 458 ; 25 L. J., Ex. 49.

XVIII. LEASE.

1. When Stamping Necessary.

Crown Leases.]—A lease from the board of ordnance, which purported to be signed, sealed and delivered, being first duly stamped, was not stamped :—Held, that being a lease from the crown, it was not necessary that it should be stamped. *Petrie* v. *Lamont*, Car. & M. 93.

Alteration or Addition after Execution.]—An alteration of a lease, to which others besides the lessor and lessee are parties, after the execution of it by such third parties, but before the execution by the lessor and lessee, does not avoid it. *Hall* v. *Chandless*, 12 Moore, 316 ; 4 Bing. 123.

By a lease between W. and S., indorsed on a prior lease between the same parties, reciting that, in consideration of money laid out upon the premises by W., S. had agreed to pay a further rent, it was witnessed that, in consideration of the rent reserved by the withinwritten indenture, and of the covenants, provisoes and agreements therein contained, and also in consideration of the further yearly rent, W. demised to S. the premises for the residue of the term granted by the withinwritten indenture, subject to the provisoes, covenants and agreements therein contained, yielding the rent, in addition to the rent reserved by the same indenture :—Held, that the original lease did not require an additional stamp on account of the lease indorsed upon it, and that the indorsed lease did not require a progressive duty, within 55 Geo. 3, c. 184, schedule, part 1, Deed. *Weedon* v. *Woodbridge*, 13 Jur. 630, n.

Agreement contained in.]—If a lease in writing contains a contract for the purchase of goods, it cannot be given in evidence to prove the sale of the goods, unless it has a lease stamp, although it has an agreement stamp. *Corder* v. *Drakeford*, 3 Taunt. 382.

By articles of agreement, signed by the plaintiff, W., and the defendant, the plaintiff let to W. a public-house, from year to year, at a certain rent, and W. agreed to buy of the plaintiff all the beer, &c., which should be consumed on the premises during the time, or to pay 30*l.* in liquidated damages for every barrel bought from any other person, and to pay monthly for the beer, &c., bought from the plaintiff ; and the defendant agreed "to hold himself responsible for any account of money which might become due from W. to the amount of 36*l.*" :—Held, that an agreement stamp was necessary, in addition to a lease

stamp. *Wharton* v. *Walton*, 7 Q. B. 474; 14 L. J., Q. B. 321.

Collateral Matters.]—An agreement which might amount to a lease, not stamped as such, is an admission by the tenant on a matter collateral to the lease, and relating to a valuation, the subject of the action. *Walker* v. *Atkinson*, 1 F. & F. 465.

Where a document, void as a lease, is tendered to show the terms of a collateral agreement, it requires a stamp as an agreement. *Golden* v. *Taylor*, 2 F. & F. 110.

Invalid Document.]—A lease in writing, not by deed, void under the 8 & 9 Vict. c. 106, s. 3, did not require a stamp. *Mott* v. *Turnage*, 1 F. & F. 6.

An agreement that A. is to have a tenement for life, does not require a lease stamp, the document not being under seal, and therefore not operating to pass an estate for life. *Stone* v. *Rogers*, 2 M. & W. 443; M. & H. 146; 6 L. J., Ex. 145; 1 Jur. 455.

Admissions or Acknowledgments.]—A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding 20*l.*, which B. admits to be due from him as tenant to A., until a future day, B. declares that, in case of default, it shall be lawful for A. to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible to prove the tenancy, without a stamp. *Hill* v. *Ransom*, 5 Man. & G. 789; 6 Scott (N.R.) 571; 12 L. J., C. P. 275.

Agreement as follows:—"I, W. E., acknowledge that I am indebted to B., as agent of S., my landlord, in 22*l.*, for arrears of rent for the cottage in my occupation; and I now pay B. 5*l.* on account and in part of such rent, and undertake to pay him 8*l.* per annum, by quarterly payments," does not require a lease stamp. *Eagleton* v. *Gutteridge*, 2 D. (N.S.) 1053; 11 M. & W. 465; 12 L. J., Ex. 359.

An instrument in these terms: "I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him immediate possession at any time he may require," does not amount to an agreement for a tenancy, so as to require a stamp. *Barry* v. *Goodman*, 2 M. & W. 768; M. & H. 108; 6 L. J., Ex. 188.

Agreements for.]—A. being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the court of chancery against the latter. A. then signed the following instrument: "I hereby attorn and become tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon":—Held, that this was an agreement to become tenant, and required a stamp. *Cornish* v. *Searell*, 8 B. & C. 471; 1 M. & Ry. 703; 6 L. J. (O.S.), K. B. 254.

A. and B. entered into the following agreement with C.:—"We agree to hire your cottages and premises, from the 27th of September next, at the rent of 40*l.* per annum, payable quarterly, free from all deductions, and agree to pay 10*l.* on the 30th of October; and in case any quarter's rent shall be in arrear, and unpaid for fourteen days we engage to quit possession, upon a notice to that effect, giving us seven days further time, being left upon the premises; and in the event of our non-compliance with such notice, we authorise you or your agent to clear the premises, as if you were the occupier, and to resume the possession accordingly, without the aid of legal authority; this right to be without prejudice to any remedy for enforcing payment of the rent that may be in arrear; and further, we engage to preserve the mills, cottages and premises from damage, and to deliver them in good condition, together with all fixtures belonging to you when our tenancy expires, reasonable wear and tear being allowed us." In an action for rent due under this agreement:—Held, that it did not require a lease stamp. *Glen* v. *Dungey*, 4 Ex. 61; 18 L. J., Ex. 359.

The following letter was produced in an action for the hire of furnished apartments, stamped with a 30*s.* stamp:—"I hereby agree (according to our conversation of last evening) to pay you for the occupation of your first floor, furnished, from Monday, March 4, 1839, to September the 4th, 1839, 52*l.* 10*s.* I also agree either to occupy the rooms from the 4th September to the 4th December, furnished, on the same terms, viz. 26*l.* 5*s.* for three months, or take them unfurnished at the rate of 84*l.* per annum." In order to explain, as he contended, that letter, the defendant put in a second, which was not stamped:—Held, inadmissible; for, if treated as a separate and an independent agreement, it should have had a 30*s.* stamp; and if the terms of the agreement were to be collected from the two letters, a 35*s.* stamp would be requisite on one of them by virtue of the 55 Geo. 3, c. 184. *Atherstone* v. *Bostock*, 2 Scott (N.R.) 637; 2 Man. & G. 511; 10 L. J., C. P. 113.

Under 23 Geo. 3, c. 58, a lease must be stamped as a lease by deed, though it was not by deed; for, though not by deed, it fell within the words of the act which required a stamp to leases, enumerated among other specialities. *Goodtitle* d. *Estwick* v. *Way*, 1 Term Rep. 737. S. P., *Harker* v. *Birkbeck*, 3 Burr. 1556; 1 W. Bl. 482.

An instrument which is sealed, but which merely amounts to an agreement for a lease, requires a 1*l.* 15*s.* stamp, as a deed not otherwise charged. *Clayton* v. *Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

To prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house, at 11*l.* per annum. The witness stated that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, on purpose to bind her husband, the husband not being present; but that the entry was not signed by the witness or his father, nor did their name appear in any part. He further stated that he had no memory of these things but from the book, without which he could not of his own knowledge be able to speak to the fact; but, on reading the entry, he had no doubt that the fact really happened:—Held, that the entry was neither a lease nor an agreement for a lease within the Stamp Act. *Rex* v. *St. Martin, Leicester*, 4 N. & M. 202; 2 A. & E. 210; 4 L. J., M. C. 25.

An agreement of demise, the terms of which have been assented to by the parties to it, although it has not been signed by them, is not admissible unstamped. *Chadwick* v. *Clarke*, 1 C. B. 700; 14 L. J., C. P. 233; 9 Jur. 539.

A., being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, "that A. should manage the farm for B., B. allowing A. 12*s*. a week, and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months' notice, or three months' wages:—Held, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. *Doe* d. *Hughes* v. *Derry*, 9 Car. & P. 494.

The following document is a mere agreement for a future tenancy, not an actual demise, under 55 Geo. 3, c. 184, and, therefore, properly stamped with a 1*l*. stamp:—"Memorandum of an agreement entered into this 31st of January, 1840, between B. and J. J. agrees to become the tenant of G. farm, at the customary time of entry, under the following conditions: viz. that 260*l*., annual rent, shall be paid at the usual time for the house, premises and lands as agreed upon; and B. agrees to lay out, in the improvement and alteration of the farmhouse and new sheds, a sum not exceeding 200*l*., with the understanding that spars for rafters shall be found from the estate. Cartage for all materials, except stones for walls, to be done or found by J." *Gore* v. *Lloyd*, 12 M. & W. 463; 13 L. J., Ex. 366.

—— **Paper Signed by Auctioneer.**]—A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, was necessary to be stamped, pursuant to 48 Geo. 3, c. 149. *Ramsbottom* v. *Mortley*, 2 M. & S. 445; 15 R. R. 304.

But a similar paper, not signed by the auctioneer nor any of the parties, is not such a minute of the agreement as was required to be stamped by the same statute, nor such a writing as would exclude parol evidence. *Ramsbottom* v. *Tunsbridge*, 5 M. & S. 434; 15 R. R. 302.

—— **Parol—On Terms of Lease.**]—Where there was a parol agreement to demise certain premises upon the terms and conditions contained in a lease of the same premises, granted by the lessor to another person:—Held, in an action by the lessor against the lessee for rent and non-repair, that the lease could not be read in evidence unless it was stamped. *Turner* v. *Ford*, 7 B. & C. 625; M. & M. 131; 6 L. J. (O.S.) K. B. 122.

—— **Of the Value of £20, now £5.**]—An agreement in the following form:—"I., J. T., hereby agree with W. M. to retake of him two acres of land, from the 10th October, 1840, at which time my tenancy expires, until the 25th of March, 1841, for 10*l*."; with a promise by J. T. to allow W. M. to plant fruit-trees, and to deliver up possession at the end of the time; signed by J. T., but not by W. M., is neither a lease nor an agreement in which the matter is of the value of 20*l*.; and, therefore, requires no stamp. *Doe* d. *Marlow* v. *Wiggins*, 3 G. & D. 504; 4 Q. B. 367; 12 L. J., Q. B. 177; 7 Jur. 529.

An agreement dated April 14th, 1804, not under seal, between M. and N. that N. shall rent of M. the ferry called D. for 6*l*. 6*s*. per annum, to be paid half-yearly, for which N. is to have the sole use of the ferry and whatever profit may accrue from it for the time he holds the same. "Be it also remembered, that N. has this day bought of M. the great ferry-boat for 20*l*., of which 5*l*. shall be paid," &c.; by instalments of 5*l*., to be paid yearly, on April 6th, the first in 1805:—Held, first, that the instrument purporting to convey an incorporeal hereditament was not a lease, because not under seal, and therefore did not require a lease stamp. *Mayfield* v. *Robinson*, 7 Q. B. 486; 14 L. J., Q. B. 265; 9 Jur. 826.

Held, secondly, that, as an agreement for a lease, it was not subjected to duty by the clause of 55 Geo. 3, c. 184, exempting agreements for leases under the yearly rent of 5*l*., for that a duty could not be imposed by implication from this exempting clause. *Ib*.

Held, thirdly, that, if the rent only was considered, the subject-matter of the agreement was not of the value of 20*l*., and therefore no stamp was necessary. *Ib*.

Held, fourthly, that the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct and separate memorandum of a bygone purchase of goods, and in itself subject to no stamp duty. *Ib*.

—— **Rack-rent under £5.**]—By 55 Geo. 3, c. 184, schedule, tit. Agreement, a memorandum or agreement for granting a lease or tack, at rack-rent, of any messuage, land, or tenement, under the yearly rent of 5*l*., is exempted from duty. An agreement for a lease of premises, though under 5*l*. per annum, is not within this exception, if the interest agreed for is a beneficial one, as a building lease. *Doe* d. *Hunter* v. *Boulcot*, 2 Esp. 595.

On Surrender.]—A deed, purporting to be a surrender of a lease, and made in consideration of 120*l*., and of a new lease to be granted of the premises at an increased rent, was stamped with a 1*l*. 15*s*. stamp:—Held, that it did not also require an agreement stamp, as the agreement for the new lease was part of the conveyance, and incident thereto. *Doe* d. *Philipps* v. *Philipps*, 3 P. & D. 603; 11 A. & E. 796. See *Weddall* v. *Capes*, 1 M. & W. 50; 1 Tyr. & G. 430; 5 L. J., Ex. 111.

Where an instrument which was offered in evidence to show a disclaimer, contained terms amounting to a surrender:—Held, that it required a stamp. *Doe* d. *Wyatt* v. *Stagg*, 5 Bing. (N.C.) 564; 7 Scott, 690; 9 L. J., C. P. 73; 3 Jur. 1127.

On Assignment.]—A deed executed by the defendant only, which when executed was intended by the parties to be the counterpart of a lease, and was stamped with a duty of 1*l*. 10*s*.; but the grantor having thereby parted with all his interest in the premises, the original deed became by operation of law an assignment:—Held, that the deed so tendered was not admissible for the purpose of proving an assignment, the proper stamp being 1*l*. 15*s*., under the general clause to the 55 Geo. 3, c. 184, applicable to "deeds of any kind, not otherwise charged, or expressly exempted from stamp duty." *Baker* v. *Gosling*, 1 Scott, 58; 1 Bing. (N.C.) 246; 4 L. J., C. P. 31.

Counterparts.]—A lessee who has executed a counterpart of a lease cannot object to its admissibility in evidence on the ground that the lease itself is not stamped. *Paul* v. *Meek*, 2 Y. & J. 116; 31 R. R. 559.

In an action for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—Held, that, although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes* v. *Clark*, 10 C. B. 905; 15 Jur. 430.

2. AMOUNT—CONSIDERATION.

Expressed Amount.]—The stamp required by 55 Geo. 3, c. 184, for a lease, is regulated by the consideration (whether fine or rent) expressed to be paid, and not by that which is actually paid. *Doe* d. *Keppel* v. *Lewis*, 10 B. & C. 673; 8 L. J. (O.S.) K. B. 300.

The ad valorem stamp duty on a lease is to be regulated by the consideration appearing on the face of it, although it may not be that which is actually paid. *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

The ad valorem duty is only payable on the consideration passing from the lessee to the lessor. *Boone* v. *Mitchell*, 1 B. & C. 18; 1 L. J. (O.S.) K. B. 25.

Primary Character—Lease or Agreement.]—The proper stamp to be borne by a written instrument must depend upon what is the leading character of such instrument. *Price* v. *Thomas*, 2 B. & Ad. 218. *S. C.*, nom. *Pratt* v. *Thomas*, 4 Car. & P. 554.

By an indenture, in the form and containing the usual covenants of a lease, A. demised premises to B., and B. and C. covenanted to pay the rent, but C. was not otherwise referred to in the instrument. In an action against C. on the covenant to pay rent:—Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary. *Ib.*

Option to Purchase contained in.]—By an instrument in writing not under seal, reciting that D. had purchased a piece of ground with four messuages built thereon, in one of which the plaintiff resided, it was agreed that the plaintiff should continue to reside therein during the residue of D.'s interest therein, provided the plaintiff should so long live, at the annual rent of one shilling; and in the event of his dying during the term, his widow shall reside there on the same terms; and D. further agreed to assign all his interest in the premises so purchased to the plaintiff on payment within seven years of 140*l.*, together with all expenses:—Held, that the instrument required an agreement stamp as well as a lease stamp. *Lovelock* v. *Frankland*, 8 Q. B. 371; 16 L. J., Q. B. 182; 11 Jur. 1035.

It was stated, in an agreement which amounted to a lease, that A. agreed to let premises to B. for two years, at the rent of 50*l.* a year; that B. should have the right of purchasing the premises at any time during the term, it being understood that A. was possessed of the same premises for his own life and the life of M., and the survivor of them:—Held, that a 30*s.* stamp was sufficient. *Worthington* v. *Warrington*, 5 C. B. 635; 17 L. J., C. P. 117.

Rent and Covenant to Complete Houses.]—A lease made in consideration of a rent, and also of a covenant to complete houses, was a lease made "for further or other valuable consideration" besides the rent, within 17 & 18 Vict. c. 83, s. 16, and was chargeable with a deed stamp beyond the ad valorem duty. *Bolton* v. *Inland Revenue Commissioners*, 39 L. J., Ex. 51; L. R. 5 Ex. 82; 21 L. T. 720; 18 W. R. 351. *But see now* the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77, sub-s. 2.

Where a piece of land was demised for ninety-nine years, at an annual rent of 8*l.*, and the lease contained a covenant that the lessee should, within a year from the granting of the lease, build a dwelling-house on the land, and expend 150*l.* at the least upon it:—Held, that a stamp of 1*l.* was sufficient under 55 Geo. 3, c. 184. *Nicholls* v. *Cross*, 14 M. & W. 42; 14 L. J., Ex. 244.

Fine or Premium.]—A person became the purchaser at an auction for 45*l.*, of certain grass herbage for a certain time, under certain conditions in a printed catalogue, which were signed by him, and which were held to amount to a lease: by one of the conditions the highest bidder was to pay a deposit of 10*l.*, and give a note for the residue payable on a subsequent day, and to be entitled to immediate possession. The defendant paid the deposit of 10*l.*:—Held, that the purchase-money was in the nature of a fine or premium, though not payable at once, and fell within the first head of the schedule in 55 Geo. 3, c. 184, tit. "Lease," and, therefore, a 1*l.* stamp was sufficient. *Cattle* v. *Gamble*, 5 Bing. (N.C.) 46; 7 D. P. C. 98; 6 Scott, 733; 1 Arn. 405; 8 L. J., C. P. 162; 2 Jur. 922.

Insurance Premiums.]—An instrument, which operated as a lease, reserved a rent of 50*l.*, but contained a stipulation that the landlord should insure the premises for 1,000*l.*, and that the premiums of insurance should be added to the rent of 50*l.*, and become due and payable in like manner as the rent:—Held, that this was not a "deed not otherwise charged" within 55 Geo. 3, c. 184, *tit.* "Deed," but was properly stamped with an ad valorem lease stamp of 1*l.* 10*s.*, as on a rent exceeding 20*l.*, and not exceeding 100*l.*; and that, if the premiums of insurance, added to the rent, exceeded 100*l.*, it lay upon the party seeking to impeach the instrument to show that they did so. *Wilson* v. *Smith*, 12 M. & W. 401; 1 D. & L. 633; 13 L. J., Ex. 113.

Two Reservations of Rent.]—Where a lease had two distinct reservations of rent, one 37*l.* in respect of house and land, and the other 50*l.* for furniture and fixtures, a stamp of 3*l.*, sufficient to cover the former, but not sufficient for both, was not enough. *Coster* v. *Cowling*, 7 Bing. 456; 5 M. & P. 399.

Peppercorn Rent.]—A lease for a term of forty-five years at a substantial rent for the first twenty-three years, and a peppercorn during the remaining twenty-two, was not a lease "exceeding thirty-five years at a yearly rent" within the meaning of 17 & 18 Vict. c. 83, sched. tit. "Lease," and was not liable to the duty imposed by that statute. *Pearson* v. *Inland Revenue Commissioners*, 37 L. J., Ex. 171; L. R. 3 Ex. 242; 18 L. T. 570; 16 W. R. 984.

A lease for years in consideration of a sum certain, and at a peppercorn rent, did not require an ad valorem stamp. *Roe* d. *Larkin* v. *Chenhalls*, 4 M. & S. 23.

Proper Amount at Date of Stamping.]—Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15*s.*, was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834, under 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—Held, that the proper duty had been paid. *Buckworth* v. *Simpson*, 1 C., M. & R. 834; 5 Tyr. 344; 1 Gale, 38; 4 L. J., Ex. 104.

Proper Consideration not set forth.] — A lease was not void by 48 Geo. 3, c. 149, s. 22, for omitting to set out truly the whole consideration directly or indirectly paid or agreed to be paid, and consequently such a fact would form no defence in an ejectment for a forfeiture. *Doe* d. *Higginbotham* v. *Hobson*, 3 D. & R. 186; 1 L. J. (O.S.) K. B. 224.

The plaintiff granted a lease to the defendant, in consideration of a premium of 40*l.*, and being indebted to the defendant in that amount for work done, a settlement of accounts took place between them, when the defendant was allowed the 40*l.* in account, but no moneys in fact passed. The plaintiff having afterwards sued the defendant for 37*l.* 4*s.* for rent and goods sold, the defendant claimed to set off the 40*l.* as money received for his use, on the ground that it was not expressed in the lease, and therefore he was entitled under 48 Geo. 3, c. 149, s. 24, and 55 Geo. 3, c. 184, to recover it:—Held, that the effect of those statutes is to put leases for a premium on the same footing as conveyances upon a sale, so that in all cases where the consideration is not expressed in the lease, the amount may be recovered back. *Gingell* v. *Purkins*, 4 Ex. 720; 19 L. J., Ex. 129.

A. being seised in fee of land, contracted with B. to execute to him a lease of the land and a house to be built thereon by B. for ninety-nine years at a rent of 9*l.* 5*s.* The house having been built, B. contracted with C. to sell him his (B.'s) interest in the land and house for 850*l.*, which was accordingly paid. In order to effect this contract B. procured an indenture to be made between himself, A. and C., whereby A. demised to C. the house and land for ninety-nine years at the same rent. No mention was made in this instrument of the purchase-money:—Held, that the lease was a conveyance, and B. was liable to the penalties imposed by 48 Geo. 3, c. 149, s. 22, for omitting to set forth the purchase-money. *Att.-Gen.* v. *Brown*, 3 Ex. 662; 18 L. J., Ex. 336. See *Boone* v. *Mitchell*, 1 B. & C. 18; 1 L. J. (O.S.) K. B. 25.

3. Several Subject-matters and Parties.

Subject-matters.]—The plaintiff demised a slate-pit at S. and stone quarries at M. to the defendant under an indenture of lease, to hold the one from Lady-day, 1815, and the others from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate-pit and 130*l.* for the quarries:—Held, that all the premises might be demised by one indenture of lease, and that one ad valorem stamp on the aggregate amount was sufficient under 55 Geo. 3, c. 184, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue. *Boase* v. *Jackson*, 6 Moore, 480; 3 Br. & B. 185.

A lease contained a demise of two separate farms, with two habendums, differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—Held, that one ad valorem stamp for the amount of both rents was sufficient. *Blount* v. *Pearman*, 1 Scott, 55; 1 Bing. (N.C.) 408; 4 L. J., C. P. 149.

Where an instrument demises several matters consisting of lands and other interests (some of which are incorporeal tenements), at one fixed rent, an ad valorem stamp is sufficient. *Reg.* v. *Hockworthy*, 2 N. & P. 383; W., W. & D. 707; 7 A. & E. 492; 7 L. J., M. C. 24.

A lease which demised a dwelling-house and land at a rent certain, and then demised two fields, from the succeeding Michaelmas, at the same rent which the lessor received from the persons who then occupied them, does not require, on account of the latter demise, a stamp of 1*l.* 16*s.* It is sufficient if such an ad valorem stamp is affixed as will cover the whole amount of rent to be paid. *Pary* v. *Deere*, 1 N. & P. 47; 5 A. & E. 551; 2 H. & W. 395; 6 L. J., K. B. 47.

It is not in violation of the Stamp Act to comprise several lettings in court in one instrument: and where a lease was made to one tenant of the entire lands, with an agreement that he should continue the other tenants in their holdings at the same rent, instead of separate leases:—Held, there was no objection on the statute or on principle. *Anon*, 1 Moll. 438.

Several Tenants.]—Where an instrument contains a written contract of demise in its general terms, with a several operation with respect to the different tenants who sign it for different estates at the different rents, set against their signatures, and one stamp only appears upon the paper, it is matter of evidence to which contract such stamp applies. *Doe* d. *Copley* v. *Day*, 13 East, 241.

XIX. LETTER OR POWER OF ATTORNEY.

Stamping, when required.]—A written authority, in these terms, "I authorise you to indorse my name to three bills of exchange now in your possession" (describing them), is a letter or power of attorney requiring a 1*l.* 10*s.* stamp, under 55 Geo. 3, c. 184. *Walker* v. *Remmett*, 2 C. B. 850; 15 L. J., C. P. 174; 10 Jur. 380.

But a power of attorney to execute a deed of composition does not require to be stamped. *Taylor* v. *Clark*, 4 F. & F. 1032.

A mere authority to act under a particular bill of sale, semble, does not require to be stamped as a letter or power of attorney. *Baker* v. *Dale*, 1 F. & F. 271.

In an action to recover goods included in a bill of sale, the written authority by the plaintiff to an attorney to take possession of the premises and property for the plaintiff, and tendered in evidence on his behalf, is not a letter of attorney requiring a stamp. *Vansittart* v. *James*, 1 F. & F. 156.

A.'s attorney gives B. a written authority to pay money for A. This does not require a stamp as a power of attorney. *Parker* v. *Dubois*, 7 C. & P. 406; 1 M. & W. 30; 1 Gale, 366; 5 L. J., Ex. 90.

A power of attorney to an agent to receive taxed costs in bankruptcy does not require a stamp. ——, *In re*, 8 L. J., Bk. 16. S. P., *Elgie, In re*, 8 L. J., Bk. 52.

XX. MARKETABLE SECURITY.

Debenture — Agreement to Pay Principal Moneys together with Premium — Payment on Specified Date—Amount of Duty.]—A debenture, being a marketable security not transferable by delivery, by which the company issuing it promises at a specified date to pay the registered holder for the time being 100*l.* "together with a premium thereon at 7*l.* 10*s.*," is a "security" for the payment of money "exceeding 100*l.*" within the meaning of the first schedule to the Stamp Act, 1891, and the instrument is chargeable with ad valorem stamp duty accordingly. *Rowell* v. *Inland Revenue Commissioners*, 66 L. J., Q. B. 528; [1897] 2 Q. B. 194.

Promissory Note.]—An instrument which contains a promise for value received to pay at a certain date a sum of money, and which is therefore a promissory note, must, nevertheless, be stamped as a "marketable security" with the Stamp Act, 1891, if on the face of the instrument there is a statement that the note is one of a series secured by the deposit of bonds to be held in trust under an agreement for the benefit of the holders of the notes, and if the instrument is dealt in, or is of such a kind as, according to the practice, to be capable of being dealt in, on the Stock Exchange. *Brown, Shipley & Co.* v. *Inland Revenue Commissioners*, 64 L. J., M. C. 241; [1895] 2 Q. B. 598; 14 R. 661; 73 L. T. 377—C. A.

Bonds of Foreign Company—"Issued in the United Kingdom."]— Under a reorganisation scheme of a railway company incorporated in the United States a new company was to be incorporated there to take over the property of the old company, and was to issue bonds, secured by a mortgage over their property, in satisfaction of the bonds in the old company. The bondholders were to deposit their bonds with certain depositaries, one of whom was in London, and in exchange therefor were to receive deposit certificates issued by the depositaries. The new company was duly incorporated in the United States, and executed the new bonds and also a mortgage of their property in favour of a trustee in New York to secure the same. These bonds were delivered to the trustee, who was to certify them upon the order or a joint committee of the bondholders, and to deliver them to the holders of the deposit certificates in exchange therefor. Each bond contained a provision that it should not be valid for any purpose unless authenticated by the certificate of the trustee endorsed thereon. A number of these bonds were sent over to London for delivery to the bondholders here, but in consequence of the high premium payable for insurance of completed bonds in transit, it was arranged between the joint committee and the trustee that the latter should come to London and sign the certificate here. This was accordingly done, and the bonds were then delivered by the depositary to the holders of the deposit certificates in London: — Held, that as the bonds were not valid until certified, they became when certified and delivered in London marketable securities "issued in the United Kingdom" within s. 82, sub-s. 1 (*b*) (*i*) of the Stamp Act, 1891, and liable to stamp duty as such. *Baring* v. *Inland Revenue Commissioners*, 67 L. J., Q. B. 44; [1898] 1 Q. B. 78; 77 L. T. 353; 46 W. R. 98; 61 J. P. 822—C. A.

—— **Issue by Foreign Company—"Issued" in United Kingdom.**]—Under a binding scheme of arrangement for reconstruction the property and assets of an English company were transferred to a new American company, and it was agreed that the debenture-holders of the old company should receive bonds of the new company in exchange for their debentures. The holder of a debenture in England received a circular from the London office of the new company, signed by its London agent, saying: "Your debenture will have to be sent to Chicago to be exchanged there for the new bond. I shall be pleased to forward your debenture to Chicago free of all cost to yourself if you will lodge the same at this office, taking my receipt for the same." The debenture-holder sent his debenture to the London agent, who sent it to the officials of the new company in America; a bond of the new company was transmitted by them to the London agent, who delivered it to the debenture-holder in England: — Held, that the bond was not "issued," or "offered for subscription and given or delivered to a subscriber," or "assigned or transferred," in the United Kingdom, within s. 82, sub-s. 1 (*b*) of the Stamp Act, 1891. *Chicago Railway Terminal Elevator Co.* v. *Inland Revenue Commissioners*, 75 L. T. 572; 45 W. R. 242—C. A.

XXI. MORTGAGE.

1. When Stamping Necessary.

Memorandum on Deposit of Title-deeds.]—When title-deeds are deposited by way of equitable mortgage, a memorandum merely stating the purpose for which they are deposited is not an agreement for a mortgage, and need not be stamped. *Meek* v. *Bayliss*, 31 L. J., Ch. 448.

The following document given in evidence by a defendant in replevin in support of his right to distrain as bailiff of J. W.:—"I, J. W., having, on the 7th October, 1843, borrowed from J. P. 300*l.*, did pledge with him the title-deeds of houses in T., in order to secure to him 300*l.* with interest; I did authorise J. P. to receive the rents of the houses during my right and interest therein; and I hereby confirm and make valid all acts, distresses, and particularly a distress on W. P., tenant of one of the houses, by J. P., and other proceedings made or taken, or to be made or taken, by J. P., and that the rents and profits of the houses may be received and taken by J. P. during all my estate and interest. (Signed) J. W."—does not require a stamp, either as an agreement accompanied with a deposit of title-deeds for making a mortgage, or as an authority to distrain, or as an agreement. *Pyle* v. *Partridge*, 15 M. & W. 20; 15 L. J., Ex. 129.

Pledge of Goods.]—A document, stating goods to have been deposited as a security for the repayment of money lent, and containing, in default of payment, a power of sale, does not require a mortgage stamp within 13 & 14 Vict. c. 97. *Attenborough* v. *Inland Revenue Commissioners*, 11 Ex. 461; 25 L. J., Ex. 22.

Deposit of Bill of Lading.]—A firm that was negotiating to obtain an advance of money on their bill, wrote to the proposed lender, stating

that, in consideration of his accepting their draft, they handed him therewith a bill of lading and a policy of insurance for wines expected to arrive, which would afford him security beyond the amount of the bill, and engaging to land and warehouse the wines, to be held at his disposal:—Held, that this document did not require a mortgage stamp within 55 Geo. 3. c. 184. *Harris* v. *Birch*, 9 M. & W. 591; 1 D. (N.S.) 899; 11 L. J., Ex. 219.

Contingent Debts.]—The words "mortgage, debt, or sum of money," in 16 & 17 Vict. c. 59, s. 10, include contingent as well as absolute debts. *Mortimore* v. *Inland Revenue Commissioners*, 2 H. & C. 838; 33 L. J., Ex. 263; 10 Jur. (N.S.) 868; 10 L. T. 655.

Further Security.] — A mortgage deed, for further securing a sum of money already secured in another mortgage, and also for securing a fresh advance, did not require an ad valorem stamp in respect of the former sum; but it did require a deed stamp of 1*l.* 15*s.* in addition to the stamps required in relation to the sum newly advanced. *Lant* v. *Pearce*, 3 N. & P. 329; 8 A. & E. 248; 7 L. J., Q. B. 135.

A deed executed and indorsed on a former deed, as a further security for advances made and to be made under the first deed, was exempted by 48 Geo. 3, c. 149, from an ad valorem duty, if the first deed was stamped with an ad valorem stamp. *Robinson* v. *Macdonnel*, 5 M. & S. 228.

Charge on Church Lands.] — An agreement by which the churchwardens and overseers charge a debt on the income of the church lands requires a mortgage stamp. *Wrench* v. *Lord*, 3 Bing. (N.C.) 672; 4 Scott, 381; 6 L. J., C. P. 193.

Promissory Note.]—If an instrument containing a mortgage is also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed. *Wise* v. *Charlton*, 4 A. & E. 786; 6 N. & M. 364; 2 H. & W. 49; 6 L. J., K. B. 80.

Exemption of Building Societies.] — *See* BUILDING SOCIETY.

Settlement.] — A mortgage deed which was expressed to be made in consideration of the advance, and also for the purpose of resettling the property, and reserved the equity of redemption to the mortgagor and his wife, or the survivor, does not require an extra stamp for a settlement, in addition to the ad valorem stamp on the mortgage. *Dawson* v. *Medhurst*, 14 L. T. 622.

Bond to replace Stock.] — Upon a loan of money produced by the sale of stock a bond was given conditional to replace the stock on a given day. By agreement of the same date reciting the bond and a deposit of title-deeds of property, it was agreed that the deeds should remain as a collateral security for replacing the stock, and that the borrower should execute a mortgage of the property to secure the replacing of the stock:—Held, that the bond was properly stamped with an ad valorem stamp. *Blair* v. *Ormond*, 14 Q. B. 732; 19 L. J., Q. B. 228; 14 Jur. 191—Ex. Ch.

Deed Defeating Conveyance.]—An indenture recited, that in consideration of 400*l.* (part of 500*l.* agreed to be advanced by the plaintiffs to the defendant), paid to certain mortgagees, by the plaintiffs, in discharge of their claim, the mortgagees surrendered into the hands of the lord land, to the intent that he might regrant the same to the plaintiffs, in trust to sell the land and return the 500*l.* The indenture contained covenants by the defendant with the plaintiffs to pay them 500*l.*, with interest, on a certain day, and that, in default of payment, the plaintiffs might enter upon the land. The indenture was stamped with two stamps, of 1*l.* 15*s.* and 1*l.* 5*s.*:—Held, that this was not a declaration or a deed for defeating or explaining or qualifying any conveyance of land, and that it did not require an ad valorem mortgage stamp, under 55 Geo. 3, c. 184. *Haywood* v. *Bibby*, 1 D. & L. 290; 11 M. & W. 812; 12 L. J., Ex. 404.

Security for Money "thereafter lent."]—An assignment, by deed, of chattels to secure to the assignee an indemnity, in case he should be called on to pay the amount secured by a bond which he had entered into as surety for the assignor, is a mortgage liable to an ad valorem stamp, being "a security for the repayment of money to be thereafter lent, advanced or paid," within 55 Geo. 3, c. 184. *Canning* (*Viscount*) v. *Raper*, 1 El. & Bl. 164; 22 L. J., Q. B. 87; 17 Jur. 390.

Surrender of Copyholds.] — T. surrendered copyhold property to the lord of a manor by way of mortgage to C., in consideration of a loan of 100*l.*; and by an indenture of even date, covenanted to repay the money borrowed, and also gave the mortgagee power of sale in case of default in payment. This indenture was stamped with an ad valorem stamp of 30*s.*:—Held, sufficient. *Sillick* v. *Trevor*, 11 M. & W. 722; 12 L. J., Ex. 401.

Principal and Surety.]—By indenture between A. and B., reciting that B., having become surety for A., for payment of 600*l.* due from A. to C., in consideration of C.'s forbearing proceedings against A., A., for securing to B. the payment of the 600*l.*, in case he should be required, as such surety, to pay the same to C., had executed a bond to B., conditioned for the payment to B., his executors and administrators, of 600*l.* on a certain day; and that for the better securing to B. the payment of the 600*l.* in case he should be required as such surety to pay the same to C., A. had agreed to grant his leasehold goods and effects to B.—A., in consideration of B. having become surety, granted his goods and effects unto B., his executors and administrators for ever. The indenture contained a proviso, to be void on payment to C. of 600*l.* with interest, on a given day; a covenant by A. with B. to pay the 600*l.* and interest to C., and to indemnify B., his executors and administrators, from the payment; a covenant by A. for quiet enjoyment by B. in case of default; a covenant to insure; and a power of sale, for payment to C. of the 600*l.* and interest:—Held, that this indenture was properly stamped with a 1*l.* 15*s.* stamp, without either an ad valorem or a 25*l.* stamp, the bond from A. to B. having been stamped with the progressive duty upon 600*l.* *Watson* v. *Macquire*, 5 C. B. 836.

Deed of "Further Charge."]—A., having pur-

chased an estate, agreed by deed with the vendor that such estate should be surrendered to a third party, who had advanced a portion of the purchase-money, such third party holding the estate by way of security for the loan. By a second deed between the purchaser and such third party, after reciting the deed above mentioned, a default in payment of the principal and interest, and the application for, and agreement to lend, a further sum of money, and the advance of that sum, the purchaser covenanted with the party making the advance, that the property should be charged with the amount of such further advance and for payment of the same:—Held, that this instrument was a deed of "further charge," and, therefore, subject only to the ad valorem duty imposed by 55 Geo. 3, c. 184. *Rushbrooke* v. *Hood*, 5 C. B. 131; 17 L. J., C. P. 58; 11 Jur. 931.

An indenture of mortgage, dated 18th April, 1840, and made between the defendant of the first part, S. V. of the second part, the plaintiffs of the third part, and C. of the fourth part; after reciting an indenture of mortgage of the 21st January, 1829, made between P. and the defendant of the first part, J. S. of the second part, and W., S. V., M. and W. of the third part, whereby premises were demised to the parties of the third part for 1,000 years, to secure repayment of two sums of 50*l.* each, theretofore advanced to P. and J. S.; and reciting an indenture of lease and release of the 4th and 5th January, 1830, whereby the premises were conveyed in fee simple to the defendant; and reciting that, by another indenture of the 6th January, 1830, made between the defendant of the one part, and W., S. V., M. and W. of the other part, the premises were charged with the further sum of 50*l.* lent to the defendant; and further reciting, that the term of 1,000 years had become vested in S. V. by survivorship, and that the defendant had been called upon to repay the three several sums of 50*l.*; witnessed, that, in consideration of 150*l.*, and the further sum of 15*l.* advanced by the plaintiffs to the defendant, the term of 1,000 years was assigned by S. V. to the plaintiffs, and the fee simple conveyed to them by the defendant, subject to the usual conditions for reconveyance upon terms expressed in the indenture. The indenture also contained a covenant by the defendant for repayment of the money, upon which the action was brought:—Held, that the indenture, under 55 Geo. 3, c. 184, required a deed stamp, in addition to the ad valorem mortgage stamp, upon the further advance of 15*l.*, as it contained an assignment of the term of 1,000 years, and also a conveyance of the fee simple, which was a fresh security not previously charged by the indenture of the 6th January, 1830. *Brown* v. *Pegg*, 6 Q. B. 1; 13 L. J., Q. B. 270; 8 Jur. 954. S. P., *Humberstone* v. *Jones*, 16 M. & W. 763; 16 L. J., Ex. 293; 11 Jur. 337.

Right of Purchaser to have Deeds Stamped.]—A ten-shilling deed stamp on a mortgage deed is insufficient, therefore a purchaser is entitled on a contract for sale with a mortgagor, to require the mortgage deed, where so stamped, to be stamped before completion to the full ad valorem duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance. *Whiting* to *Loomes*, 50 L. J., Ch. 463; 17 Ch. D. 10; 44 L. T. 721; 29 W. R. 435—C. A.

2. AMOUNT—CONSIDERATION.

Where Advance "Uncertain and without Limit."]—Where a mortgage of leasehold premises, subject to a proviso for redemption on payment of the principal and interest, contained covenants by the lessee (the mortgagor) to procure, at his own costs, renewals of the lease (under a power contained in the original lease), and in case the mortgagor refused or neglected to do so, then it should be lawful for the mortgagee to procure such renewals; and a covenant that all the fines, costs and expenses of the mortgagee in procuring such renewals, should be a charge on the premises, and the same should not be redeemed or redeemable until payment of such costs, charges and expenses:—Held, that an ad valorem stamp of 4*l.* was sufficient, and that the deed did not require a stamp of 25*l.*, within 55 Geo. 3, c. 184, as a security for repayment of money to be thereafter advanced or paid, the amount of which was uncertain and without limit. *Wroghton* v. *Turtle*, 11 M. & W. 561; 1 D. & L. 473; 13 L. J., Ex. 57. Cp. *Paddon* v. *Bartlett*, 2 A. & E. 9; 4 N. & M. 1; 4 L. J., K. B. 65.

A., being indebted to the defendant in 184*l.* 7*s.* 6*d.*, assigned to him furniture and also a policy of assurance, with a proviso for redemption on payment of the principal and interest, and a further proviso, that in default of payment it should be lawful for the defendant to take and sell the furniture and policy, and out of the proceeds to reimburse himself all costs and expenses, and all sums he might expend in keeping on foot the policy. Then followed a covenant by A. for payment to the defendant of the 184*l.* 7*s.* 6*d.*, and for payment to the insurance company of the premiums, and that, in case of the avoidance of the policy or the insolvency of the company, A. would insure in another office, and assign the new policy to the defendant, and that if A. should neglect to pay the premium or insure in another office, the defendant might do so, and the sums so advanced by the defendant, for continuing the insurance or making a fresh policy, should be considered as principal, and bear interest, and the policy should be a security for repayment, and should not be redeemed without payment to the defendant of the sums so advanced, and interest, as well as the 184*l.* 7*s.* 6*d.*:—Held, that such mortgage was not "a security for the repayment of money to be thereafter lent, advanced or paid," and to an amount uncertain and without limit, within 55 Geo. 3, c. 184, and therefore did not require a 25*l.* stamp. *Lawrance* v. *Boston*, 7 Ex. 28; 21 L. J., Ex. 49.

A 25*l.* stamp was not necessary for a mortgage deed to secure an indefinite sum, where a subsequent proviso limited the principal sum to be secured. *Doe* d. *Smith* v. *Warner*, 2 Car. & K. 1014.

On a mortgage of a term for years determinable on lives, the sum of 130*l.* was advanced, with power for the mortgagee to pay 70*l.* for renewal, in case a life should drop:—Held, that a 2*l.* stamp was sufficient, notwithstanding there was a covenant by the mortgagor to procure a renewal without any limit of the sum to be paid by him for that purpose. *Doe* d. *Jarman* v. *Larder*, 3 Bing. (N.C.) 92; 3 Scott, 437; 2 Hodges, 186; 5 L. J., C. P. 322.

By 55 Geo. 3, c. 184, schedule, part 1, mortgages were subjected to a duty of 25*l.* if the

amount of the money secured thereby be uncertain, and without limit; but if it be limited, then to an ad valorem duty:—Held, that the limit must be one expressed on the face of the deed; and, therefore, that a mortgage for 1,500*l.* with covenants for payment of the yearly premium and other charges of an insurance of 1,000*l.* upon a particular life for seven years, required a 25*l.* stamp. *Halse* v. *Peters*, 2 B. & Ad. 807; 1 L. J., K. B. 2.

A mortgage deed to secure 3,000*l.* and interest, together with all expenses incurred in the execution of the powers of sale contained in the deed, and interest thereon, did not require a 25*l.* stamp as a security for an uncertain and indefinite amount. *Doe* d. *Scruton* v. *Smith*, 1 M. & Scott, 230; 8 Bing. 146; 1 L. J., C. P. 59.

A mortgage deed, to secure 300*l.* and interest, with a proviso for redemption, if the mortgagor should repay the sum due, and should pay all rates and taxes which might be imposed on the premises, and containing a covenant, also to the same effect, was properly stamped with an ad valorem stamp under 55 Geo. 3, c. 184, and did not require the 25*l.* stamp payable on deeds securing a sum of indefinite amount. *Doe* d. *Mercerон* v. *Bragg*, 3 N. & P. 644; 8 A. & E. 620; 7 L. J., Q. B. 263.

A mortgage, expressed to be made for securing the repayment or retransfer of an uncertain and unlimited amount of money or stock, is admissible in evidence (under 13 & 14 Vict. c. 97), for such amount of money or stock intended to be thereby secured as the ad valorem duty denoted by the stamp thereon will extend to cover. *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193.

Aggregate Amount.]—By a mortgage deed, A. assigned certain barges to three of his creditors, as a security for three distinct debts, to each in their separate rights. The aggregate amount only was stated in the deed:—Held, that an ad valorem stamp on such amount was sufficient. *Reed* v. *Wilmott*, 5 M. & P. 553; 7 Bing. 577; 9 L. J. (o.s.) C. P. 176.

If copyhold premises are mortgaged with other property by separate deeds, the ad valorem duty must be charged upon the instrument relating to the other property. *Ib.*

Interest.]—By deed dated the 17th November, 1845, reciting that A. was indebted to B. in 100*l.*, A. assigned to B. all the goods, fixtures, tools, &c., which then were, or at any time during the continuance of the security should be, in and upon certain premises, to have, receive and take the goods, &c., thereby assigned, as per schedule, unto B. The deed contained a covenant by A. for payment of the 100*l.* on the 8th November, 1846, with interest thereon from the 8th August preceding:—Held, that a mortgage stamp on the deed applicable to a sum not exceeding 100*l.* was sufficient within 55 Geo. 3, c. 184. *Daines* v. *Heath*, 3 C. B. 938.

Progressive Duty.]—By a deed made between a duke of the first part, and the marquis, his son, of the second part, and R. of the third part, it appeared that the duke was entitled to estates for his life, with remainder to the marquis, and that he was also entitled to other real and personal property, and that the real and personal property was subject to incumbrances amounting to 1,027,282*l.*; that the marquis covenanted with the duke to concur in raising, by a mortgage upon the property, 1,100,000*l.* to be applied in payment of the incumbrances; that the 1,100,000*l.* should be considered as the debt of the duke; that the marquis had proposed to the duke that the marquis should take of and absolutely purchase from the duke all the equity of redemption, estate or title to the real and personal property comprised in the schedules to the deed, to which proposal the duke had acceded; that the duke granted to R. all the lands, to hold the same, subject to the charges, in trust for the marquis, and that the real and personal property should be the primary fund for satisfying the debts and liabilities. There was also a covenant by the marquis that he would apply all the moneys that should come into his hands in respect of the estates, chattels, &c., towards the relief and indemnification of the duke. This deed having been stamped with the duty of 1*l.* 15*s.*, and nine progressive stamps of 1*l.* 5*s.* each, and the opinion of the commissioners having been desired on the question, they were of opinion that the deed was chargeable under 55 Geo. 3, c. 184, with the ad valorem duty of 1,000*l.*, and with nine progressive duties of 1*l.* each as a conveyance upon the sale of property:—Held, that the crown was entitled to the smaller duty only. *Chandos* (*Marquis*) v. *Inland Revenue Commissioners*, 6 Ex. 464; 20 L. J., Ex. 269.

Consideration — Validity—Companies Clauses Act.]—The 41st and 42nd sections of the Companies Clauses Act, 1845, requiring mortgages to be duly stamped and the consideration to be duly stated, do not make void an instrument the consideration for which is apparent, though it is not in terms stated. *Landowners' West of England Drainage Co.* v. *Ashford*, 50 L. J., Ch. 276; 16 Ch. D. 411; 44 L. T. 20.

3. Assignment and Transfer.

Stamps Requisite.]—A mortgage deed which bore an ad valorem stamp on the amount advanced did not require a 1*l.* 15*s.* deed stamp, because it contained also an assignment by a former mortgagee, to whom part of the money was paid in satisfaction of his mortgage. *Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241; 13 L. J., Ex. 200.

A deed of assignment of a term, for a nominal consideration, to a trustee for a mortgagee, in order to the better securing the repayment of the mortgage money, requires only a 1*l.* 15*s.* stamp, and not an ad valorem stamp. *Ib.*

An assignment of a policy of assurance to secure a debt, was an assignment by way of mortgage within 55 Geo. 3, c. 184, and required an ad valorem stamp as such. *Caldwell* v. *Dawson*, 5 Ex. 1; 14 Jur. 316.

The plaintiff claimed under an assignment of a mortgage, bearing a 35*s.* stamp:—Held, sufficient, although the seisin of the mortgagor was not proved. *Doe* d. *Brame* v. *Maple*, 3 Bing. (N.C.) 832; 5 Scott, 35; 3 Hodges, 213; 6 L. J., C. P. 271.

An ad valorem stamp duty is requisite on the assignment of a mortgage, if an additional sum be inserted therein. *Martin* v. *Baxter*, 5 Bing. 160; 6 L. J. (o.s.) C. P. 242.

G. mortgaged premises to B. for 1,000 years to

secure 150*l*., and devised them to his widow for life, remainder to his son in fee. After his death, C. agreed to advance 350*l*. to his widow and son, to enable them to pay the loan due to B., and for their other occasions. A deed was executed, whereby B. assigned, and the devisees confirmed, the term to C., subject to a proviso for redemption on payment of 350*l*., and with a covenant by the devisees to pay the same. This deed had an ad valorem stamp for 4*l*.:—Held (under 55 Geo. 3, c. 184, and 3 Geo. 4, c. 117, s. 2), that the stamp was not sufficient; the covenant by the devisees creating a new security, in respect of which a deed stamp was necessary. *Doe* d. *Crawley* v. *Gutteridge*, 11 Q. B. 409; 17 L. J., Q. B. 99; 12 Jur. 51.

By an indenture in 1877—after reciting that by a mortgage in 1872, W., the mortgagor, had conveyed certain hereditaments to secure 350*l*. lent to him by the mortgagees, with a proviso for redemption on payment of the 350*l*.; it was witnessed that in consideration of 350*l*. paid by S. to the mortgagees at W.'s request in satisfaction of all moneys owing upon the recited mortgage (the receipt of which 350*l*. the mortgagees acknowledged, and therefrom released S. and W.), and also in consideration of 120*l*. paid by S. to W. the mortgagees conveyed and released, and W. released and confirmed to S. in fee, the hereditaments discharged from the said provision for redemption; with a proviso for redemption on payment by W. to S. of the two sums of 350*l*. and 120*l*., making together the sum of 470*l*., and a covenant by W. for payment thereof to S.:—Held, that though there was no formal assignment of the old debt of 350*l*., and though that debt and the old equity of redemption were extinguished, the indenture of 1877 was as to the 350*l*. in substance a "transfer of a mortgage" within the meaning of the schedule to the Stamp Act, 1870, and was therefore liable to be stamped as a transfer, with a further ad valorem duty on the fresh advance of 120*l*., and was not liable to be stamped as a "mortgage" for 470*l*. *Wale* v. *Inland Revenue Commissioners*, 48 L. J., Ex. 574; 4 Ex. D. 270; 41 L. T. 433; 27 W. R. 916.

T. mortgaged to B. for 150*l*. Afterwards, by a deed purporting to be between B., T. and S., in consideration of S. paying B. the 150*l*., and advancing 70*l*. to T., the mortgage was transferred to S., but B. never executed:—Held, that this was a transfer of a mortgage with an additional advance of 70*l*., and, therefore, under 3 Geo. 4, c. 117, s. 2, required only an ad valorem stamp as on a mortgage for 70*l*. *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615; 3 G. & D. 637; 12 L. J., Q. B. 254; 7 Jur. 847.

The transfer duty on a mortgage is imposed only where no further sum is advanced. *Doe* d. *Bartley* v. *Gray*, 4 N. & M. 719; 3 A. & E. 89; 1 Har. & W. 235; 4 L. J., K. B. 197.

Where an additional sum is advanced, it is sufficient to pay the ad valorem duty on the sum advanced. *Ib.*

So where the original mortgage is assigned to secure the mortgage money. *Ib.*

The 28 & 29 Vict. c. 96, s. 17, which imposes in lieu of the duties imposed by 13 & 14 Vict. c. 97, an ad valorem duty of 6*d*. per 100*l*. on transfers of mortgages, does not by implication repeal the 24 & 25 Vict. c. 91, s. 30, as to transfers of mortgages. *Foley* (*Lord*) v. *Inland Revenue Commissioners*, 37 L. J., Ex. 109; L. R. 3 Ex. 263; 18 L. T. 725; 16 W. R. 1055.

XXII. NEWSPAPER.

A publication containing public news, printed and published in London, for sale for less than 6*d*., exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, and published periodically in parts or numbers at intervals exceeding twenty-six days, was not liable to stamp duty under 6 & 7 Will. 4, c. 76. *Att.-Gen.* v. *Bradbury*, 7 Ex. 97; 21 L. J., Ex. 12; 16 Jur. 130.

XXIII. NOTARIAL ACT.

A notarial instrument in the form of schedule H. given by 21 & 22 Vict. c. 76, s. 12, was correctly stamped with a 1*s*. stamp. *Eglinton* v. *Inland Revenue Commissioners*, 3 H. & C. 871; 34 L. J., Ex. 225; 11 Jur. (N.S.) 676; 12 L. T. 707; 13 W. R. 902.

XXIV. POLICY OF INSURANCE.

Accident.]—An instrument assuring the owners of cattle from loss arising from their death is a policy of insurance and subject to stamp duty. *Att.-Gen.* v. *Cleobury*, 4 Ex. 65; 18 L. J., Ex. 395.

Guarantee of Mortgage Debt.]—A policy of assurance upon mortgage, securing payment of principal and interest to the mortgagee, the assured, is chargeable with the duty of 6*d*. as an agreement, and does not fall within the second clause of the schedule to the act as to policies of insurance, which assesses the duty of 1*d*. for any "payment agreed to be made . . . . by way of indemnity against loss or damage of or to any property." *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners*, 57 L. J., Q. B. 174; 58 L. T. 769.

See SHIPPING (INSURANCE).

XXV. RECEIPT.

When Stamp Required.]—An acknowledgment of having received the acceptance of a bill of exchange, was a receipt for money within 23 Geo. 3, c. 49. *Scholey* v. *Welsby*, Peake, 34.

A receipt for money advanced to the party giving a bill of exchange does not require a stamp. *Jones* v. *Horry*, 1 F. & F. 333.

A receipt stamp is necessary, where it appears from the paper that the acknowledgments were made at successive times upon the payment of the money. *Wright* v. *Shawcross*, 2 B. & Ald. 501, n.

Where a receipt was produced purporting to be a receipt for money given by the agent of a person who received money from different customers, for the purpose of negotiating the purchase and sale of annuities:—Held, to require a stamp. *Catt* v. *Howard*, 3 Stark. 3; 23 R. R. 751; but see *Clarke* v. *Hougham*, infra.

If a party on payment of his bill writes the word "settled," by way of receipt, he is liable to the penalty for giving a receipt without a stamp. *Spawforth* v. *Alexander*, 2 Esp. 621.

A bill of parcels on which was written the following words, "settled by one bill at three, and another at nine months," should have a receipt stamp. *Smith* v. *Kelby*, 4 Esp. 249.

No Money Passing.]—The defendant, in sup-

port of a plea that he had paid five quarters' rent to M., tendered the following paper, signed by M.: "Mr. Jones (the defendant) having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent till the 24th July, 1841." M. had delivered the paper to the defendant, being then indebted to him on a mortgage debt exceeding 72*l.*:—Held, that the instrument was a receipt. *Lucas* v. *Jones*, 5 Q. B. 949; D. & M. 774; 13 L. J., Q. B. 208; 8 Jur. 422.

Document may be Shown to be a Receipt.]—A document not purporting on the face of it to be a receipt for the payment of money, may be shown to be a receipt by extrinsic evidence. *Reg.* v. *Overton*, Dears. C. C. 308; 23 L. J., M. C. 29; 18 Jur. 134; 2 W. R. 228; 6 Cox C. C. 277.

Taxes by Deputy Receiver-General.]—A receipt for taxes, signed by a clerk of the deputy receiver-general of a county in his name, requires no stamp. *Edden* v. *Read*, 3 Camp. 338.

Counsel's Fees.]—The master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge. *Beavan, In re*, 5 De G., M. & G. 40; 23 L. J., Ch. 536; 2 W. R. 299.

Periodical Payments.]—A payment by instalments is a periodical payment within the Stamp Act, 1870, s. 72. *Limmer Asphalte Co.* v. *Inland Revenue Commissioners*, 41 L. J., Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.

When made Abroad.]—Where an action was brought for money lent in France, and unstamped receipts were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them valid was rejected on the ground that the courts of this country will not notice the revenue laws of foreign states. *James* v. *Catherwood*, 3 D. & R. 190.

An unstamped receipt, dated at Cologne, is receivable here; and the fact that such a receipt would not be receivable at Cologne until it had been stamped, on payment of a penalty, would make no difference as to its admissibility here, as our courts do not take notice of foreign revenue laws. *Bristow* v. *De Sequeville*, 5 Ex. 275; 3 Car. & K. 64; 19 L. J., Ex. 289; 14 Jur. 674.

Memoranda in the Nature of.]—A memorandum importing that one party had paid money, but containing no acknowledgment by the other that he had received it, is not a receipt. *Rex* v. *Harvey*, R. & R. 227.

Where a landlord fraudulently and improperly received various sums of money from several of his tenants, and the evidence of payments by them consisted of memoranda of account delivered to the tenants, in which the items in question were set down, and to each of which the landlord wrote the word "paid":—Held, that such memoranda were admissible without a stamp, when coupled with entries in the steward's books to the same effect. *Clarke* v. *Hougham*, 3 D. & R. 325; 2 B. & C. 149; 1 L. J. (o.s.) K. B. 249.

In an action against the drawer of a bill of exchange for 9*l.* 5*s.*, accepted by M., the defendant pleaded payment by the acceptor, and gave in evidence the following document;—"*Myself* v. *Marks*. Mr. M. has this day left with me 10*l.* on account of the debt, interest and costs in this action. E. L. Levy, the plaintiff in person":—Held, that this did not require a receipt stamp. *Levy* v. *Alexander*, 4 Ex. 485; 19 L. J., Ex. 113.

A paper in the following form, signed by the party: "Memorandum, 30th April, 1836, settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for. (Signed) J. T."—stamped with an agreement stamp, is receivable without a receipt stamp. *Tebbutt* v. *Ambler*, 9 Car. & P. 60.

In an action to recover 170*l.*, with interest, the plaintiff proved a loan of between 150*l.* and 180*l.*, and in order to take the case out of the statute of limitations, offered this document:—"170*l.* 16th March, 1841. Received from B. T. the sum of 170*l.*, for which I promise to pay her at the rate of 5*l.* per cent. from the above date":—Held, that this document did not require to be stamped, either as a receipt, a promissory note or an agreement. *Taylor* v. *Steele*, 16 M. & W. 665; 16 L. J., Ex. 177; 11 Jur. 806.

In an action for goods sold and delivered, in which the defendant pleaded payment, the only evidence offered in support of the plea was a document in the following form, signed by the plaintiff: "Memorandum. That any demand we may have against Mr. G. W. for ironwork is this day discharged in consideration of services rendered by him to us. N. B. Particulars of our account shall be delivered with a stamped receipt":—Held, that since the document was offered as evidence of a transaction amounting to a payment of money, it was offered as a receipt or a discharge for or upon the payment of money, and therefore required a receipt stamp. *Livingstone* v. *Whiting*, 15 Q. B. 722; 19 L. J., Q. B. 528; 15 Jur. 147.

In an action by a coal merchant against his clerk, to recover the amount of money received and not accounted for, the plaintiff having proved an admission by the defendant, on the 15th August, that a sum of 12*l.* was due, the latter offered in evidence an unstamped receipt of a subsequent date for a larger amount. This being rejected, the defendant gave in evidence a memorandum on the back of the same paper, written and signed by the plaintiff as follows:—"Balanced up this day, as per cash-book. S. F. 19th November":—Held, that this memorandum did not require a receipt stamp, and was properly admitted without producing, and without notice to produce, the cash-book to which it referred, which was in the plaintiff's possession. *Finney* v. *Tootell*, 5 C. B. 504; 17 L. J., C. P. 158; 12 Jur. 291.

On Duly Stamped Instrument.]—A receipt indorsed on the back of a deed may be separately read in evidence, though it is a part of an instrument requiring another stamp. *Odye* v. *Cockney*, 1 M. & Rob. 517.

Where from the number of indorsements there is no room on the back of the bond, receipts written on unstamped paper annexed to the bond may be read in evidence. *Orme* v. *Young*, 4 Camp. 336; 17 R. R. 611.

Containing Collateral Matters.]—A receipt, not having a proper stamp, cannot be used as evidence of a matter collateral to the payment of the money. *Evans* v. *Prothero*, 2 Mac. & G. 319; 20 L. J., Ch. 448; 15 Jur. 113.

Thus, where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped :—Held, that the evidence could not be admitted. *Ib.* See *S. C.*, 1 De G., M. & G. 572; 21 L. J., Ch. 772.

In replevin, the issue being whether the plaintiff held certain closes at a fixed rent, specified in the avowry :—Held, that unstamped receipts tending to show that he had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. *Hawkins* v. *Warre*, 3 B. & C. 690; 5 D. & R. 512.

The following document, stamped as an agreement, is admissible without a receipt stamp :—"I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of D.; and I hereby undertake to procure and hand the bill over to you." *Von Dadelszen* v. *Swann*, 5 Ex. 825; 20 L. J., Ex. 50.

When a receipt for money and an agreement are written on the same piece of paper: this is receivable as a receipt, if it has a receipt stamp, without an agreement stamp. *Grey* v. *Smith*, 1 Camp. 387.

A receipt for the price of a horse, with a warranty of soundness, may be received as evidence of the warranty, without an agreement stamp. *Skrine* v. *Elmore*, 2 Camp. 407; 11 R. R. 754.

In an action for goods sold, the defendant, in order to prove that the goods were sold to D., and not to himself, put in an unstamped paper containing a bill of parcels from the plaintiff to D., at the foot of which were the words "settled, W. M." (the plaintiff). The whole of the paper had been written at one time, and no money in fact passed :—Held, that the two parts being distinct, so much of the paper as consisted of the bill of parcels was admissible, for the above-mentioned purpose, without a receipt stamp. *Millen* v. *Dent*, 10 Q. B. 846; 16 L. J., Q. B. 374; 11 Jur. 818.

A written acknowledgment at the foot of an account, stating that such account is correct, may be given in evidence without a receipt stamp. *Wellard* v. *Moss*, 7 Moore, 503; 1 Bing. 134; 1 L. J. (O.S.) C. P. 18.

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped. *Matheson* v. *Ross*, 2 H. L. Cas. 286; 13 Jur. 307.

Its admissibility under such circumstances is restricted to this extent: so far as it relates simply to proving the statement of accounts, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way. *Ib.*

When the cases say that an unstamped receipt may be given in evidence to prove a collateral matter, they must be taken to mean a matter wholly unconnected with the fact of payment. *Ib.*

In an action for work and labour, there was tendered a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. This paper was offered by the defendant, not for the purpose of proving that the money had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time :—Held, admissible for that purpose. *Ib.*

An instrument given by an overseer of the poor to the reputed father of a bastard child, stating that he had received a sum of money from the latter by a bill of exchange, payable after date, and which, when paid, would exonerate him from the expenses attending the birth and maintenance of such child, does not require an agreement stamp, but a receipt stamp is sufficient. *Watkins* v. *Hewlett*, 3 Moore, 211; 1 Br. & B. 1.

A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp. *Doe* d. *Wheble* v. *Fuller*, 1 Tyr. & G. 17.

XXVI. SETTLEMENT.

"Definite and Certain Sum."]—By the Stamp Act, 1870, an ad valorem duty is chargeable on a settlement, the definition of which includes any instrument "whereby any definite and certain amount of stock is settled" :—Held, that a settlement of contingent and defeasible interests in certain specified amounts of stock which were vested in trustees with power to vary investments was within the definition. *Onslow* v. *Inland Revenue Commissioners*, 60 L. J., Q. B. 138; [1891] 1 Q. B. 239; 64 L. T. 211; 39 W. R. 373—C. A.

Property the subject of a settlement, was therein described as consisting of real estate purchased under a power and as held in trust to be resold. It was meanwhile to be considered as personalty, but in lieu of the sale moneys of such estate, the trustees, with the beneficiaries' consent, were empowered to accept a conveyance of it :—Held, to be "no definite and certain principal sum of money" within the Stamp Act, 1850. *Stuckley's Settlement, In re, Stuckley* v. *Inland Revenue Commissioners*, 39 L. J., Ex. 86; L. R. 5 Ex. 85; 21 L. T. 18; 18 W. R. 462.

Order for Settlement.]—An order of the court making a settlement should bear the usual settlement stamp. *Gowan, In re, Gowan* v. *Gowan*, 50 L. J., Ch. 248; 17 Ch. D. 778.

The assignment to trustees of a marriage settlement, of a policy of insurance effected on the settlor's life for a sum named, and all moneys assured or to become payable by or under the policy, is not liable to the payment of an ad valorem duty under 13 & 14 Vict. c. 97, as being a deed whereby any definite and principal sum of money is settled. *Sanville* v. *Inland Revenue Commissioners*, 10 Ex. 159; 23 L. J., Ex. 270; 2 W. R. 529. *See* 27 Vict. c. 18.

Foreign Bonds.]—A marriage settlement is chargeable with ad valorem duty under 13 & 14 Vict. c. 97, in respect of Brazilian bonds, New Brunswick bonds, Nova Scotia bonds, scrip Peruvian loan, Chilian bonds, Mexican Remanet bonds, and Indian 5*l.* per Cents., created by 22 & 23 Vict. c. 139. *Alsager, In re*, 2 H. & C. 969; 10 Jur. (N.S.) 828; 10 L. T. 238; 12 W. R. 477. *S. C.*, nom. *Alsayer and Guidici* v. *Inland Revenue Commissioners*, 33 L. J., Ex. 161.

Mortgage.]—A mortgage deed, which was expressed to be made in consideration of the advance, and also for the purpose of resettling the property, and reserved the equity of redemption

to the mortgagor and his wife, or the survivor, does not require an extra stamp for a settlement, in addition to the ad valorem stamp on the mortgage. *Dawson* v. *Medhurst*, 14 L. T. 622.

XXVII. VOTING PAPER.

Stamp when Required.]—The Stamp Act of 1870 (33 & 34 Vict. c. 97), imposing a penny stamp on "Voting paper; that is, any instrument for the purpose of voting by any person entitled to vote at any meeting," does not extend to voting papers used, under 7 Will. 4 & 1 Vict. c. 78, ss. 13, 14, at a meeting of the town council of a municipal borough for the election of aldermen. *Reg.* v. *Strachan*, 41 L. J., Q. B. 210; L. R. 7 Q. B. 463; 26 L. T. 835; 20 W. R. 629.

Proxies for Appointment of Commissioners.]—A note in writing signed by proprietors under a local act authorising others to act for them in the nomination and appointment of a special commissioner, requires to be stamped. *Reg.* v. *Kelk*, 12 A. & E. 559; 4 P. & D. 185; 9 L. J., Q. B. 362.

D. COMMISSIONERS.

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I. JURISDICTION.

One Commissioner.]—One commissioner of taxes has no power, under 52 Geo. 3, c. 93, to receive an information and issue a summons for non-payment of taxes. *Reg.* v. *Griffin*, 9 Q. B. 155; 2 New Sess. Cas. 368; 15 L. J., M. C. 120.

Re-Assessment—How Enforced—Mandamus.]—Where the commissioners of taxes refused to re-assess the inhabitants upon a default made by the collector, unless they were indemnified, being doubtful of their authority so to do; the court, being of the opinion that they were bound to do so, granted an order in the nature of a mandamus. *Wootton, In re*, 6 Price, 103.

If the acting commissioners of taxes refuse (unless indemnified) to proceed to make a re-assessment on a parish, to which the deficiency applies, where an insuper has been set on the parish, whose collector is a defaulter, the court will order them to do so by rule to show cause, in the nature of a mandamus; and will also order a service on their clerk to be deemed good service: the crown is not limited to any time within which to make such an application. *Ib.*

The mode of enforcing a re-assessment of the amount of a deficiency in the collection of the assessed taxes is by distringas, under 43 Geo. 3, c. 99, s. 47, against the collectors, on motion by the attorney-general on the part of the commissioners for affairs of taxes. *Anon.*, 12 Price, 153.

Commissioners of Land Tax.]—*See cases* ante, col. 193.

II. CLERK TO.

Election of—Mandamus.]—Before 17 & 18 Vict. c. 85, if the clerk of the commissioners of land tax was improperly elected under 43 Geo. 3, c. 99, a mandamus would lie to them to admit the person who had the majority of legal votes. *Rex* v. *Thatcher*, 1 D. & R. 426.

III. COLLECTORS OF TAXES.

Appointment of.]—The insertion of the name of a person as collector of the assessed taxes in the warrants of the commissioners, is not a sufficient appointment to that office. *Rex* v. *Radley*, Forrest, 150.

The Land Tax Acts require the assessors and collectors to be inhabitants of the respective parishes, &c., for which they are to act:—Held, that the acts of a person duly appointed as assessor and collector were valid, although he was not duly qualified by inhabitancy. *Waterloo Bridge Company* v. *Cull*, 1 El. & El. 213; 28 L. J., Q. B. 70; 5 Jur. (N.S). 464; 7 W. R. 87. *S. C.*, in Ex. Ch. 29 L. J., Q. B. 10; 5 Jur. (N.S.) 1288.

Default of One—Re-Assessment.]—If there are two collectors of taxes appointed under 43 Geo. 3, c. 99, s. 13, for a single parish, by the commissioners, one for one division of the parish called the upper parish, and one for another called the lower parish, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions; in case of a deficiency in the amount of the taxes collected through the misconduct of either, the whole parish must be re-assessed, and not the particular district, the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises, although the taxes of the other division have been collected and paid over to the receiver-general. *Henllam, Ex parte*, 7 Price, 594.

If a collector of assessed taxes does not pay over all sums collected by him, the parish is answerable to the crown for the deficiency. *Rex* v. *St. George's, Hanover-square*, 3 Anst. 920.

—— **Liability of Others.**]—A joint collector is liable for any deficiency in the collection for a year, in the amount received by his coadjutor, although he has not himself collected during the time, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted or received a share of the poundage at any time. *Bromley, In re*, 5 Price, 5.

—— **Imprisonment.**]—A collector in custody under an extent is not entitled to be discharged, although his deficiency has been made good to the crown by a re-assessment upon the parish. *Rex* v. *Bennett*, Wightw. 1.

Committal.]—The income-tax commissioners have no power to commit a defaulting collector of income-tax in the county of Middlesex to Newgate; the commitment should be made to Whitecross-street prison. *Masters, Ex parte*, 33 L. J., Q. B. 146; 9 L. T. 733.

Where a warrant for the apprehension of a defaulter, under 3 Geo. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and it was backed by justices of Lancashire and Gloucestershire, and on a return to a habeas corpus it appeared that he was in custody on the warrant in Cambridge gaol, the court refused to discharge him, on a suggestion that he had been

apprehended at Cheltenham, being clearly in legal custody at Cambridge. *Sharpe, Ex parte*, 9 D. P. C. 513.

Exacting Duty not Charged in Assessment.]—A collector exacting a duty, in respect of which there had been no charge at all in the assessment upon the person from whom the payment was exacted, is not liable to the penalties under 43 Geo. 3, c. 99, s. 12. *Lister* v. *Priestley*, Wightw. 67, 405.

Collection without Warrant — Liability of Sureties.] — A duplicate of the assessment of duties under Schedule A of 5 & 6 Vict. c. 35, made on persons in M. for three years ending April, 1847, had been delivered to L. by the commissioners of income-tax, together with a warrant for collecting the same; but no such duplicate of assessments under Schedule D, nor warrant for collecting had been delivered to him. On the 14th October, 1846, he died, having received previously some of the duties, under Schedules A and D for the year ending April, 1847, for which he had given the usual receipt as collector:—Held, that his sureties were not liable in respect of the duties received under Schedule D, as for want of the duplicate and warrant, L. had not at the time authority to receive the same. *Kepp* v. *Wiggett*, 10 C. B. 35; 14 Jur. 1137.

See PRINCIPAL AND SURETY.

IV. JURISDICTION OF COURT IN REVENUE MATTERS.

Hearing of Revenue Matters.]—The court is always sitting to hear revenue matters. *Reg.* v. *Morse*, 6 D. & L. 224; 3 Ex. 223.

The equity jurisdiction of the exchequer, as a court of revenue, is not taken away by 5 Vict. c. 5. *Att.-Gen.* v. *Halling*, 15 M. & W. 687; 16 L. J., Ex. 303.

Duty paid on filing Resolutions—Refusal of Registration.]—When the registration of liquidation resolutions is refused, the court has no power to order repayment of the ad valorem duty paid on the presentation of the resolutions for registration. The only mode of obtaining a return of the duty is by a memorial to the commissioners of inland revenue. *Izard, Ex parte, Moir, In re*, 51 L. J., Ch. 939; 20 Ch. D. 703; 47 L. T. 212; 30 W. R. 861—C. A.

Removal of Proceedings.]—The court has jurisdiction to remove at any stage of the proceedings an action commenced in another court against a revenue officer, for an act done in the execution of his duty. *Att.-Gen.* v. *Kingston*, 1 D. (N.S.) 358; 8 M. & W. 163; 11 L. J., Ex. 72.

Where actions, brought against revenue officers for acts done by them in discharge of their duty, are removed into the exchequer, they are like other causes on the plea side of the court, and the proceedings are not conducted in the office of the queen's remembrancer. *Smith* v. *Cameron*, 9 Jur. 405.

A vessel, having a quantity of firearms on board, was seized by the officers of the board of customs, and, after being detained some time, was delivered up unconditionally to the owners. An action having been commenced in the common pleas for such seizure and detention, the exchequer made a rule absolute in the first instance, on motion of the attorney-general, and upon his statement, without affidavit, for the removal of the cause into that court, on the ground that the revenue of the crown might be affected. *Adams* v. *Freemantle*, 3 Ex. 453; 6 D. & L. 10; 17 L. J., Ex. 312.

The prerogative of the crown to remove into the court of exchequer a cause in another court touching the crown revenue is not affected by the County Courts Act (9 & 10 Vict. c. 95), s. 90. *Mountjoy* v. *Wood*, 1 H. & N. 58; 2 Jur. (N.S.) 452.

When a cause is removed by virtue of this prerogative, it is in the same stage in the exchequer as it was in the other court. *Ib.*

—— **Affidavit in Support of.**]—An affidavit in support of an application for the removal of proceedings from one court to another is properly entitled, "The Attorney-General, informant, *v.* A., defendant," if some proceedings have been commenced, though the information has not been filed. *Att.-Gen.* v. *Kingston*, supra.

V. PROCEEDINGS.

Informations.]—By 8 & 9 Vict. c. 87, s. 82, all penalties imposed by any act relating to the customs may be sued for, prosecuted and recovered by action, or by information before two justices of the peace. By s. 83, upon the exhibiting any information before any justice for any offence against any act relating to the customs, such justice is required to issue a summons for the appearance of the party before two justices of the peace:—Held, that s. 82 referred only to the hearing of the information; and that by s. 83, the information might be exhibited before one justice. *Reg.* v. *Harwich JJ.*, 3 New Sess. Cas. 368; 13 Q. B. 237; 18 L. J., M. C. 106; 13 Jur. 259.

—— **Form of.**]—It is no objection to an information for penalties under the revenue laws, that several offences are charged against several defendants, some in one count and some in another, nor that some of the defendants jointly charged are acquitted and some found guilty, and judgment for the whole amount of penalties and costs given only on one count against each, who was convicted upon it. *Ruck* v. *Att.-Gen.*, 3 H. & N. 208; 27 L. J., Ex. 313; 4 Jur. (N.S.) 167; 6 W. R. 283—Ex. Ch.

Misjoinder of counts and of offences, in an information for penalties, is only the subject of an application at the trial to have the defendants tried separately. *Ib.*

In informations for acts done contrary to 16 & 17 Vict. c. 107 (the Customs Consolidation Act), counts following literally the forms given in Schedule B are good. *Att.-Gen.* v. *Henley*, 8 Ir. C. L. R. 267.

These forms are applicable in proceedings before all courts having jurisdiction, as well as in proceedings before justices. *Ib.*

It is not necessary in an information to make a direct averment that the cause of forfeiture took place before the seizure of the goods. *Att.-Gen.* v. *Clare*, 12 M. & W. 640; 14 L. J., Ex. 82.

Effect of Statute of Limitations.]—The 3 & 4 Will. 4, c. 53, s. 120, enacted that all suits, indictments or informations exhibited for any offence against that or any other act relating

to the customs in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—Held, that this was confined to indictments to be brought, under ss. 75 and 112, in the name of the attorney-general, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the queen of certain duties, which was an offence at common law. *Reg.* v. *Thompson*, 16 Q. B. 833; 20 L. J., M. C. 183; 15 Jur. 654.

Actions for Penalties.]—The enactment in 44 Geo. 3, c. 98, s. 10 (prohibiting the bringing of actions for penalties "incurred by virtue of that or any other act relating to the stamp duties," unless prosecuted in the name of the attorney-general, or of the solicitor of stamps), applies only to cases in which the subject-matter of the action relates to the stamp duties, and not therefore to an action on 38 Geo. 3, c. 78, ss. 7 and 10, for publishing a newspaper without having delivered a proper affidavit at the Stamp Office, and without stating in such paper the true names and additions of the printer and publisher. *Smith* v. *Gillett* or *Gilbert*, 4 N. & M. 225; 2 A. & E. 361; 4 L. J., K. B. 32.

Petition—Question of Revenue taken by Consent.]—A testator bequeathed a legacy to C. "for her absolute use and benefit, except as hereinafter limited," and directed the same, with other legacies to females, to be invested, and the interest to be for the legatees' separate use; and in case any of the legatees should become bankrupt, or assign the interest bequeathed to her, the same was to fall into his residuary estate, "except in respect of C., whose legacy is to go to her children, according to her appointment, and in default to them absolutely." By C.'s marriage settlement her husband had covenanted to settle all after-acquired property of his wife. C. died without having become bankrupt or assigned her interest in the legacy, and having, by will, appointed the same to her children equally. The Commissioners of Inland Revenue thereupon insisted that C.'s share did not go to her children directly under the will, but that her husband must take out administration to her estate, in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the court under 22 & 23 Vict. c. 35, s. 30:—Held, that by consent the question, although between the crown and a subject, might be decided on this petition; and that under the will the legacy upon C.'s death went directly to her children. *Ware's Trusts, In re*, 41 L. J., Ch. 121; 25 L. T. 727; 20 W. R. 142.

Defence in Formâ Pauperis.]—The defendant, in an excise information will be admitted to defend in formâ pauperis upon the common affidavit that he is not worth 5*l.*, over and above his wearing apparel. *Att.-Gen.* v. *Dummie*, 2 C. & M. 393; 4 Tyr. 284; 3 L. J., Ex. 86.

Right of Beginning.]—On an executor, who has been summoned by writ under the Succession Duty Act (16 & 17 Vict. c. 51), ss. 47, 48, to deliver accounts and pay duty, or show cause to the contrary, appearing to show cause, the crown has the right to begin. *Greenwood, In re*, 39 L. J., Ex. 30; L. R. 4 Ex. 327; 21 L. T. 25; 17 W. R. 861.

—— **Special Case stated by Commissioners.**]—In a special case, stated for the opinion of the exchequer by the commissioners for the purpose of deciding a question as to the proper stamp duty to be paid upon a conveyance:—Held, that the counsel for the appellant was entitled to begin. *Chandos* (*Marquis*) v. *Inland Revenue Commissioners*, 6 Ex. 464; 2 L. M. & P. 311; 20 L. J., Ex. 269. S. P., *Eglinton* v. *Inland Revenue Commissioners*, 13 W. R. 902.

—— **Right of Reply.**]—And the counsel has the general right to reply; and per Pollock, C. B., in the exchequer, the crown has the right to general reply in all cases where the crown has an interest. *Ib.*

—— **On Appeal.**]—On an appeal against the decision of the commissioners, the appellant on the argument of the case, is entitled to begin. *Micklethwaite, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

Number of Counsel.]—When a writ of summons against executors, calling upon them to pay legacy duty to the crown, has been turned into a special case, on the argument, the court will only hear one counsel on each side. *Hastie, In re*, 18 W. R. 72; S. P., *Eglinton* v. *Inland Revenue Commissioners*, 13 W. R. 902.

Evidence—Examiners to take.]—The equity jurisdiction of the court of exchequer in matters of revenue still exists, notwithstanding 5 Vict. c. 5; and the court, on an application on behalf of the attorney-general, appointed clerk examiners to take evidence in a revenue suit instituted on the equity side, although the office of clerk examiner was in terms abolished by s. 15. *Att.-Gen.* v. *Evans*, 5 L. T. 760.

——**By Affidavit or Orally—Discretion of Court below.**]—An information was filed on the equity side of the exchequer division to recover passenger duty from a railway company, the question in dispute being whether certain trains run by the company were cheap trains within the meaning of the act exempting from passenger duty the fares for the conveyance of passengers at fares not exceeding one penny per mile by cheap trains. The company applied to have the evidence taken orally:—Held, that the evidence ought to be orally, as it was desirable that in such a case the court should be able to obtain immediate information and explanations by putting questions to the witnesses. *Att.-Gen.* v. *Metropolitan Ry.*, 5 Ex. D. 218; 42 L. T. 342; 28 W. R. 376—C. A.

—— **Witness—Question as to the Informer.**]—The rule of public policy, which prevents a witness being asked such questions as will disclose the informer, if he is a third person, applies equally to questions which will disclose whether or not the witness himself was the informer. *Att.-Gen.* v. *Briant*, 15 M. & W. 169; 15 L. J. Ex. 265.

Therefore, in an information by the attorney-general for a breach of the revenue laws, the court decided that a witness for the crown could not be asked this question, "Did you give the information?" *Ib.*

—— **Defendant as a Witness for Himself.**]—On the trial of an information by the attorney-general, for the recovery of penalties for smuggling under 8 & 9 Vict. c. 87, the defendant was

tendered as a witness on his own behalf and rejected:—Pollock, C. B., and Parke, B., held, that he was not rendered a competent witness by 14 & 15 Vict. c. 99, and therefore, that he was properly rejected on the ground that the proceedings by the attorney-general to recover penalties by an information filed by him on behalf of the crown are criminal proceedings. Platt. B., and Martin, B., contra. *Att.-Gen.* v. *Radloff*, 10 Ex. 84; 2 C. L. R. 1116; 23 L. J., Ex. 240; 18 Jur. 555; 2 W. R. 566.

On the trial of an information for penalties incurred under 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, against an annuitant for refusing to allow the tenants of the premises, on which the annuity was charged, the property-tax, to be deducted out of the rents, he cannot be called as a witness. *Reg.* v. *Sheil*, 1 F. & F. 204.

Impressed Stamp.]—Under 13 & 14 Vict. c. 97, s. 14, the commissioners, by impressing the stamp therein provided, adjudicate that the proper stamp duty has been paid. *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193.

Conviction for Offences against Police Regulation—Sufficiency of.]—By 4 & 5 Will. 4, c. 85, s. 2, every person applying for a licence to sell beer or cider by retail, to be drunk on the premises, must annually deposit with the excise a certificate of good character, signed by six householders. By s. 8, a penalty is imposed upon summary conviction on any person who shall in such certificate certify any matter as true, knowing the same to be false. Other sections impose a duty on excise licences for selling beer, &c., and relate to the revenue of the excise. By 11 & 12 Vict. c. 43, s. 17, summary convictions may be drawn upon a short form given in the schedule. But, by s. 35, nothing in the act shall extend to any proceedings under or by virtue of any of the statutes relating to her majesty's revenue of excise. Upon a rule to quash a conviction, under 4 & 5 Will. 4, c. 85, s. 8, for an offence against s. 2, which was drawn up in the form given in the schedule, as authorised by 11 & 12 Vict. c. 43, s. 17:—Held, that the conviction, which was for an offence against a police regulation, in s. 2, was sufficient, although there were in the statute other sections relating to the revenue of excise. *Reg.* v. *Bakewell*, 7 El. & Bl. 848; 26 L. J., M. C. 150; 3 Jur. (N.S.) 1003; 5 W. R. 655.

Distress—Legality of.]—One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal. *Patchett* v. *Bancroft*, 7 Term Rep. 367; 4 R. R. 465.

The judgment of the commissioners of land tax on appeal is conclusive in trespass, brought against the officer for levying under a warrant of distress. *Ib.*

A collector of taxes cannot, under a warrant of the commissioners, break open the outer door of a house, for the purpose of taking a distress for land tax, under 38 Geo. 3, c. 5, s. 17, without the presence of a constable. *Foss* v. *Racine*, 4 M. & W. 419; 7 D. P. C. 53; 1 H. & H. 403; 8 Car. & P. 699; 8 L. J., Ex. 38.

The necessity of such presence is not confined to the breaking open of a box or chest within the house. *Ib.*

A vicar, who was also farmer of the rectorial tithes, was assessed to the land tax in one gross sum for the rectorial and vicarial tithes; he paid the assessment on the vicarial tithes, but refused to pay on the rectorial tithes, the land tax on them having been redeemed; the collector therefore distrained under the general warrant of distress given by 38 Geo. 3, c. 5, s. 17. The vicar did not appeal under that statute, but brought trespass:—Held, that the action lay, and that he was not bound to appeal. *Charleton* v. *Alway*, 3 P. & D. 618; 11 A. & E. 993; 9 L. J., Q. B. 237.

The distress being made for an assessment alleged to be due on a past half-year:—Held, that the collector could not justify under a distress for the current half-year, no demand having been made for the sum due for the latter period. *Ib.*

Under 38 Geo. 3, c. 5, ss. 2, 12, land tax for the quarter ending 25th May is due, and may be demanded, and upon default in payment distrained for, at any period during that quarter. Under 38 Geo. 3, c. 5, ss. 9, 17, and 43 Geo. 3, c. 99, s. 33, where payment of land or assessed taxes is demanded upon the premises, in the absence of the owner, mere non-payment, without notice of the demand, is not a neglect or refusal to pay, to justify an immediate distress; a reasonable interval must be allowed between the demand and the seizure. *Gibbs* v. *Stead*, 2 M. & Ry. 457; 8 B. & C. 528; 6 L. J. (O.S.) K. B. 378.

A rate of one-tenth of a penny in the pound on the rateable property in a parish was sufficient to raise the quota which the parish was liable to contribute to the land tax; but in order to avoid the difficulty and inconvenience of collecting such small sums as would under that rate have to be collected, amounting in many cases to no more or even less than a penny, the assessors assessed the parish at the rate of one penny in the pound, thereby realising an amount which, after deducting the quota payable by the parish to the tax, left a large surplus; but it was the intention of the commissioners that such surplus should be collected yearly for four years, and be applied at the end of each year, under 24 & 25 Vict. c. 91, so as in four years' time wholly to extinguish the land tax chargeable on the parish. Due notice of a meeting of commissioners to hear appeals from persons aggrieved was given, but no ratepayer appealed. Upon the plaintiff refusing to pay the penny rate assessed on a leasehold house belonging to and occupied by him, the collector, acting under a warrant of distress signed by the defendant and another commissioner, seized a piece of furniture of the plaintiff's on the premises; whereupon the plaintiff brought an action in the county court against the defendant for an illegal distress, in which judgment was given, with damages, in the plaintiff's favour; and on appeal by the defendant, it was held that, the distress warrant and proceedings thereunder being perfectly regular, the case came within and was concluded by *Patchett* v. *Bancroft* (7 Term Rep. 367; 4 R. R. 465), and that the plaintiff could not go behind the warrant which justified the persons executing it; and that, the quota being established, the rate assessed, not being appealed against, must be considered as the rate payable under the judgment of the commissioners, and the plaintiff, if objecting to the amount, should have appealed to them under the provisions of 38 Geo. 3, c. 5, by which their decision was made final and conclusive. *Simpkin* v. *Robin-*

son. 45 L. T. 221. But see *Charleton* v. *Alway*, supra.

A collector of the house and window tax under 43 Geo. 3, c. 161, might distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods were only borrowed, and the person in arrear had other goods of his own on the premises, sufficient to satisfy the arrears. *Jusan* v. *Dixon*, 1 M. & S. 601.

Capias — Before Information.]—A defendant arrested by a capias under 3 & 4 Will. 4, c. 53, s. 95, for an offence against the Customs Act, is not entitled to be discharged out of custody on the ground that no information was filed before issuing the capias. *Att.-Gen.* v. *Reilly*, 12 M. & W. 217; 1 D. & L. 399; 13 L. J., Ex. 82.

Appeal—Notice of.]—An information under 7 & 8 Geo. 4, c. 53, contained four counts. The justices convicted on the fourth and acquitted on the others. The defendant gave notice of appeal from the judgment to the sessions; but the officer on the part of the crown gave no notice of appeal against the judgment of acquittal on the first three counts:—Held, that the defendant's notice of appeal was limited to the judgment of the convicting justices on the fourth count; and that if, on the hearing, the court of appeal was of opinion that the count was not sustained by the evidence adduced, but that the second count was, the judgment must be altogether for the defendant. *Reg.* v. *Gambell*, 16 M. & W. 384; 2 New Sess. Cas. 687; 16 L. J., M. C. 149.

Where an officer of excise, by whom an information of penalties is exhibited, is absent at the time of the hearing, and there is an appeal against the judgment, on the part of the crown, to the sessions, under 7 & 8 Geo. 4, c. 53, s. 82, the notices of appeal required by s. 83 may, by virtue of 4 & 5 Will. 4, c. 51, ss. 22 and 23, be given and signed by an officer of excise who is present, conducting the proceedings. *Reg.* v. *Woodrow*, 15 M. & W. 404; 2 New Sess. Cas. 346; 16 L. J., M. C. 122.

When an adjudication by justices on an information under the Excise Act (7 & 8 Geo. 4, c. 53) is appealed against, notice of appeal must be served on the justices:—Held, that service in court upon the clerk to the justices, in their presence, was good service. *Reg.* v. *Eaves*, 39 L. J., M. C. 70; L. R. 5 Ex. 75; 21 L. T. 829.

Notice of hearing of the appeal is also by 4 Vict. c. 20, s. 30, required to be served on the respondent at his place of abode:—Held, that such notice must be served on the person laying the information, and that service at the office of excise was insufficient, although by 7 & 8 Geo. 4, c. 53, s. 61, no information can be exhibited under the act except by the order of the commissioners of excise. *Ib.*

Certiorari.]—It appeared, on affidavit, that the court of appeal, constituted by 7 & 8 Geo. 4, c. 63, s. 82, suspended its judgment, and stated a special case for the opinion of the court of exchequer, under s. 84:—Held, that no certiorari was requisite to enable that court to give its direction on the special case. *Reg.* v. *Gambell*, 16 M. & W. 354; 2 New Sess. Cas. 687; 16 L. J., M. C. 149.

A licence for the sale of beer, granted by an officer of excise without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act removable by certiorari. *Reg.* v. *Salford Overseers*, 18 Q. B. 687; 21 L. J., M. C. 223; 16 Jur. 907.

Costs following the Event.]—In revenue cases costs follow the event, unless otherwise ordered. *Att.-Gen.* v. *Blucher de Wahlstatt (Countess)*, 3 H. & C. 390.

—— **Quarter Sessions—Against the Crown.**]—An officer of excise having, on behalf of the queen, sued before two justices for a penalty imposed by one of the excise acts, and the information being dismissed, appealed on behalf of the queen to the quarter sessions, where the sessions made an order by which his appeal was dismissed with costs. The court quashed the order of quarter sessions, on the ground that they had no jurisdiction to award costs against the crown in such cases. The provisions of the 18 & 19 Vict. c. 90, ss. 1, 2, do not apply to such a case. *Reg.* v. *Beadle*, 7 El. & Bl. 492; 26 L. J., M. C. 111; 3 Jur. (N.S.) 863.

—— **On Appeal.**]—When the decision of the commissioners of inland revenue is appealed against, and the court decides in favour of the appellant, he is entitled to costs against the crown. *Michlethwaite, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

The 20 & 21 Vict. c. 43, which gives an appeal against an order of justices, binds the crown. *Moore* v. *Smith*, 1 El. & El. 597; 28 L. J., M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206.

—— **Charge of Several Penalties—Proof of One.**]—Where one count of an information charges several penalties, the crown having established a right to one penalty alone, is entitled to the costs of proving that penalty only where the statute gives costs to the crown. *Att.-Gen.* v. *Shillibeer*, 4 Ex. 606; 19 L. J., Ex. 115.

J. M.

REVERSION AND REVERSIONER.

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REVISING BARRISTER.

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See WATER.

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See WAY.

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ROMAN CATHOLICS.

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SAILOR AND SEAMAN.

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SALE.

By Auction.] — *See* AUCTION AND AUCTIONEER.

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Of Commission.]—*See* ARMY AND NAVY.

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Of Land.]—*See* VENDOR AND PURCHASER.

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Of Offices and Pensions and Pay.] — *See* PUBLIC OFFICER.

Of Settled Estates.]—*See* SETTLED LAND.

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SALE OF GOODS.

[BY J. RITCHIE.]

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A. THE CONTRACT.

1. CONSTRUCTION.

a. Generally.

For Court or Jury.]—The construction of the contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. *Bowes* v. *Shand*, 46 L. J., Q. B. 561 ; 2 App. Cas. 455 ; 36 L. T. 857 ; 25 W. R. 730—H. L. (E.)

In modern times the judge leaves the construction to be put upon mercantile instruments to the consideration of the jury, semble. *Fruhling* v. *Schroeder*, 4 L. J., C. P. 169.

As to Meaning Acquired by Mercantile Usage.]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth* v. *Redford*, 43 L. J., C. P. 57 ; L. R. 9 C. P. 20.

A plaintiff sold to the defendants goods ; the invoice was dated the 1st of May, and at the foot of it were written the words : "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage; the jury having found that the action was not brought too soon :—Held, that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. *Ib.*

The bought and sold notes for the purchase of palm oil differed in these respects : the former was for "100 tons of oil at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, to be delivered from the 'Speedy' or 'Charlotte,' expected to arrive about November or December next ; and should the said vessels be lost, this contract to be void." The latter omitted the mention of the weights and allowances, and was "ex 'Speedy' and 'Charlotte' to arrive." Evidence of mercantile usage was received to construe the notes, and according to that evidence there was no material variance :—Held, that the evidence was properly received, and the contract was valid. *Bold* v. *Rayner*, 1 M. & W. 343 ; 1 T. & G. 820 ; 5 L. J., Ex. 172.

See further, EVIDENCE (PAROL EVIDENCE TO EXPLAIN DOCUMENTS).

b. Particular Terms.

Words of Estimate and Expectation—"About 150 Tons."]—The plaintiffs having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale, "about 150 tons," wrote to the defendants, "We are buyers of good wrought scrap iron free of light and burnt iron, for our American house, and understand from S. that you have for sale about 150 tons. We can offer you 80*s.* per ton." There were three intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote, "We accept your offers for old iron, viz., 80*s.* per ton ; we deliver-

ing alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it." Before S. saw the plaintiffs he had seen in the yard of the defendants, who were builders, a heap of iron, and said, "You seem to have about 150 tons there:" The reply was, "Yes, or more." The defendants only delivered 44 tons, that being the quantity of the heap in the yard. The plaintiffs recovered 50*l.* damages in an action for short delivery :—Held, that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty as to quantity, and, therefore, the defendants were not bound to deliver 150 tons ; that the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in the defendants' yard. *McLay* v. *Perry*, 44 L. T. 152.

—— **"Say."**]—An agreement was made, by which the plaintiff agreed to buy, and the defendant to sell, all the naphtha he might make during two years, say from 1,000 to 1,200 gallons per month. A declaration on this agreement contained no averment of any construction given by mercantile usage to the word "say" :—Held, that it was no breach not to have made any naphtha, there being no allegation that the neglect or refusal to do so was in fraud of the agreement. *Gwillim* v. *Daniel*, 2 C., M. & R. 61 ; 1 Gale, 143 ; 5 Tyr. 644 ; 4 L. J., Ex. 174.

An agreement, dated the 12th December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th January, "say not less than 100 sacks of wool" : —Held, that in the absence of an averment that the word "say" had any particular meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 sacks, as a minimum, during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period. *Leeming* v. *Snaith*, 16 Q. B. 275 ; 20 L. J., Q. B. 164 ; 15 Jur. 988.

M., on behalf of the firm of M. & Co., merchants in Quebec, of which he was a member, entered into the following contract with R. M. : "R. M. sells and Messrs. M. & Co. buy, all of the spars manufactured by R. M., say about 600 red pine spars, averaging by cutter's measurement in Quebec 16 inches, at the sum of, &c., delivered free of charge in Quebec. The above spars will be out of the lot manufactured by B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by B. was found to consist of 603 spars, of which 496 averaged 16 inches :—Held, that M. & Co. were bound to accept the 496 spars at the rate agreed on, the words "say about 600 red pine spars," being words of estimate only and not amounting to a warranty. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203 ; 28 L. T. 713 ; 21 W. R. 609.

A charterparty provided that the ship should proceed to the port of lading, and there load a full and complete cargo of iron ore, "say about 1,100 tons." The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons :—Held, that the words "say about 1,100 tons" were not words of expectation but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity ; but that three per cent. was a fair amount of excess over 1,100 tons to allow in estimating what was a full and complete cargo of about 1,100 tons, and consequently that the cargo actually provided fell short of the charterer's obligation by 53 tons. *Morris* v. *Levison*, 45 L. J., C. P. 409 ; 1 C. P. D. 155 ; 34 L. T. 576 ; 24 W. R. 517.

Cargo.]—The plaintiff sold to the defendant "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum." The plaintiff chartered a vessel, on which were placed 3,000 barrels of petroleum, and a bill of lading was signed making them deliverable to the plaintiff ; but as this quantity did not constitute a full cargo, 300 additional barrels were placed on board, which were marked with a different mark, and for which a separate bill of lading was signed. The plaintiff gave notice to the defendant of the shipment of the 3,000 barrels, and as ready to order the vessel from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3,000 barrels, and to take the 300 himself, or to deliver to the defendant at any such port 2,750 barrels as the mean between 2,500 and 3,000, but the defendant refused to accept either the 3,000 barrels or any other quantity. The plaintiff having brought an action for non-acceptance :—Held, that, on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it ; that the defendant was therefore not bound to accept part of a cargo, and that the action was not maintainable. *Borrowman* v. *Drayton*, 46 L. J., Ex. 273 ; 2 Ex. D. 15 ; 35 L. T. 727 ; 24 W. R. 194—C. A.

"As soon as Possible."]—The plaintiff contracted to furnish iron hoops to the defendant, "as soon as possible" :—Held, that "as soon as possible" meant "as soon as the plaintiff possibly could," and that his contract was so far performed if he furnished the hoops without unreasonable delay, regard being had to his ability to make them, and the orders he had already in hand. *Attwood* v. *Emery*, 1 C. B. (N.S.) 110 ; 26 L. J., C. P. 73 ; 5 W. R. 19.

"Market Value."]—The plaintiff agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, and of the market value of 11*d.* per yard, and the making to be charged at 5*d.* per yard ; and it was agreed that, if the market value of the canvas should be less than 11*d.* per yard, the amount (the difference) should be deducted :—Held, that "market value" meant the price in the market to an ordinary consumer, irrespectively of the particular contract. *Orchard* v. *Simpson*, 2 C. B. (N.S.) 299.

Discount less Duty.]—Where goods were sold under a written contract at so much per load, "to be taken by the dock account and paid for in cash, allowing 2½ per cent. discount within fourteen days from the date ; the goods to be taken on board and the duty deducted" ; and the duty was payable by the buyer :—Held, that the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty. *Smith* v. *Blandy*, R. & M. 260.

"Good" or "Fine" Barley.]—The defendants wrote to the plaintiffs, offering them a certain quantity of "good" barley, upon certain terms ;

to which the plaintiffs answered, after quoting the defendant's letter, as follows:—"Of which offer we accept, expecting you will give us fine barley and full weight." The defendants in reply stated that their letter contained no such expression as fine barley, and declined to ship the same. Evidence was given at the trial, that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley:—Held, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that they having found what that meaning was, it was for the court to determine the meaning of the contract; and the court held, that there was not a sufficient acceptance. *Hutchinson* v. *Bowker*, 5 M. & W. 535; 9 L. J., Ex. 24.

"Seed Barley."]—The plaintiff having heard that the defendant had some barley to sell went to his counting-house, when his agent produced a sample which he said was "seed barley," offered to the defendant at 39*s.*, and said that if the plaintiff would take it at 40*s.* he might have it; the plaintiff approved of it and agreed to buy it. The plaintiff afterwards sold it under a warranty in writing as "Chevalier seed barley." It turned out that it was "barley bigg," a species of barley unfit for malting purposes; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty:—Held, that the contract was satisfied by the delivery of barley fit for sowing; and that if the term "seed barley" meant barley fit for malting purposes, that ought to be shown by clear and irresistible evidence. *Carter* v. *Crick*, 4 H. & N. 412; 28 L. J., Ex. 238; 7 W. R. 507.

On Arrival.]—A., by a bought and sold note, agreed to sell to B. "100 tons of nitrate of soda, at 18*s.* per cwt., to arrive ex Daniel Grant, to be taken from the quay at landing weights," &c.; and below the signature of the brokers there was the following memorandum: "Should the vessel be lost, this contract to be void":—Held, that the contract did not amount to a warranty, on the part of the seller, that the nitrate of soda should arrive, if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition of the arrival of the vessel with the specified cargo on board. *Johnson* v. *Macdonald*, 9 M. & W. 600; 12 L. J., Ex. 99; 6 Jur. 264.

There is no difference, in such cases, between the legal effect of the words "on the arrival" and "to arrive." *Ib.*

A contract in London for the sale of tallow then at sea, in which it was agreed that if it did not arrive at a certain time, the bargain was to be void, means arrival in London and not elsewhere. *Idle* v. *Thornton*, 3 Camp. 274; 13 R. R. 799.

If there is a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods. *Boyd* v. *Siffkin*, 2 Camp. 326; 11 R. R. 721.

—— **Nature of Condition.**]—Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery; but where the agreement is absolute, or conditional on an event which happens, the vendor will be liable for a breach, though without default on his part; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. *Hale* v. *Rawson*, 4 C. B. (N.S.) 85; 27 L. J., C. P. 189: 4 Jur. (N.S.) 363; 6 W. R. 339.

Contract for the sale of fifty cases of East India tallow, at the price of 48*s.* 6*d.* per cwt., to be paid fourteen days after finishing the landing thereof, "to be delivered by the seller to the purchaser on safe arrival of 'The Countess of Elgin,'" at the time of the contract on her passage from Calcutta to London, the quality to be equal to sample:—Held, that no property in the tallow passed to the purchaser by the sale. *Ib.*

Held, also, that the contract was an absolute contract to sell and deliver the tallow, provided the vessel arrived, and was not subject to the condition of the tallow arriving in the vessel. *Ib.*

In a contract to sell 500 bales of cotton, to arrive in Liverpool, per ship or ships, from Calcutta, there was the following stipulation: "The cotton to be taken from the quay":—Held, that this stipulation was an independent stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed. *Neill* v. *Whitworth*, 1 H. & R. 832; 35 L. J., C. P. 304; L. R. 1 C. P. 684; 12 Jur. (N.S.) 761; 14 L. T. 670; 14 W. R. 844—Ex. Ch.

In an action by a vendee, for non-delivery of goods:—Held, that in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery on that day is a condition precedent; and if they do not so arrive (without default of the vendor) the agreement is null. *Alewyn* v. *Pryor*, R. & M. 406; 27 R. R. 763.

For Delivery.]—Where a quantity of barley was sold upon a contract to "deliver alongside a sloop or warehouse at G. or K., at the buyer's option, in all April, or sooner," and the barley was brought into dock at G. on the 29th of April:—Held, that the contract was broken, inasmuch as it would have taken four days to unload the vessel and deliver the cargo into the buyer's possession. *Cox* v. *Todd*, 7 D. & R. 131; 4 L. J. (O.S.) K. B. 34.

Action on a contract for the sale of 50 tons of bicarbonate of soda at "11*l.* per ton, in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10*s.* less per ton, free on board, to be delivered in equal monthly quantities during April, May, and June, 1865." Averment, that the defendant duly delivered divers portions of the goods according to the agreement, and that the plaintiff was not required by the defendant to accept the delivery of the residue. Breach, non-delivery of the residue. Plea, that the defendant was ready and willing to deliver the residue according to the agreement, whereof the plaintiff had notice, and that the plaintiff was not ready and willing to accept, and would not accept, and did not require, the delivery of the same:—Held, that before the defendant was bound to deliver the goods, the plaintiff was bound to name the ship

or the place where he desired the goods to be delivered, and that a tender of the goods by the defendant was not a condition precedent to their delivery, or to the ship or place being named by the plaintiff. *Sutherland* v. *Allhusen*, 14 L. T. 666.

Ice to be taken "from the Deck."]—A cargo of ice was consigned to the plaintiff, and before the ship came into harbour the defendants purchased the cargo, with a condition that the ice was to be taken from the ship's deck by them :—Held, that the contract "from the deck" meant that the vendor should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before goods could be removed were payable by the vendor. *Playford* v. *Mercer*, 22 L. T. 41.

Purchaser "to take upon himself all Risks and Dangers of Sea."]—By an agreement in which C. was described as vendor, and P. as purchaser, C. agreed to ship a cargo of ice, and on being shipped, to forward to P. bills of lading, on receipt of which he was to "take upon himself all risks and dangers of the sea," &c., he agreeing also to buy and receive the ice on its arrival, taking the ice from alongside the ship, and paying for it in cash on delivery at the rate of 20*s.* per ton, weighed on board during delivery :—Held, that the effect of the clause as to risks and dangers of the sea was not merely to save C. from liability for non-delivery, but to bind P. to insure the cargo on receiving the bill of lading ; and that the ship and cargo having been lost on the voyage through perils of the sea, P. was liable to pay C. the price or the value of the cargo. *Castle* v. *Playford*, 41 L. J., Ex. 44 ; L. R. 7 Ex. 98 ; 26 L. T. 315 ; 20 W. R. 440—Ex. Ch.

For Shipment.]—A contract for the sale of flax exported from Petersburg, contained a stipulation "that the flax should be dispatched from Petersburg, not later than 31st of July, O. S., either for Hull or London" :—Held, to be enough that before the day specified the flax had been sent down from Petersburg in lighters, and put on board the ship at Cronstadt, although she was not despatched on her homeward voyage till after the day. *Busk* v. *Spence*, 4 Camp. 329.

A stipulation in such a contract, that "as soon as the seller knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer," forms a condition precedent. *Ib.* S. P., *Graves* v. *Legg*, 9 Ex. 709 ; 2 C. L. R. 1266 ; 23 L. J., Ex. 228.

Bill of Lading—Delivery of, to Purchaser.]—A., by letter, requested B. to purchase for him 150 bales of cotton. The letter contained the following terms : "Upon executing the above, and forwarding a bill of lading, I will accept your draft at sixty days' sight after the receipt of the bill of lading" :—Held, that B. was bound to deliver the bill of lading as soon after its arrival as he conveniently could, without reference to the arrival or unloading of the cargo. *Barber* v. *Taylor*, 5 M. & W. 527 ; 9 L. J., Ex. 21.

—— **Time of Shipment.**]—A. contracted to sell to B. a specific cargo of wheat, described in the bought and sold note as "shipped per 'Diletta Mimbella,' as per bill of lading, dated September or October," and which was all on board at the date of the contract :—Held, that this did not necessarily entitle the buyer to rescind the contract, on its turning out that all the wheat was not shipped before the bill of lading was given. *Gattorno* v. *Adams*, 12 C. B. (N.S.) 560.

As to Allowances.]—In a contract for the sale of ten bales of cotton at so much a pound, the following stipulation was contained :—"Claims for damaged cotton allowed at the value of the sound cotton at the time of return, if claim and return made within ten days and three months." Of two out of the bales delivered respectively, two-thirds were sound and one-third was damaged :—Held, that the purchaser was not entitled to return and to be allowed for the whole bales, but only the one-third that was damaged. *Mellor* v. *Street*, 15 L. T. 223.

Bought and Sold Notes—"Put off."]—A broker, employed by the plaintiffs to sell 200 casks of tallow, sold fifty to the defendant and the remainder to two other parties, to be delivered some months subsequently to the sale. In the bought note he described the transaction as a purchase of fifty casks for his principals, i.e. the buyers ; and in the sold note, as a sale of 200 casks sold to his principals. In his book he stated the defendant as the purchaser of fifty casks, and the two other parties as purchasers of the remainder. There was no disclosure of the principals on either side. About the time appointed for the delivery, the broker urged the defendant to buy 100 other casks of a third person, and on the latter objecting to do so, on the ground that the fifty casks already contracted for by him would soon be delivered, offered to "put off" those casks. The fifty casks were never actually delivered to the defendant. It was objected, that the plaintiffs ought to be nonsuited on two grounds : first, that inasmuch as there was a variance between the bought and sold notes, the broker's book not being evidence of the contract, there was no valid contract ; and, secondly, that there was nothing to show any delivery of the fifty casks to the defendant. The judge being of that opinion, nonsuited the plaintiffs :—Held, that the nonsuit was wrong on the second ground, it being a question for the jury whether the words "put off" meant a sale of the goods to a third person by the broker on account of the defendant, or a postponement of the delivery with or without the consent of the plaintiffs. *Thornton* v. *Charles*, 9 M. & W. 802 ; 11 L. J., Ex. 302.

c. Divisible or Entire.

Sale of Certain Quantity.]—The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the B., only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper :—Held (by Cotton and Thesiger, L.JJ., Brett L.J., dissenting), that the contract was entire, and that the defendants

were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract. *Reuter* v. *Sala*, 48 L. J., C. P. 492; 4 C. P. D. 239; 40 L. T. 476; 27 W. R. 631—C. A.

Defendant promised, in consideration of the plaintiff supplying A. with goods to the amount of 35*l*., to pay to plaintiff that amount in monthly instalments of 25*s*.; in case of default in payment of any one instalment, the whole balance of 35*l*. to become due:—Held, that the consideration was indivisible, and that the plaintiff, having supplied goods to the amount of 29*l*. 4*s*. only, was not entitled to recover anything. *Johnson* v. *Gandy*, 4 W. R. 22.

Order of Several Articles.]—If a person orders several articles from a tradesman at the same time, though at distinct prices, he may consider the whole as forming one order. *Baldey* v. *Parker*, 3 D. & R. 220; 2 B. & C. 37; 1 L. J. (O.S.) K. B. 229; 26 R. R. 260.

And he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accepts of any one article, he is precluded from saying that the order was entire, and he will be obliged to accept and pay for so many as are individually furnished according to contract. *Champion* v. *Short*, 1 Camp. 53; 10 R. R. 631.

Sale by Auction of Several Lots.]—Where different lots are sold at an auction for different sums, the contracts are separate both in law and fact; and in an action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. *James* v. *Shore*, 1 Stark. 426; 18 R. R. 798.

Goods Belonging to Different Owners.]—Where a horse-dealer, employed to sell the horses of different persons, sold two horses belonging to several owners at an entire price, and warranted both sound:—Held, that, as respected the warranty, the contract was several. *Symonds* v. *Carr*, 1 Camp. 361.

At Different Places.]—A. and B. went (in one day) to several places distant a few miles from each other, where they agreed for the purchase and sale of different lots of timber, and at the last place a memorandum of the whole transaction was made and signed by A. Part of the timber was accepted by B., but he refused to take the rest:—Held. that the whole formed one joint contract. *Bigg* v. *Whisking*, 14 C. B. 195; 2 C. L. R. 617.

Plans of Goods to be Delivered.]—The defendant agreed with the plaintiff to supply him with 150 tons' weight of cast-iron girders of various sizes, to be shown in drawings to be provided by the plaintiff's architect, at so much per ton; drawings for a few tons' weight only were sent within a reasonable time from the making of the agreement:—Held, that the contract was not divisible, and that as drawings for the whole of the girders had not been sent within a reasonable time, the plaintiff could not recover for non-delivery of those for which drawings had been sent within a reasonable time. *Kingdom* v. *Cox*, 5 C. B. 522; 17 L. J., C. P. 155; 12 Jur. 336.

See also post, cols. 441, 442, *and cases*, sub. CONTRACT, ante, vol. iv. col. 253.

d. Evidence as to Meaning.

Mercantile Usage—When Admitted.]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has acquired a definite meaning by mercantile usage. *Ashworth* v. *Redford*, 43 L. J., C. P. 57; L. R. 9 C. P. 20.

Contract not Ambiguous.]—In an action for not accepting linseed bought under a contract, which stipulated that fourteen days were to be allowed for the delivery of the linseed, from the time of the ship being ready to discharge:—Held, that the contract not being ambiguous in its terms, the judge was right in rejecting evidence of its meaning. *Sotiliehos* v. *Kemp*, 3 Ex. 105; 18 L. J., Ex. 36.

Contract Insufficient.]—The defendant having ordered goods by letter, which did not mention any time for payment, the plaintiff sent the goods and an invoice:—Held, that evidence to show that the order was given on the terms of six months' credit was admissible, the letter not being a valid contract within the statute of frauds. *Lockett* v. *Nicklin*, 2 Ex. 93; 19 L. J., Ex. 403.

"Prime Bacon."]—On a contract of sale of "prime bacon," it was held inadmissible to show that by a usage of the trade, bacon with an "average taint" answered the description. *Yates* v. *Pym*, 6 Taunt, 446; 16 R. R. 653.

Allowance of Credit.]—The defendant's traveller entered and signed in the plaintiff's order-book a contract in the following terms: "Of E. Y., 39 pockets Sussex hops, Springett's, 5 pockets Kenward's, 78*s*.; Springett's, to wait orders." In an action by the purchaser for the non-delivery of the thirty-nine pockets:—Held, that parol evidence of the course of dealing between the parties was not admissible to show that the sale was at a credit of six months. *Ford* v. *Yates*, 2 Scott (N.R.) 645; 2 Man. & G. 549; 10 L. J., C. P. 117.

"Ware Potatoes."]—In an action on a written contract for the delivery of "ware potatoes," it appearing that the term "ware" applied equally to all kinds of potatoes, and meant the best or largest of any kind:—Held, that evidence to show that a particular sort, called "Regent's wares," were intended, was inadmissible. *Smith* v. *Jeffryes*, 15 M. & W. 561; 15 L. J., Ex. 325.

Firm Name.]—A contract was made for the sale of a quantity of "Scott & Co.'s mess pork," and it appeared by the evidence of mercantile men that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—Held, that the warranty was not satisfied by supplying pork which had merely passed through the hands of Scott & Co. as consignors, and which bore their brand-mark, but that it meant pork of their manufacture. *Powell* v. *Horton*, 2 Hodges, 12; 2 Bing. (N.C.) 668; 3 Scott, 110; 5 L. J., C. P. 204.

Held, also, that the evidence of the mercantile men was properly received. *Ib.*

"Best Oil."]—A plaintiff sold to a defendant "fifty tons of best palm oil, expected to arrive

per the 'Chalco,' at 40*l.* 10*s.* per ton; wet, dirty, and inferior oil, if any, at a fair allowance" The oil, on arrival, contained one-fifth only of "best oil":—Held, that oral evidence was admissible to show that, according to mercantile usage, the contract was satisfied if the oil delivered contained a substantial portion of "best" oil. *Lucas* v. *Bristow*, El. Bl. & El. 907: 27 L. J., Q. B. 364; 5 Jur. (N.S.) 68; 6 W. R. 685.

"Bales."]—So on a contract for 1,170 bales of gambier, "now on passage from Singapore, and expected to arrive at London, viz. per 'R.' 805 bales, per 'L. A. D.' 365," evidence is admissible to show what the word "bales" meant by the custom of the trade. *Gorrissen* v. *Perrin*, 2 C. B. (N.S.) 681: 27 L. J., C. P. 29; 3 Jur. (N.S.) 867; 5 W. R. 709.

"Your Wool."]—A wool-buyer purchased of sheep-farmers a quantity of wool, described in the written contract simply as "your wool." A previous conversation had taken place between the parties, in which the farmers had stated that, besides their own clip of wool, they had purchased the clips of four or five neighbouring farmers, whose names were specified, and that altogether the quantity amounted to "2,300 stones; 100 stones more or less":—Held, in an action against the buyer for not accepting the wool, that evidence of this conversation was admissible to explain what was meant by the term "your wool." *M'Donald* v. *Longbottom*, 1 El. & El. 987; 29 L. J., Q. B. 256; 6 Jur. (N.S.) 724; 2 L. T. 606; 8 W. R. 614—Ex. Ch.

From particular Place.]—The plaintiff sold to the defendant, "deliverable in London, ex 'Ion,' from Savannah, 400 loads of pitch pine timber, the timber warranted of fair average quality; to be taken of fair average of the cargo." Evidence was given that pitch pine timber is an article which comes from several parts of Central America, and that pitch pine timber from Darien has more heart in it, being better butted and with fewer holes than that from Savannah:—Held, that the evidence was admissible to explain the contract, and that upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber. *Jones* v. *Clarke*, 2 H. & N. 725; 27 L. J., Ex. 165.

Price—Consideration for.]—C. contracted, in writing, with B., to make and deliver 7,000 knapsack slings, at 3*s.* 9*d.* a set, to be delivered in certain quantities every month. The agreed price having been paid to C., but the slings not having been delivered in time, B. brought an action for the breach of contract:—Held, that evidence for B. was inadmissible to show that part of the agreed price was given in consideration of the delivery within the specified times, and that the market price was 2*s.* 10*d.* a set. *Brady* v. *Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300; 11 Jur. (N.S.) 22; 11 L. T. 681.

"Cwt."]—In an action upon a sold note, in the following form: "Sold to Mr. S., 18 pockets Kent hops, viz. 10 pockets Burton East Kent, 8 pockets Springall, Goodhurst, at 100*s.*"—parol evidence is admissible, either to supply the term "cwt." or to show that the term "pockets" meant cwt. *Spicer* v. *Cooper*, 1 Q. B. 424; 1 G. & D. 52; 10 L. J., Q. B. 241; 5 Jur. 1036.

Mistake in Note.]—In trover the following plea, as an equitable defence, was allowed on an affidavit of its truth:—"That the plaintiff was owner of chemical works, that the goods for which the action was brought were stock-in-trade and materials on the premises, that the defendant agreed to purchase the chemical works of the plaintiff, and that the goods were included in those sold; that the brokers employed by the plaintiff and defendant to make the contract made it by bought and sold notes, and by mistake they so made the notes that they did not include the goods; that possession of the chemical works with the goods had been given to the defendant, and that the purchase had been completed and the purchase-money paid, and that the plaintiff was unjustly availing himself of what was a mistake in the drawing of the bought and sold notes." *Steele* v. *Haddock*, 10 Ex. 643; 3 C. L. R. 326; 24 L. J., Ex. 78; 3 W. R. 172.

Effect of Note.]—The plaintiff, professedly as C.'s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced them to sign a bought note, which described the plaintiff as the seller at an ascertained price per ton, by representing that this price was nominal, and that as the defendants were dealing with the crown, whose officer C. was, they would incur no risk. A day was fixed by the note, on which a deposit of twenty per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiff sent the defendants an invoice specifying the quantity of the bark, and debiting them, as buyers from himself, with a sum calculated at the price per ton in the bought and sold notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants, without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a sale by himself, as principal, at the price in the bought and sold notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price which he had then ascertained in the manner originally agreed, and took possession of the bark:—Held, that parol evidence was admissible to show that the bought and sold notes did not really contain the contract between the parties. *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L. J., Ex. 241; 9 Jur. (N.S.) 898; 9 L. T. 292; 11 W. R. 1074.

A contract made by brokers in their own names, for the purchase of iron for the plaintiffs, was contained in bought and sold notes. The notes differed only in these particulars, that while the bought note delivered by the brokers to the plaintiffs had the words "Deposit 5*s.* per ton, brokerage 0 per cent.," the sold note contained the words "Deposit (blank), brokerage half per cent":—Held, that parol evidence was admissible to show an arrangement between the brokers and the plaintiffs, by which they required the latter to pay a deposit of 5*s.* per ton, and that the apparent variances, so explained by the usage of the parties between the notes, was not material. *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191; 11 Jur. (N.S.) 832; 14 W. R. 15.

Where a complete contract (through brokers)

for the sale of goods is to be gathered from a written offer on the one side and a written acceptance on the other, such contract is not the less binding on the buyer because bought and sold notes are subsequently exchanged between the brokers, containing terms not warranted by the authority given to the buyer's broker; at all events, in the absence of evidence of a custom in the particular trade to contract by bought and sold notes, or of a distinct understanding between the parties to that effect. *Heyworth* v. *Knight*, 17 C. B. (N.S.) 298; 10 Jur. (N.S.) 866.

Sale by Brokers—Undisclosed Principal.]—The plaintiff employed T. and M., London brokers, to sell oil for him, and S. employed the defendants, who were also London brokers, to buy for him. The dealing was between the brokers. The defendants sent to T. and M. a sold note, signed by them, as follows:—

"London, Aug. 14, 1855.

"Sold this day, for T. and M., to our principals, ten tons of linseed oil, &c.

"D., M. & Co., brokers."

T. and M. made the following entry in their books:—

"London, Aug. 14, 1855.

"Sold to D., M. & Co., per account of C. H., ten tons of linseed oil, &c.

"T. and M., brokers."

The defendants did not disclose their principal till an unreasonable time after the contract; and evidence was given that, according to the usage of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser:—Held, first, that there was evidence of a contract of bargain and sale, and that evidence of the usage was admissible, as it was not repugnant to or inconsistent with the written instrument. *Dale* v. *Humfrey*, 7 El. & Bl. 266; 26 L. J., Q. B. 137; 3 Jur. (N.S.) 213. Affirmed on appeal, El. Bl. & El. 1004; 27 L. J., Q. B. 390; 5 Jur. (N.S.) 191; 6 W. R. 854—Ex. Ch.

Parol evidence of a broker may be admitted, to show that a sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer. *Wilson* v. *Hart*, 1 Moore, 45; 7 Taunt. 295.

The defendant, a merchant residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him; after which H. contracted with the plaintiff to sell him tallow (of more than 10*l.* value), and H.'s name was used as before, H. intending to make the contract on his own account; but the plaintiff did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker, acting for both parties. He signed the bought and sold notes; the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals:" no buyer or seller being further named:—Held, that the defendant was liable for the non-delivery of the tallow, that the bought and sold notes constituted a sufficient note in writing to charge the defendant, and that no objection lay to the admission of parol evidence of these facts as varying the written instrument. *Trueman* v. *Loder*, 11 A. & E. 589; 3 P. & D. 567; 9 L. J., Q. B. 165.

Evidence was offered by the defendant of a custom in the tallow trade that on such contracts as the above "a party might reject the undisclosed principal and look to the broker for the completion of the contract":—Held, inadmissible, as varying a written instrument. *Ib.*

Alleged Custom that Buyer Acts as Principal—Discovery.]—A horsedealer brought in a claim, in an action for the administration of a deceased customer's estate, for a balance of account alleged to be due in respect of the sale and purchase of horses for the testator. The executrix sought discovery from him of the prices which he had obtained for, and the names of the persons to whom he had sold, the horses. He alleged that, according to the custom of the trade, he had acted as a principal and not as agent in the matter, and therefore that until that issue was determined the discovery ought not to be allowed. Evidence of the alleged custom by means of affidavits of other horsedealers and of owners of horses that they had respectively bought and sold horses in this way was tendered by him:—Held, that the evidence was admissible on the issue that the custom was not unreasonable, and that the executrix was not entitled to the discovery until the determination of the prior question whether such custom existed or not. *Leigh, In re, Rowcliffe* v. *Leigh (Steward's Claim)*, 6 Ch. D. 256; 37 L. T. 557; 25 W. R. 783—C. A.

Broker's Book as Evidence.]—Where the notes of a sale, delivered by a broker to the parties, differ in the terms, the broker's book is not evidence to show which is correct. *Thornton* v. *Meux*, M. & M. 43; 31 R. R. 711.

In an action by the vendee on a contract made through a broker, it is sufficient for the vendee to produce the bought note, handed to him by the broker, and to show the employment of the latter by the vendor. If the sold note varies from the bought note, it lies on the vendee to prove that variance by producing the sold note. *Hawes* v. *Forster*, 1 M. & Rob. 368.

When a contract is made through a broker, the bought and sold notes delivered to the parties constitute the contract, not the entry made by the broker in his book, especially when, by the usage of trade, the bought and sold notes are looked upon as the contract. *Ib.*

Where bought and sold notes are given, the bought and sold notes constitute the contract between the parties, and not the entry of the contract made by the broker in his book. But if there are no bought and sold notes, the entry in the broker's book may be resorted to. *Townend* v. *Drakeford*, 1 Car. & K. 20.

See also cases, post, cols. 411, et seq.

And see CONTRACT—EVIDENCE.

2. THE CONSIDERATION.

a. What is Sufficient.

See CONTRACT.

b. Price.

When not Mentioned.]—A contract of sale may be complete and binding, though silent as to the price (such silence being equivalent to a stipulation for a reasonable price) and as to the time and mode of payment. *Valpy* v. *Gibson*,

4 C. B. 837. S. P., *Joyce* v. *Swann*, 17 C. B. (N.S.) 84.

A memorandum which is silent as to price will not support a count alleging a contract at the shipping price. *Acebal* v. *Levy*, 10 Bing. 376; 4 M. & Scott, 217; 3 L. J., C. P. 98.

Nor where the parol evidence discloses a contract at the shipping price, will it, under a count for goods bargained and sold, prove a contract at a reasonable price. *Ib.*

When a contract, that is silent as to price, is executed by the acceptance of the goods by the vendee, the law will supply the want of an agreement as to price, by inferring that the parties must have intended a reasonable price. *Ib.*

A contract to furnish goods, with a certain latitude as to the price, as saddles at 24*s.* or 26*s.*, may be described as a contract to furnish them at a reasonable price. *Laing* v. *Fidgeon*, 6 Taunt. 108; 4 Camp. 169; 16 R. R. 589.

Uncertain.]—Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4*s.* per stone, and the contract proved was, that the defendant should deliver it at 4*s.* per stone, and so much more as the plaintiff paid to any other person, this was:—Held, a variance. *Churchill* v. *Wilkins*, 1 Term Rep. 447.

A declaration averred the consideration for the purchase of a horse to be, "that the buyer should give a large price, to wit, 100 guineas." Proof that the buyer was to give "100 guineas and 10*l.* more, if the horse suited him":—Held, no variance. *Care* v. *Coleman*, 3 M. & Ry. 2; 7 L. J. (O.S.) K. B. 25.

See further as to VARIANCE, post, col. 522.

Mistake.]—On the sale of a specific article for a certain price, a dispute afterwards arising as to the amount, if the parties never were ad idem as to the price, by reason of mutual mistake, there would be an implied contract (the article having been retained so long that it could not be returned in the same condition) to pay its real value. *West* v. *De Wezele*, 4 F. & F. 596.

"Fair Value thereof."]—In March, 1853, H., by parol, sold goods to the defendant, at an agreed price, and the defendant then took possession. In the following May, by articles of agreement, it was agreed between them as follows: "That H. shall sell and the defendant shall purchase the same goods, and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties differ as to the same, by arbitration, in manner hereinafter mentioned; and that the defendant shall pay to H. the amount of such price within two calendar months after such price shall have been fixed." The defendant continued in possession of the goods, and never objected to the price originally fixed. H. having become bankrupt in August, his assignees sued the defendant for the amount, as for goods sold and delivered:—Held, that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shown that the event upon which the arbitration clause was to apply had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to. *Cannan* v. *Fowler*, 14 C. B. 181; 2 C. L. R. 43; 23 L. J., C. P. 48; 2 W. R. 101.

Contract for—When Implied—Wrongful Sale by Co-owner of Shares in a Ship.]—The plaintiff was the owner of certain shares in a ship. The defendant, who was the managing owner of the ship, being desirous of selling the ship, wrote to the plaintiff and asked her for a bill of sale of her shares. This she refused to give, but subsequently she offered to sell her shares for 100*l.* The defendant, without further communication with her, sold the ship, with the consent of all the other co-owners, at a price which would have yielded to the plaintiff in respect of her shares a less sum than 100*l.*:—Held, that there was an implied contract by the defendant to pay for the shares as upon a contract of sale, and that, though there was no presumption of law that the defendant agreed to pay any price asked, yet, it being found that the price asked was a reasonable one, a presumption arose from the facts of the case that the defendant agreed to pay that price. *Nicol* v. *Hennessey*, 44 W. R. 584.

c. Payment.

After Delivery.]—Where an agreement, as described in a declaration, was "to deliver fifty tons of iron, for the price of 9*l.* per ton, the goods to be delivered forthwith to the defendant, at his works, and the price to be paid in cash in fourteen days from the time of the making the contract:"—Held, that it sufficiently appeared upon the face of the contract, as stated, that the delivery was intended to be a condition precedent to the payment. *Staunton* v. *Wood*, 16 Q. B. 638; 15 Jur. 1123.

Where the words "terms cash" are inserted in a contract, payment on delivery is not a condition precedent. *Nelson* v. *Patrick*, 2 Car. & K. 641.

A contract for the sale of thirty bales of goats' wool, at a certain price per pound, contained the following stipulation:—"Customary allowance for tare and draft, and to be paid for by cash in one month, less five per cent. discount":—Held, that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month. *Spartali* v. *Benecke*, 10 C. B. 212; 19 L. J., C. P. 293.

After Action brought.]—A. contracted to buy of B. cement, in casks and bags, at a given price, for cash, B. agreeing to allow A. 3*s.* 6*d.* for each cask, and 2*s.* 6*d.* for each bag that should be returned perfect. In an action by A. against B., for not accepting and paying for the casks and bags, the declaration averred, that A. duly paid B. for the cement, and for the casks and bags, and that although A. was ready and willing and offered to return the casks and bags, B. refused to accept or pay for them. B. pleaded that A. did not duly pay B. for the cement, casks and bags, and that A. was not ready and willing to return the casks and bags to B. within a reasonable time:—Held, that a payment of the price of the cement by A., after an action brought against him, was a payment according to the contract, so as to entitle him to complain of a breach of the contract on the part of B. *Nelson* v. *Pattrick*, 3 C. B. 772; 16 L. J., C. P. 98.

Resuming Possession in Default.]—An agreement between vendor and vendee of a chattel, that the former may resume the possession if the price is not duly paid, is a personal contract, not

binding on an alienee, or the personal representative of the vendee. *Howes* v. *Ball*, 1 M. & Ry. 288; 7 B. & C. 481; 6 L. J. (O.S.) K. B. 106; 31 R. R. 256.

By Bills—Dishonour—Production.]—A purchaser having given the seller in payment for goods bills of exchange, which were afterwards dishonoured, the latter sued him for the price of the goods:—Held, that the seller was not bound to produce the bills at the trial, and that the fact of their being in the possession of his agent at the time did not bar his right to recover. *Hadwen* v. *Mendizabel*, 2 Car. & P. 20; 10 Moore, 477; 3 L. J. (O.S.) C. P. 198.

A purchaser, in payment of goods, accepted two bills drawn on him by the vendor, and returned them to him by post. The vendor in a letter, to which a receipt stamp was affixed, acknowledged the receipt of the bills, and that they had been placed to the purchaser's credit. He afterwards sent the same bills by post to the purchaser, in a letter, requesting him to accept the bills, payable at a banker's, and then to return them. The bills never were returned; the purchaser denied having received them back, but there was other evidence that he had so received them. It was found as a fact, that the vendor had not accepted the bills as payment:—Held, that he might recover the price of the goods without producing the bills. *Widders* v. *Gorton*, 1 C. B. (N.S.) 576; 26 L. J., C. P. 165.

—— **Renewal—Discharge.**]—The purchaser of goods to be paid for by a bill upon an agent, who has no funds in hand when it becomes due, is not discharged by the renewal of the bill without notice. *Clarke* v. *Noel*, 3 Camp. 411; 14 R. R. 768.

—— **Custom in London—Time for Rescission.**]—If goods in the city of London are sold by a broker to be paid for by a bill, the vendor has a right within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract; but the vendor must intimate his dissent as soon as he has an opportunity to inquire into the solvency of the purchaser. *Hodgson* v. *Davies*, 2 Camp. 530; 11 R. R. 789.

Five days considered too long a period for this purpose. *Ib.*

—— **For more than Price.**]—A vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bills being dishonoured, precluded from recovering against the buyer the price of the goods. *Fry* v. *Hill*, 7 Taunt. 397; 18 R. R. 512.

—— **By Approved Bill.**]—If it is stated generally on a bought and sold note that the goods are to be paid "by bill," evidence cannot be received to show, that by bill is meant an approved bill; and, semble, that an approved bill is a bill to which there is no reasonable objection, and that ought to be approved. *Hodgson* v. *Davies*, supra.

The plaintiffs sold to the defendants goods to be paid for according to the contract between the parties by cash or "approved banker's bills." The defendants paid for them by an approved banker's bill, which was dishonoured on presentment for acceptance. They were not parties to the bill, and received no notice of dishonour. In an action against them by the plaintiffs for the price of the goods:—Held, that their liability was not more extensive than it would have been if they had indorsed the bill, and that they were therefore discharged, not having received due notice of dishonour. *Smith* v. *Mercer*, 37 L. J., Ex. 24; L. R. 3 Ex. 51; 17 L. T. 317.

By Cheque—No Funds to Meet.]—On a sale of goods for ready money, if the purchaser gives in payment his cheque, which he then knows he has not funds in the bank to meet, this amounts to a false representation of a material fact, which vitiates the sale and entitles the seller to rescind the contract, even though the purchaser at the time believed, and had reasonable grounds for believing, that the cheque would be paid. *Loughnan* v. *Barry*, Ir. R. 6 C. L. 457.

See further PAYMENT.

d. Sale on Credit.

Nature of Contract.]—On a contract for credit, a promise to pay before the time is nudum pactum, but it may be material as to whether the contract was for credit. *Heritage* v. *Lawrence*, 2 F. & F. 532.

Credit—To whom given.]—Where a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it is shown by unequivocal evidence that the credit was in fact given to another. *Storr* v. *Scott*, 6 Car. & P. 241. See *Leggat* v. *Reed*, 1 Car. & P. 17; *Thompson* v. *Davenport*, 9 B. & C. 86; 4 M. & Ry. 110.

Evidence as to Person to whom Credit given.]—In an action for goods sold and delivered upon the credit of the defendant, a question as to the amount of his income cannot be put, if the evidence is tendered with a view to show the improbability of the authority having been given to purchase the goods. *Rowe* v. *Polkinghorne*, 1 Car. & K. 618.

Where, however, an action was brought against a widow for dresses ordered and worn by her daughter, who was about to be married:—Held, that evidence of the amount of her income was admissible, as tending to show that the dresses were not supplied upon her credit, but upon the credit of her daughter's future husband. *Ib.*

Where a plaintiff, through his agent, contracted with K. for the sale of goods, and the question was, whether they were sold on the credit of K. or of the defendant (whose agent K. was for the purchase of such goods):—Held, that a letter of instructions from the plaintiff to his agent on the subject, not communicated to K., or to the defendant, was not admissible for the plaintiff. *Smethurst* v. *Taylor*, 12 M. & W. 545; 14 L. J., Ex. 86.

In an action for goods supplied for building cottages, the question was, whether the goods were supplied to a builder afterwards a bankrupt, or to the defendant who had employed the builder. The defendant called the builder, who stated that the plaintiff's contract was made with himself, and that he had received moneys from the defendant in respect of the cottages:—Held, that he might also be asked by the defendant which way the balance was between him

and the defendant at the time of the bankruptcy. *Gerish* v. *Chartier*, 1 C. B. 13; 14 L. J., C. P. 84; 9 Jur. 69.

A bill of parcels, delivered by the plaintiff, having at the foot of it a receipt written at the same time with the bill, is nevertheless admissible without a receipt stamp for the purpose of proving that the goods were sold to a third person, and not to the defendant. *Millen* v. *Dent*, 10 Q. B. 846; 16 L. J., Q. B. 374.

Married Woman.]—Where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise, where such management did not exist. A. was the manager of a limited company's hotel at Bradford—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication:—Held, that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife. *Debenham* v. *Mellon*, 50 L. J., Q. B. 155; 6 App. Cas. 24; 43 L. T. 673; 29 W. R. 141; 45 J. P. 252—H. L. (E.)

If the wife, with the concurrence of her husband, carries on a separate trade, she has an implied authority to order goods for the purposes of that trade. *Petty* v. *Anderson*, 3 Bing. 170; 10 Moore, 577; 3 L. J. (O.S.) C. P. 223.

The presumption that a wife has authority to order all the requisites of a household on her husband's credit may be rebutted by proving that she had no such authority. *Jolly* v. *Rees*, 15 C. B. (N.S.) 628; 33 L. J., C. P. 177; 10 Jur. (N.S.) 319; 10 L. T. 299; 12 W. R. 473.

And see HUSBAND AND WIFE.

No Proceeding before Credit Expired.]—Goods sold on a credit unexpired, is a denial of any right of action by the vendor for the price. *Broomfield* v. *Smith*, 2 Gale, 114; 1 M. & W. 542; 1 Tyr. & G. 929; 5 L. J., Ex. 155.

If goods are sold on a credit, the vendor cannot before the credit has expired maintain an action for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price. *Ferguson* v. *Carrington*, 9 B. & C. 59; 3 Car. & P. 457; 7 L. J. (O.S.) K. B. 139. S. P., *Strutt* v. *Smith*, 1 C. M. & R. 312; 4 Tyr. 1019; 3 L. J., Ex. 357.

On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks"; and the jury found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—Held, that the question was properly left to the jury, and the verdict right. *Ashworth* v. *Redford*, 43 L. J., C. P. 57; L. R. 9 C. P. 20.

On Vendee's refusal to give Bill.]—Where goods were sold upon a contract, that the vendee was to pay for them in three months by a bill at two months:—Held, that the contract was for a credit of five months, and therefore that an action for goods sold and delivered could not be brought at the end of three months, upon the neglect of the vendee to give his bill at two months; the remedy being by a special action for damages for not giving such bill. *Mussen* v. *Price*, 4 East, 147.

Goods were sold, and work was done, the price of which amounted to 244*l.*, upon an agreement that 30*l.* should be paid in ready money, and the residue by bills of 30*l.* each, payable in succession every three months:—Held, that, until the expiration of the period at which the last bill would become due, the vendor could not recover in an action for goods sold and delivered and work done, although the defendant had omitted to pay the 30*l.* or to give the bills, and that the proper remedy was by a special count for not paying that sum and giving the bills. *Paul* v. *Dod* or *Dodd*, 2 C. B. 800; 15 L. J., C. P. 177; 10 Jur. 335.

Where goods are sold and delivered upon an agreement to be paid for by a present bill payable at a future day, it does not create a present debt, on which an action for goods sold and delivered is maintainable by the vendor, before the time when the bill agreed to be given becomes due, and when the contract is no longer executory. *Hoskins* v. *Duperoy*, 9 East, 498; 6 Esp. 58.

The plaintiffs contracted to deliver iron of a certain quality to the defendants, and agreed to receive payment for each delivery, either in cash for discount within a month, or by bills at four months, according to the defendants' option. Upon application by the plaintiffs in July for payment for iron delivered in June the defendants elected to pay by bill. Before, however, the bill was given, the defendants discovered that the iron which had been worked up into plates was of inferior quality to the sample, and useless to them. They therefore refused to accept any more bills, and the plaintiffs immediately, in August, brought an action to recover the contract price of the June delivery:—Held, that the contract having been broken by the plaintiffs delivering iron of inferior quality, and it being consequently their fault that the bill for the invoiced price was not given, and yet both parties having at the time, and up to the discovery of the quality of the iron, treated the delivery as made under the contract, and to be paid for under it, the period of credit had not expired, and the plaintiffs were not entitled to sue either for the contract price or on a quantum valebant for the reduced value of the goods. *Wayne's Merthyr Steam Coal and Iron Co.* v. *Morewood*, 46 L. J., Q. B. 746.

If the agreed terms of payment for goods sold are by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the

buyer is not bound to accept a bill for a larger amount than his debt, and even if he refuses to accept a bill correctly drawn the seller cannot sue for goods sold and delivered before the end of three months from the date of the bill drawn by him. *Anderson* v. *Carlisle Horse Clothing Co.*, 21 L. T. 760.

If, however, the agreed terms are cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept. *Ib.*

When goods were sold under the following terms, "2½ per cent., or three months' bill," which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2½ per cent., or, at the buyer's option, a bill at three months from the same period; the buyer having refused to accept a bill at the end of the second month:—Held, that the seller might at once sue him for the price of the goods, and was not bound to wait the additional three months. *Rugg* v. *Weir*, 16 C. B. (N.S.) 471.

B. agreed to furnish goods to C., to the amount of 600*l.*, on the terms of half cash, and half by bill at six months; goods to the amount of 88*l.* having been delivered without either cash or bill from C., and an application having been made by him for payment, he replied by letter, that "the demand was opposed to treaty," that he "closed all further orders," and desired that what he had "not purchased might be taken off the premises":—Held, that his letter was a rescission of the contract, and that B. was not bound to bring his action on the special contract, but might sue at once for the goods actually delivered. *Bartholomew* v. *Markwick*, 15 C. B. (N.S.) 711; 33 L. J., C. P. 145; 10 Jur. (N.S.) 615; 9 L. T. 651; 12 W. R. 314.

Where goods are sold at three months' credit, the vendor agreeing, if the vendee should want further time, to take his bill at three months' date at the end of the first three months; unless the vendee gives such a bill, although before the end of the first three months the vendor may bring his action immediately. *Nickson* v. *Jepson*, 2 Stark. 227.

Where a bill of exchange given in payment for goods sold is, upon presentment to the drawee, refused acceptance:—Held, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such a bill as a nullity, and recover his demand on the latter counts, although the credit on the bill is not expired. *Hickling* v. *Hardy*, 1 Moore, 61; 7 Taunt. 312.

Goods sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option, is in effect a nine months' credit. *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L. J. (O.S.) K. B. 258.

Option to give Bill—Part Payment.]—A person bought goods upon the following terms of payment: "four months' bill on the 10th of the month following delivery, or 20*s.* for cash." After the delivery of the goods he paid part of the price in cash:—Held, that he had exercised his option of paying ready money, and therefore that the seller might sue him for goods sold and delivered, without waiting for the expiration of the four months. *Schneider* v. *Foster*, 2 H. & N. 4.

—— **Six or Nine Months.**]—Upon a sale of goods at six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt till they are expired. *Price* v. *Nixon*, 2 Rose, 438; 5 Taunt. 338.

After Expiration of Credit.]—After the time of credit expired, the action will lie. *Miller* v. *Shawe*, 4 East, 149.

If goods are sold at two months' credit to be paid for by a bill at twelve months, and the goods are not paid for after the expiration of the fourteen months, the vendor may sue for goods sold and delivered. *Brooke* v. *White*, 1 Bos. & P. (N.R.) 330. S. P., *Marshall* v. *Poole*, 13 East, 98; 12 R. R. 310.

So, if the time given was after the sale, or if the sale was not bonâ fide, the party may sue for his debt immediately. *De Symons* v. *Minchwich*, 1 Esp. 430.

From what Date Credit begins to Run.]—In computing the time of credit on a mercantile contract, the day on which the contract was made is to be excluded from the reckoning. *Webb* v. *Fairmaner*, 6 D. P. C. 549; 3 M. & W. 473; 7 L. J., Ex. 140.

Non-Delivery of Goods Sold on Credit.]—A., having bought some sheep on credit, left them in the custody of the vendor. Without any default on the part of A., the vendor resold the sheep:—Held, that though the price had not been paid or tendered by A., the resale was a conversion of the sheep by the vendor in respect of which A. was entitled to maintain trover. *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J., Ex. 180; 2 L. T. 466; 8 W. R. 629.

B. STATUTE OF FRAUDS.

See CONTRACT.

1. WHAT WITHIN THE STATUTE.

a. Subject-Matter.

Mixed.]—A contract for the sale of goods, of the value of 10*l.* or upwards, is not the less within s. 17 of the Statute of Frauds, because it also embraces some other matter to which the statute does not extend. *Harman* v. *Reeve*, 18 C. B. 587; 25 L. J., C. P. 257; 4 W. R. 599.

A promise to accept a bill of exchange at three months for a given amount, the aggregate of a previous debt, and the price of certain goods of above 10*l.* value, agreed to be bought and sold, is invalid, unless there be a note in writing according to 29 Car. 2, c. 3, s. 17. *Head* v. *Baldrey*, 6 Ad. & E. 459; 2 N. & P. 217; 7 L. J., Q. B. 94.

Auction.]—Sales by auction are within the 17th section. *Kenworthy* v. *Schofield*, 4 D. & R. 556; 2 B. & C. 945; 2 L. J. (O.S.) K. B. 175; 26 R. R. 600.

Bonds, Shares and Stock.]—A contract for the sale of railway shares, or shares in a banking company, of the value of 10*l.*, is not a contract for the sale of goods, wares or merchandise, within the 17th section. *Bowlby* v. *Bell*, 3 C. B. 284; 16 L. J., C. P. 18; *Humble* v. *Mitchell*, 3 P. & D. 141; 11 A. & E. 205; 2 Railw. Cas. 70; 9 L. J., Q. B. 29.

Nor is a contract to buy, sell or deliver

Spanish bonds. *Heseltine* v. *Siggers*, 1 Ex. 856; 18 L. J., Ex. 166.

Nor is a sale of a share in a mining company. *Watson* v. *Spratley*, 10 Ex. 222; 2 C. L. R. 1434; 24 L. J., Ex. 53; 2 W. R. 627.

Quære, whether a contract made by a stock-broker for foreign stock is a contract for goods, wares, and merchandise within s. 17 of the Statute of Frauds, and consequently requires a note in writing of the bargain thereunder. *Pawle* v. *Gumm* or *Gunn*, 4 Bing. (N.C.) 445; 6 Scott, 286; 7 L. J., C. P. 206.

Artificial Teeth.]—But a contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and a count for work, labour and materials is not sustainable. *Lee* v. *Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; 7 Jur. (N.S.) 1302; 4 L. T. 546; 9 W. R. 702.

To Paint Picture.]—A contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel. *Isaacs* v. *Hardy*, 1 Cab. & E. 287.

Carriage.] — Where the plaintiff agreed by parol, that, if the defendant would employ his ship to carry corn, he would procure him coals at A., and convey them to B. at a stipulated price: —Held, that this was not a contract nor an agreement within the provisions of the statute, so as to be required to be in writing; nor was part delivery or part payment necessary to make it binding on the parties. *Cobbold* v. *Caston*, 1 Bing. 399; 1 Car. & P. 51; 8 Moore, 456; 2 L. J. (O.S.) C. P. 38.

L., a cornfactor at N., agreed to sell barley of the plaintiff to the defendant, to be delivered at L.'s warehouse at D., to go by the first boat of L., which went from N. to D., at 38*s.* per quarter, which was a higher price on account of its being to be delivered at L.'s expense; and the barley being then in the hands of T. the defendant desired him to see it delivered and measured, and put up properly, and the barley was sent by L.'s first boat, and the invoice delivered to the defendant, who requested time to pay, but afterwards refused to accept the barley:—Held, that this was a contract for the sale of goods, and not a mixed contract for the carriage as well as sale, though the price was enhanced by the carriage; and that the defendant's having appointed the particular boat, and having desired T. to inspect the loading, did not amount to an acceptance on his part. *Astey* v. *Emery*, 4 M. & S. 262; 16 R. R. 460.

To Grow Crops.]—Where A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at 1*l.* 1*s.* the Winchester bushel, and the seed so produced at the price agreed upon exceeded in value the sum of 10*l.*:—Held, that this contract was within the statute, and void for want of a memorandum in writing. *Watts* v. *Friend*, 10 B. & C. 446; 8 L. J. (O.S.) K. B. 181.

Sale for Delivery Elsewhere.]—A sale of goods for more than 10*l.* by sample in one place, to be afterwards delivered at another, is within the statute. *Cooper* v. *Elston*, 7 Term Rep. 14.

Trees to be Felled.] — The plaintiff verbally agreed to sell to the defendant trees growing upon the plaintiff's land, "to be got away as soon as possible." The defendant thereupon cut down some of the trees, and lopped off the stumps and branches. The plaintiff afterwards countermanded the sale, but the defendant cut down the remaining trees and carried them away: — Held, that, as the trees were to be felled forthwith after the agreement to buy them, the contract did not relate to an interest in land within s. 4 of the Statute of Frauds; that the contract was for the sale of goods, and that there had been a sufficient acceptance and actual receipt to satisfy s. 17. *Marshall* v. *Green*, 45 L. J., C. P. 153; 1 C. P. D. 35; 33 L. T. 404; 24 W. R. 175.

Writing differing from Contract.] — A parol agreement was for the sale of a quantity of whiskey to be ascertained by a redip:—Held, that a memorandum in writing, representing the sale of an ascertained quantity, was not sufficient to satisfy the Statute of Frauds. *Mahalen* v. *Dublin and Chapelizod Distillery Co.*, Ir. R. 11 C. L. 83.

b. Executory Contracts.

Construction of Statutes.]—Section 17 of the 29 Car. 2, c. 3, and s. 7 of the 9 Geo. 4, c. 14, are to be read together. *Harman* v. *Reeve*, 18 C. B. 587; 25 L. J., C. P. 257; 4 W. R. 599.

The effect of s. 7 of the 9 Geo. 4, c. 14, is to substitute for the words "for the price of 10*l.*" in s. 17 of the 29 Car. 2, c. 3, the words "of the value of 10*l.*" *Ib.*

Goods Made, and to be Made.]—Where an order is given for goods, some of which are ready-made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready-made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole, to satisfy s. 17 of the Statute of Frauds, and the 9 Geo. 4, c. 14, s. 7, as the whole forms but one entire contract. *Scott* v. *Eastern Counties Ry.*, 12 M. & W. 33; 13 L. J., Ex. 14; 7 Jur. 996.

Where Materials Found.]—A printer verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof-sheet of the dedication was revised by the defendant, and returned to the printer, he, for the first time, discovered that it was libellous matter, and refused to complete the printing of it:—Held, that this was not a contract for the sale of goods, within s. 17 of the Statute of Frauds, as extended by 9 Geo. 4, c. 14, s. 7. *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur. (N.S.) 908; 4 W. R. 557.

The 9 Geo. 4, c. 14, s. 7, only applies to cases where the bargain is for goods afterwards to be made, and not for goods for which the material is found. *Ib.*

Materials to be Procured.]—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance, that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the con

tract. *Hibblewhite* v. *M'Morine*, 5 M. & W. 462; 8 L. J., Ex, 271; 13 Jur. 509.

2. SUFFICIENCY OF NOTE OR MEMORANDUM.

See cases, sub tit. CONTRACT, ante, vol. iv. cols. 32 et seq.

a. General Requisites.

Contents.]—The memorandum of a contract for the sale of goods required by the Statute of Frauds must express every essential element of the contract. *M'Lean* v. *Nicoll*, 7 Jur. (N.S.) 999; 4 L. T. 863; 9 W. R. 811.

When made.]—The memorandum of a contract for the sale of goods must have been made before the commencement of the action. *Bill* v. *Bament*, 9 M. & W. 36; 11 L. J., Ex. 81. S. P., *Lucas* v. *Dixon*, 58 L. J., Q. B. 161; 22 Q. B. D. 357; 37 W. R. 370.

The memorandum or note of an agreement must be a memorandum of an agreement complete at the time the memorandum is made. *Mundy* v. *Asprey*, 49 L. J., Ch. 216; 13 Ch. D. 855; 28 W. R. 347.

Attempted Repudiation.]—A. upon one and the same occasion bought several parcels of goods of B., one parcel (consisting of chimney-glasses amounting to 38*l.* 10*s.* 6*d.*) for ready money, the rest (some of which had to be manufactured) on credit. The goods were sent to the purchaser at different times. The chimney-glasses being damaged in the carriage, he declined to receive them. A. afterwards, in answer to an application by B. for payment for the whole of the goods, wrote to him in substance as follows: "The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time; with regard to the rest I am ready to pay." An action having been brought to recover the value of the whole of the goods, A. paid into court sufficient to cover all but the price of the chimney-glasses, and the jury found that the chimney-glasses were sold under a separate contract from the rest of the goods:—Held, that the letter, inasmuch as it contained an admission of the bargain and of all the substantial terms of it, was a sufficient note or memorandum of the contract, notwithstanding the subsequent attempted repudiation of liability. *Bailey* v. *Sweeting*, 9 C. B. (N.S.) 843; 30 L. J., C. P. 150; 9 W. R. 273.

b. Statement of Price.

Whether Necessary.]—Where an executory contract is entered into for the fabrication of goods, without any agreement as to price, the memorandum of the contract required by the statute is sufficient without the specification of price. *Hoadley* v. *M'Laine*, 10 Bing. 482; 4 M. & Scott, 340; 3 L. J., C. P. 162.

The defendant agreed to purchase the plaintiff's goods at a discount of twenty-five per cent., from a list of goods with prices annexed, and he signed an order for the goods, referring to the list. The terms as to discount were not mentioned in the order:—Held, that the order was not a sufficient memorandum of the bargain, as it did not contain the price. *Goodman* v. *Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 145; 5 W. R. 369.

A sold note expressed "eighteen pockets of hops at 100*s.*":—Held, that parol evidence was admissible to show that the 100*s.* meant the price per cwt. *Spicer* v. *Cooper*, 1 G. & D. 52; 1 Q. B. 424; 5 Jur. 1036; 10 L. J., Q. B. 241.

The defendants, merchants at St. Vincent's, sent the plaintiffs an order to ship goods therein specified, by the "Emerald." The order directed that the terms were to be "moderate." The plaintiffs accepted the order, and shipped the goods accordingly. They were lost in the passage out:—Held, first, that there was a sufficient contract within the Statute of Frauds. *Ashcroft* v. *Morrin*, 4 Man. & G. 450; 6 Jur. 783.

Held, secondly, that it was not necessary for the completion of the contract that the price of the goods should be specified; it was enough to say that the price should be moderate, and the goods being named, that price might be ascertained with sufficient certainty to satisfy the statute. *Ib.*

A contract of sale may be complete and binding, though silent as to price (such silence being equivalent to a stipulation for a reasonable price) and as to the time and mode of payment. *Valpy* v. *Gibson*, 4 C. B. 837.

There may be a complete contract, so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed on between them. *Joyce* v. *Swann*, 17 C. B. (N.S.) 84.

A note of a bargain for the purchase and sale or goods must state the price of the goods, or it will not satisfy the requisites of the statute. *Elmore* v. *Kingscote*, 8 D. & R. 343; 5 B. & C. 583; 29 R. R. 341.

—— **Part Performance—Parol Evidence.**]—After a parol agreement for the sale of goods, to be delivered by successive consignments at a specified price, had been entered into, a memorandum in writing of the bargain, but omitting the price, was made and signed by the agent of the sellers; and several of the consignments were delivered, accepted and paid for at the price agreed on:—Held, in an action for non-delivery of the remaining consignments, that the memorandum was merely an admission of a contract of which there had been part performance, and that parol evidence was admissible to prove the price. *Jeffcott* v. *North British Oil Co.*, Ir. R. 8 C. L. 17.

Method of Payment.]—At the time of entering into a contract for the sale of goods it was agreed that payment should be made by a cheque on the defendant's brother:—Held, that the omission of that stipulation did not vitiate the memorandum. *Sarl* v. *Bourdillon*, 1 C. B. (N.S.) 188; 26 L. J., C. P. 78; 2 Jur. (N.S.) 1208; 5 W. R. 196.

Upon a sale of whiskey, the parol agreement was that the price should be paid in cash within a month after delivery, or by a bill at four months with bank rate of interest added:—Held, in an action for non-delivery of the whiskey, that a memorandum in writing, representing the sale as for "net cash," was not sufficient to satisfy the Statute of Frauds. *Mahalen* v. *Dublin and Chapelizod Distillery Co.*, Ir. R. 11 C. L. 83.

c. Names of Buyer and Seller.

Certainty as to.]—A contract in writing to satisfy the Statute of Frauds must contain the

name of the seller, quâ seller, as well as the signature of the person to be charged. *Vandenberg* v. *Spooner*, 4 H. & C. 519 ; 35 L. J., Ex. 201 ; L. R. 1 Ex. 316 ; 14 L. T. 701 ; 14 W. R. 843.

The following bought note : " D. S. agrees to buy the whole of the lots of marble purchased by V., now laying at Lyme, at 1*s.* per foot," is not a sufficient memorandum, inasmuch as it does not appear by reasonable construction or necessary intendment that V. is the vendor. *Ib.*

It is not necessary that the parties should be described as buyer and seller, provided it is clear from the surrounding circumstances which position they respectively occupy. *Newell* v. *Radford*, 37 L. J., C. P. 1 ; L. R. 3 C. P. 52 ; 17 L. T. 118 ; 16 W. R. 97.

A baker bought of a flour dealer a quantity of flour. At the time of the sale Williams, the dealer's agent, by whom the sale was effected, wrote and signed the following entry in the baker's book : " Mr. Newell, 32 sacks culasses, at 39*s.* 280. To wait orders. John Williams. June 8th " :—Held, that the surrounding circumstances of the contract might be looked at in ascertaining the meaning of the document, and that it was a sufficient note or memorandum of the contract within the statute. *Ib.*

Section 17 of the Statute of Frauds cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified either nominally or by description or reference. It must state the name of the seller as well as the buyer ; the party supplying as well as the party supplied with goods. Therefore, where J. signed the following paper, addressed to no one in particular, but given to H., " I will furnish H. with funds to purchase a steam-engine on his suiting himself and notifying the purchase to me," and H. showed this to B., who supplied the engine to J., it was held, that the contract was void for not stating the name of the party supplying the goods. *Williams* v. *Byrnes*, 1 Moore, P. C. (N.S.) 154 ; 2 N. R. 47 ; 9 Jur. (N.S.) 363 ; 8 L. T. 69 ; 11 W. R. 487.

How Inserted.]—It is immaterial when the name of the party sought to be charged is added by the party himself, on what part of the paper it appears—whether at the head, in the middle, or at the end ; and it is the same thing, in that respect, when it is put there by the party's authorised agent. *Durrell* v. *Evans*, 1 H. & C. 174 ; 31 L. J., Ex. 337 ; 9 Jur. (N.S.) 104 ; 7 L. T. 97 ; 10 W. R. 665—Ex. Ch.

d. Signature.

See cases, sub tit. CONTRACT, ante, vol. iv. col. 51.

Of Party to be Charged.]—It is no objection to the validity of a contract for the sale of goods, signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. *Allen* v. *Bennet*, 3 Taunt. 169 ; 12 R. R. 633.

A party cannot sue another for not accepting goods, if the contract note was only signed by himself ; for if he acted as a broker, he cannot sue as a principal ; and if he was a principal, his signing would not bind the vendee. *Rayner* v. *Linthorne*, 2 Car. & P. 124 ; R. & M. 325.

A memorandum signed by parties, whereby they agreed to give so much for goods, takes the case out of the statute, though not signed by the seller, nor expressing any consideration for their promise, otherwise than by inference from their own obligation. *Egerton* v. *Matthews*, 6 East, 307 ; 2 Smith, 389 ; 8 R. R. 489.

A note or a memorandum of a contract for the sale of goods, signed by the seller only, is not sufficient. *Champion* v. *Plummer*, 1 Bos. & P. (N.R.) 252 ; 5 Esp. 240 ; 8 R. R. 795.

Entry in Parties' Books.]—A memorandum of sale of goods in the vendor's books, signed by the vendee in initials, the vendor's name not appearing in the book, is not a sufficient note in writing ; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum. *Jacob* v. *Kirk*, 2 M. & Rob. 221.

The traveller of hop merchants in London agreed with the defendant, at Leeds, for the sale to him, by sample, of a quantity of hops. The defendant wrote in his own book, which he kept, the following memorandum : " Leeds, 19th October, 1836, sold John Dodgson, 27 pockets Playsted, 1836, Sussex, at 103*s.* ; 4 pockets Selme Beekley at 95*s.* The bulk to answer sample. Samples and invoice to be sent per Rockingham coach. Payment in bankers' bills at two months." This was signed by the traveller on behalf of the sellers :—Held, a sufficient memorandum of the contract. *Johnson* v. *Dodgson*, 2 M. & W. 653 ; 6 L. J., Ex. 185.

The defendant went into the plaintiff's shop, and agreed to purchase goods in the aggregate exceeding the value of 10*l.* The several articles, with their respective prices, were entered in the plaintiff's order-book, on the fly-leaf, at the beginning of which was written the name of the plaintiff ; and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain :—Held, a sufficient signature of the contract by both parties. *Sarl* v. *Bourdillon*, 1 C. B. (N.S.) 188 ; 26 L. J., C. P. 78 ; 2 Jur. (N.S.) 1208 ; 5 W. R. 196.

Open Proposal Signed by Writer.]—A promise in writing, signed, to pay any one unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. *Williams* v. *Byrnes*, supra.

Name Printed.]—A letter containing proposed terms of a contract between A. B., the sender, and the sendee, written out by the sender upon paper bearing a printed heading, " Memorandum from A. B.," was held to be a sufficient note in writing to charge A. B. A memorandum of a contract is sufficiently signed within s. 4 of the Statute of Frauds if it contains the terms of the contract and the name of the party charged, and is given by him to the other party under circumstances which show a recognition of the name as it stands for his own. *Tourret* v. *Cripps*, 48 L. J., Ch. 567 ; 27 W. R. 706.

A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract. *Saunderson* v. *Jackson*, 2 Bos. & P. 238 ; 3 Esp. 180 ; 5 R. R. 382.

A bill of parcels, in which the name of the vendor is printed, and that of the vendee written

by the vendor, is sufficient to charge the vendor. *Schneider* v. *Norris*, 2 M. & S. 286; 15 R. R. 825.

"Approved by me J. S."]—Quære, whether the words "approved by me J. S.," affixed to certain memoranda by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds. *Parker* v. *Smith*, 1 Coll. C. C. 608.

Who can Sign as Agent.]—One of the parties to a contract cannot sign the name of the other as his agent, so as to bind him under the Statute of Frauds. The signature as agent must be by some third person. *Sharman* v. *Brandt*, 40 L. J., Q. B. 312; L. R. 6 Q. B. 720; 19 W. R. 956.

A broker, carrying on business as "W. S. & Co.," was authorized by Messrs. B. & H. to buy for them in the market 200 tons of hemp. He drew up and forwarded to them a contract-note: "Bought for Messrs. B. & H. of our principals 200 tons of hemp—W. S. & Co., brokers." He had, in fact, no principals as sellers in the transaction; but B. & H. had no notice of this. They having refused to accept hemp under the contract:—Held, that he could not maintain an action on the contract, on the grounds that the contract in writing was with an undisclosed principal as seller, and not with himself as seller; and also, that he, if a party to the contract, could not sign as agent for Messrs. B. & H., so as to bind them within s. 17 of the Statute of Frauds. *Ib.*

The agent contemplated by s. 17 of the Statute of Frauds, who may bind a person by his signature to the memorandum of a bargain, must be a third person, and not the other contracting party. Where, therefore, an auctioneer wrote the name of the defendant in his book opposite to a lot purchased:—Held, in an action brought in the name of the auctioneer, that such entry was not sufficient to take the case out of the statute. *Farebrother* v. *Simmons*, 5 B. & Ald. 333; 24 R. R. 399.

The vendor is not an agent of the vendee sufficient to satisfy the statute, though he wrote the note by the direction and at the dictation of the vendee; an agent must be some third person. *Wright* v. *Dannah*, 2 Camp. 203; 11 R. R. 693.

In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller, when he took the order for the goods, wrote out in the presence of the defendant, upon printed forms, two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:—Held, that there was no evidence that the traveller signed the memoranda as agent of the defendant, so as to bind him within the Statute of Frauds, s. 17. *Murphy* v. *Boese*, 44 L. J., Ex. 40; L. R. 10 Ex. 126; 32 L. T. 122; 23 W. R. 474.

The signature of a contract by an agent authorised to make a binding contract is sufficient, and it is not necessary that, at the time of signing, there should be any intention that such signature should be binding within the Statute of Frauds. *Durrell* v. *Evans*, 1 H. & C. 174; 31 L. J., Ex. 337; 9 Jur. (N.S.) 104; 7 L. T. 97; 10 W. R. 665—Ex. Ch.

D., a hop-grower, having sent samples of his hops to his factor, E., went to the factor and offered to buy some at 16*l.* 16*s.* a cwt. After some negotiation between E., the factor, and D., the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of D. and E., a memorandum of the bargain in duplicate, one part of which he headed with the name of E. and the other part with the name of D. E. requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. D. consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of E., and delivered it to him, and kept the counterfoil in his possession:—Held, that there was evidence that the factor was the agent of both parties for the purpose of drawing the record of the contract binding on them; and that, if he was, the name of E., at the head of that part of the memorandum delivered to him, was a sufficient signature by his agent. *Ib.*

A contract for the sale of goods was, in the presence and at the desire of the buyer, written and signed by the seller's traveller in a book belonging to the former, as follows: "Of North & C., 30 mats. Maurs. Cash, two months. Joseph Dyson:"—Held, that this was not a sufficient note or memorandum of the bargain, Dyson not appearing to be authorised to sign it as agent for the buyer. *Graham* v. *Musson*, 7 Scott, 769; 5 Bing. (N.C.) 603; 8 L. J., C. P. 324. S. P., *Graham* v. *Fretwell*, 4 Scott (N.R.) 25; 3 Man. & G. 368; 11 L. J., C. P. 41.

The authority of an agent to sign such a contract need not be in writing. *Ib.*

Bought and Sold Notes.]—The sold note, bearing the signature of the broker, who acts for both buyer and seller, is a note or memorandum in writing of the bargain signed by a lawfully authorized agent of the buyer, to satisfy s. 17 of the Statute of Frauds. *Parton* v. *Crofts*, 16 C. B. (N.S.) 11; 33 L. J., C. P. 189; 10 L. T. 34; 12 W. R. 553.

A broker, signing a contract-note as selling as broker for undisclosed principals, cannot sue as principal on the contract. *Sharman* v. *Brandt*, 40 L. J., Q. B. 312; L. R. 6 Q. B. 720; 19 W. R. 956.

Where the vendor countermanded the authority of the broker after he had agreed to sell, but before the sale note was made out:—Held, that the contract could not be enforced. *Farmer* v. *Robinson*, 2 Camp. 339, n.

A broker acting for the plaintiff made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book, in which he signed both the bought and sold notes. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—Held, that his conduct amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold note bound him. *Thompson* v. *Gardiner*, 1 C. P. D. 777.

Held, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds. *Ib.*

A broker having a general authority to purchase spices for one person, having purchased some for that person on Saturday, went to another person on the Sunday, and offered them to him for sale, saying that he would deliver the

contract on the Monday. The person to whom they were offered said, that he must have the contract on that day (Sunday). A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendor, whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed:—Held, that the contract was not sufficient under the statute. *Smith* v. *Sparrow*, 2 Car. & P. 544; 4 Bing. 84; 5 L. J. (o.s.) C. P. 80; 29 R. R. 514.

A broker, employed to effect a sale of goods for his principal, made a verbal contract with the vendee, and after entering it into his own book without signing it, delivered a bought and sold note to the vendor and vendee respectively, each paper differing in its items:—Held, that there was no memorandum in writing of the contract to bind either under the statute. *Grant* v. *Fletcher*, 8 D. & R. 59; 5 B. & C. 436; 29 R. R. 286.

Where a broker is authorised by one man to sell goods, and by another to buy such goods, an entry in his book of a sale of those goods from the one to the other, signed by him, is a binding contract between the parties. *Heyman* v. *Neale*, 2 Camp. 337.

If a broker makes a contract with the defendant for the purchase of goods, and delivers by mistake a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book:——Held, that the buyer may maintain an action for the breach of this contract. *Gale* v. *Wells*, 1 Car. & P. 388.

Where there is an entry of the contract between buyer and seller, by a broker acting for both parties, in his book, signed by him, that entry is the binding contract between the parties, and a mistake made by him when sending them a copy of it in the shape of a bought or sold note will not affect its validity. *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529; 15 Jur. 947.

Where a broker omits to enter and sign any contract in his book, and sends bought and sold notes to the buyer and seller, if these agree they constitute a binding contract; but if there is any material variance between them, they are both nullities, and there is no binding contract. *Ib.*

Where, in a sale between brokers, the bought and sold notes were not exchanged, and there was no evidence that the seller had notice of the contract, but the contract was in part performed:—Held, that there was a binding memorandum. *Thomas, Ex parte, Thorp, In re*, 11 Jur. (N.S.) 49; 11 L. T. 586—L. C.

If a broker, employed both by seller and buyer, negotiates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises. *Thornton* v. *Kempster*, 5 Taunt. 786; 1 Marsh. 355; 15 R. R. 658.

The signed entry of a contract in a broker's book is not of necessity the only evidence to render the contract binding within the statute. *Goom* v. *Aflalo*, 9 D. & R. 148; 6 B. & C. 117; 30 R. R. 262; 5 L. J. (o.s.) K. B. 31.

Where a broker entered in his book the terms of a contract, but did not sign it, and delivered to the parties bought and sold notes copied from his book, and which he did not sign:—Held, that these constituted a sufficient note or memorandum of the bargain, and rendered it binding upon the parties. *Ib.*

A broker who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and his employer a sold note, is to be considered as an agent for both parties; and such note is a sufficient note within the Statute of Frauds. *Rucker* v. *Cammeyer*, 1 Esp. 105.

Where a person is told by two parties that he is to be the broker, to make a contract between them for the sale of goods, and he in consequence reduces it into writing, and sends a sale note on the terms to each party, this is a valid contract within the statute. *Chapman* v. *Partridge*, 5 Esp. 256; 8 R. R. 852.

The defendants bought of the plaintiff a quantity of wool, it being agreed between them, in the presence of a broker, that the wool was to be delivered in good dry condition. On the same day the broker sent a sold note signed by him to the plaintiff, no copy of which was communicated to the defendants, but in which he omitted the stipulation as to the condition of the wool. The wool delivered to the defendants was not in good dry condition:—Held, in an action against them for the price of the wool, that they were not liable, there being no note in writing within the Statute of Frauds, as the broker was not their agent to make the contract, but merely to sell them wool in a good dry condition. *Pitts* v. *Beckett*, 13 M. & W. 743; 14 L. J., Ex. 358.

The defendant, a merchant residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him; after which H. contracted with the plaintiff to sell him tallow (of more than 10*l.* value), and H's name was used as before, H. intending to make the contract on his own account; but the plaintiff did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker acting for both parties. He signed the bought and sold notes; the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals:"—Held, that the bought and sold notes constituted a sufficient note in writing to charge the defendant, and that he was liable. *Trueman* v. *Loder*, 11 A. & E. 589; 3 P. & D. 567; 9 L. J., Q. B. 165.

D. M. & Co., brokers in London, being employed by S. to purchase oil, dealt with T. & M., brokers, who were employed by the plaintiff to sell oil, without either broker disclosing the names of their principals. D. M. & Co. delivered to T. & M. a note as follows:—"Sold this day for T. & M. to our principal, ten tons of oil," specifying the terms and price, which was above 10*l.* This note was signed "D. M. & Co., brokers, quarter per cent. brokerage to D. M. & Co." D. M. & Co. did not disclose the name of their principal, S., till after the lapse of an unreasonable time, when S. had become insolvent. The plaintiff sued D. M. & Co. for not accepting the oil, laying the sale as by himself to D. M. & Co. D. M. & Co. denied the contract. On the trial, the plaintiff proved a custom in the trade, that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal:—Held, that

evidence of this custom was admissible as explaining the terms of the instrument, and that as thus explained it was a sufficient memorandum of the contract to satisfy the Statute of Frauds. *Dale* v. *Humfrey*, El. Bl. & El. 1004; 27 L. J., Q. B. 390; 5 Jur. (N.S.) 191; 6 W. R. 854—Ex. Ch.

Where A., having goods to sell, employed a broker for the purpose, and B., being desirous of purchasing them, authorised the broker's salesman to offer a certain price, who in consequence brought the parties together, and who having concluded the contract in the absence of the salesman, dictated to him the terms of it; of which he made an entry in his master's book, but did not sign it, and afterwards communicated the circumstances to the broker, who directed a clerk to enter and sign the contract in his book, and sent a sale note, signed by himself, to A., but no bought note was sent to B.:—Held, that there was no note or memorandum in writing, signed by an agent duly authorised, to satisfy the statute. *Henderson* v. *Barnewall*, 1 Y. & J. 387; 30 R. R. 799.

Auctioneers.]—It seems that taking sales of goods by auction to be within s. 17, the auctioneer or broker, who is a middleman, must be taken to be the agent of both parties, so as to bind the purchaser by his signature, *Hinde* v. *Whitehouse*, 7 East, 558; 3 Smith, 528; 8 R. R. 676.

An auctioneer is an agent lawfully authorised by the buyer to sign a contract for him, whether it is for the purchase of an interest in land or goods, and his authority is given by the buyer bidding aloud; and the name of the purchaser of divers lots at an auction being written down on the sale bill opposite to such lots, for which the purchaser was declared to be the highest bidder, is a note or memorandum in writing sufficient to satisfy the intent of the statute. *Emmerson* v. *Heelis*, 2 Taunt. 38; 11 R. R. 520.

—— **Entry in Sale Book.**]—The highest bidder is bound by the entry in the sale book of the auctioneer's clerk made in his presence, upon his name being called out as the purchaser, even in an action brought by the auctioneer. *Bird* v. *Boulter*, 1 N. & M. 313; 4 B. & Ad. 443.

In an action by an auctioneer against a purchaser for goods sold, on entry in the sale book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorised; for the clerk is not identified with the auctioneer, and in the business which he performs of entering names, &c., he is impliedly authorised by the persons attending the sale to be their agent. *Ib.*

Upon a sale by auction, subject to conditions of sale, the auctioneer's entry in his book is void under the Statute of Frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein. *Rishton* v. *Whatmore*, 47 L. J., Ch. 629; 8 Ch. D. 467; 26 W. R. 827. See *Pierce* v. *Corf*, 43 L. J., Q. B. 52; L. R. 9 Q. B. 210; 29 L. T. 219; 22 W. R. 299.

—— **After Auction.**]—The plaintiff put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards the defendant called on the auctioneer, and selected from the catalogue two of the unsold lots, which he agreed to purchase. The auctioneer then wrote, in the defendant's presence, his name in the catalogue opposite these lots:—Held, that the auctioneer was not the agent of the defendant, so as to bind him by signing his name, and consequently there was no sufficient note or memorandum of the bargain. *Mews* v. *Carr*, 1 H. & N. 484; 26 L. J., Ex. 39.

So a receipt given by an auctioneer's clerk three days after the sale, and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. J. S.'s property," is not such a memorandum in writing as would bind the vendor. Semble, that the name of the auctioneer printed on the back of the particulars and conditions of sale, is sufficient to bind the vendor. *Dyas* v. *Stafford*, 7 L. R., Ir. 590.

e. Subsequent Ratification.

Alteration—Connected Documents.]—A verbal order for goods was given with a direction that they should be sent by a particular route. The goods were afterwards sent by another route, and a letter written to the purchaser by the vendors stating the original order and the alteration in the mode of transit, and inclosing an invoice which contained the particulars of the goods and the price. The goods did not reach the purchaser, who, on being applied to afterwards for payment, wrote a letter in which he acknowledged the original order, but declined to pay on the ground that the goods were not sent by the route directed. In an action for the price of the goods, the jury found that the purchaser, by his conduct, had ratified the alteration in the route:—Held, that the letters and invoice constituted a memorandum in writing of the original contract within the Statute of Frauds, and the alteration of the route having been ratified by the purchaser, the vendors were entitled to recover, although the ratification was not in writing. *Leather Cloth Co.* v. *Hieronimus*, 44 L. J., Q. B. 54; L. R. 10 Q. B. 140; 32 L. T. 307; 23 W. R. 593.

Admission of Parol Evidence to Prove Assent or Terms.]—A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:—Held, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to show that the purchaser had so assented, inasmuch as there had never been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to show what was the condition of the document when it became a contract between the parties. *Stewart* v. *Eddowes*, 43 L. J., C. P.

204 ; L. R. 9 C. P. 311 ; 30 L. T. 333 ; 22 W. R. 534.

A. and B. being jointly interested in a quantity of oil, A. entered into a contract for the sale of it without the authority or knowledge of B., who, on receiving information of the circumstance, refused to be bound by it, but afterwards assented by parol, and samples were delivered by the vendees :—Held, that B.'s subsequent ratification of the contract rendered it binding ; and that it was to be considered as a contract in writing within the statute. *Soames* v. *Spencer*, 1 D. & R. 32 ; 24 R. R. 631.

Authority of Agent.]—If an agent, without authority, makes a contract in writing for the purchase of goods by his principal, who subsequently ratifies the contract, such ratification will render a note or memorandum of the sale, signed by the agent, sufficient under the statute. *Maclean* v. *Dunn*, 4 Bing. 722 ; 1 M. & P. 761 ; 6 L. J. (O.S.) C. P. 184 ; 29 R. R. 714.

See also PRINCIPAL AND AGENT.

Admission to Agent.]—Where the defendant having commissioned R. to buy for him a mare belonging to the plaintiff, and R. on the 15th May wrote to the defendant that he had bought the plaintiff's mare for 42*l.*, and asked for a cheque ; and on the 25th the defendant wrote to R. that he only returned home the day before, or he would have at once answered his letter and sent a cheque for the mare which he had bought for him, and promised to send a cheque :—Held, that the written admission by the purchaser to his agent, that he had bought certain goods for him, was a sufficient note or memorandum of the bargain between him and the vendor. *Gibson* v. *Holland*, 1 H. & R. 1 ; 35 L. J., C. P. 5 ; L. R. 1 C. P. 1 ; 11 Jur. (N.S.) 1022 ; 13 L. T. 293 ; 14 W. R. 86.

f. Connected Documents.

Bought and Sold Notes—Material Alterations and Variations.]—A material alteration in a sale note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract, evidenced by the instrument so altered by him. *Powell* v. *Divett*, 15 East, 29 ; 13 R. R. 358.

A material alteration in a sold note made by the buyer, without the knowledge or consent of the seller, prevents the former suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. *Mollett* v. *Wackerbarth*, 5 C. B. 181 ; 17 L. J., C. P. 47 ; 11 Jur. 1065.

If there is a material discrepancy between the bought and sold notes there is no contract. *Townend* v. *Drakeford*, 1 Car. & K. 20. S. P., *Fisenden* v. *Levy*, 11 W. R. 258 ; *Gregson* v. *Ruck*, 4 Q. B. 737.

A broker delivered to the vendor bought and sold notes written on one sheet of paper, and the day for payment was inserted at the end of the bought note only, but in those made out for the purchasers the day was inserted at the end of the bought as well as of the sold note :—Held, that as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract ; and consequently that there was no variance. *Maclean* v. *Dunn*, 4 Bing. 722 ; 1 M. & P. 761 ; 6 L. J. (O.S.) C. P. 184 ; 29 R. R. 714.

C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. indigo, through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H. for his approval ; when, H. having objected to a particular word remaining, the broker took the note to C., and informed him of H.'s objection, C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in material terms from the sold note :—Held, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note, and affixing his initials, were not sufficient to make that note alone a binding contract ; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. *Cowie* v. *Remfry*, 5 Moore, P. C. 232 ; 3 Moore, Ind. App. 448 ; 10 Jur. 789.

—— **Intention to Bind.**]—A broker, acting for the plaintiff, verbally contracted to buy hemp of the defendant, and sent him a note, stating the terms, commencing thus : "Sold for Mr. C. to Mr. M." The defendant sent back another note, commencing : "I have this day sold, through you, to Mr. M.," &c. The time of the sale, as stated in the two notes, varied materially. In an action against the defendant for non-delivery, treating the note signed by him as the contract :—Held, that his liability depended upon the question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable, or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as buyer. *Moore* v. *Campbell*, 10 Ex. 323 ; 2 C. L. R. 1084 ; 23 L. J., Ex. 310.

See also cases ante, cols. 394, 412.

Letters—Acceptance in Terms.]—Letters do not constitute a note in writing of the contract if they vary in their description of the terms of the contract. *Smith* v. *Surman*, 4 M. & Ry. 455 ; 9 B. & C. 561 ; 7 L. J. (O.S.) K. B. 296.

A letter written by a defendant, in answer to letters of the plaintiff containing the terms of a bargain for the sale of cotton, does not amount to a sufficient memorandum, because it does not amount to an absolute admission of the existence of a contract in the terms alleged by the plaintiff, being equally consistent with the existence of a different contract. *Curegan* v. *Richards*, 15 L. T. 252.

On the 11th of January, B. verbally agreed with R. to buy his wool for a price exceeding 10*l.*, and wrote the terms in a letter, which R. took away. One of those terms was, "the whole to be cleared in about twenty-one days." In a letter sent to B. on the 8th of February, and signed by R., he said, "It is now twenty-eight days since you and I had a deal for my wool which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this, therefore I shall consider the deal off, as you have not completed your part of the contract. . . . ." On the 9th of February, B. ver-

bally asked R. for a copy of the contract which he had given him on the 11th of February, and later on the same day R. wrote and signed a letter to B.: "I beg to inclose a copy of your letter of the 11th of January, 1871." On the same paper and underneath, there was in R.'s writing, a copy of the letter of the 11th of January. B. having sued R. for not delivering the wool:—Held, that, rightly interpreted, R.'s two letters admitted the contract, but alleged that his construction of the contract was the correct one; and that taking the three letters together there was a sufficient memorandum in writing to charge R. within s. 17 of the Statute of Frauds. *Burton* v. *Rust*, 41 L. J., Ex. 1; L. R. 7 Ex. 1; 26 L. T. 502; 20 W. R. 100. Affirmed 41 L. J., Ex. 173; L. R. 7 Ex. 279; 27 L. T. 210; 20 W. R. 1014—Ex. Ch.

The defendant agreed to purchase of the plaintiff goods, at a discount of twenty-five per cent., from a list of goods with prices annexed, and he signed an order for the goods referring to the list. The terms as to discount were not mentioned in the order. The defendant afterwards wrote to the plaintiff, requesting him to send the invoice, which he did. The defendant wrote in reply a letter, signed by him, returning the invoice, and declining to take the goods:—Held, that the order was not a sufficient memorandum of the bargain, as it did not contain the price. And that the letter returning the invoice was not a sufficient admission of the contract as stated in the invoice, so as to satisfy the statute. *Goodman* v. *Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 145; 5 W. R. 369.

A nephew of the plaintiff having a horse to sell, some negotiations took place between them; but as they could not agree as to the price, the horse was not sold; subsequently, however, the plaintiff wrote to his nephew, making an offer for the horse, stating in his letter that he should consider it a bargain if he did not hear to the contrary. His nephew did not reply, and having a sale shortly afterwards of some of his effects, the horse was sold by mistake, the auctioneer having had instructions from his nephew not to sell it. Two days after the sale, the nephew wrote to the plaintiff, the contents of which letter showed that he intended to accept his uncle's offer:—Held, in an action by the plaintiff against the auctioneer for the conversion of the horse, that as there was no memorandum in writing binding the nephew at the time of the sale, and no evidence that he had at that time accepted the offer, the property in the horse had not vested in the plaintiff, and that he could not rely on the subsequent letter of the nephew, as that would not relate back so as to complete the plaintiff's title at the time in question. *Felthouse* v. *Bindley*, 7 L. T. 835; 11 W. R. 429—Ex. Ch. Affirming 11 C. B. (N.S.) 869; 31 L. J., C. P. 204.

A defendant authorised his brokers by letter to buy for him a cargo of bone-ash at a certain price per ton, "on a basis of 70 per cent. mean of two London chemists; usual London terms, viz. cash in twenty-eight days, less 2½ per cent." This offer was communicated by the defendant's brokers to the seller's brokers, by letter, as follows:—"We can take the cargo, cash in twenty-eight days from last day of landing, less 2½ per cent.; to be analysed by two London chemists." The sellers accepted the offer, and sent a bought-note to the buyer's brokers, describing the terms of payment thus: "Payment, cash before delivery, allowing a discount of 2½ per cent. equal to cash in Liverpool within twenty-eight days from last day of landing:—Held, that there was no substantial difference between the offer and the acceptance, and consequently there was a binding contract between the parties. *Heyworth* v. *Knight*, 17 C. B. (N.S.) 298; 10 Jur. (N.S.) 866.

In an action for a mare sold and delivered, it appeared that the defendant having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted, and as she lays out, turn her out my mare." The plaintiff agreed to sell her for the twenty guineas. The defendant subsequently wrote again to him: "My son will be at the World's End (a public house) on Monday, when he will take the mare, and pay you; send anybody with a receipt and the money shall be paid; only say in the receipt "sound and quiet in harness." The plaintiff wrote in reply, "She is warranted sound and quiet in double harness; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days and then returned her as being unsound. The judge stated to the jury that the question was whether the defendant had accepted the mare; and directed them to find for the defendant, if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her away without the warranty. The jury found that the defendant did not accept the mare; and that the son had not authority to take her away:—Held, that there was no complete contract in writing between the parties; that, therefore, the direction of the judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent, and, consequently, that the plaintiff was not entitled to recover. *Jordan* v. *Norton*, 4 M. & W. 155; 1 H. & H. 234; 7 L. J., Ex. 281.

A. having applied to B., a coachmaker, to build for him a carriage of a particular description, the latter, at his request, sent him a drawing, which A. returned with objections; B. thereupon wrote to A. expressing his regret that the drawing sent did not meet his approval, adding, "If you order, every attention shall be paid to any particulars you may think proper." A., in answer, wrote, "I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating, as far as possible, the chance of any misconception which might otherwise arise in respect to my order, which I can now, of course, give in general terms only, and on the assumption that you undertake to execute it in a manner which will meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built, and forwarded to A., who found many faults in it and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet the approval of A., on the score of convenience and taste, the latter was entitled (acting bonâ fide, and not from mere caprice) to reject it. *Andrews* v. *Belfield*, 2 C. B. (N.S.) 779.

The plaintiff wrote to the defendants, offering

to sell them seed of growing turnips, to which the defendants replied asking what turnips he had in growth, their quantities and prices. The plaintiff answered that all he could offer them at present was the produce of five acres of white globe seed at 18*s.* per bushel. The defendants offered to take two or three acres at 16*s.* 6*d.* per bushel. The plaintiff replied that he could not accept less than 18*s.* The defendants then wrote to him as follows: "In reply to your favour of this morning, we beg to say as our neighbours are giving you 18*s.* per bushel for white globe turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested, 1861, free of carriage to London station. Let us know what other sorts you may have to offer, and also wurzell seeds of sorts for 1861 harvest: waiting your reply." The plaintiff wrote no answer to this letter, but subsequently saw one of the defendants at their warehouse, on which occasion it was found by the jury that the plaintiff verbally assented to the terms contained in that letter:—Held, that there was a sufficient memorandum or note in writing of the contract. *Watts* v. *Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448; 6 L. T. 252.

The defendant verbally agreed to purchase of the plaintiff barrels of flour. The defendant afterwards wrote to the plaintiff, stating that he had received some barrels which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour; it was sold to you subject to your examining the bulk, and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot therefore object to fulfil your agreement." The defendant replied as follows: "I beg to say the barrels I have received are not the same I saw. I took a sample with me from the sample I have, and the barrels I saw were quite as fine as I compared them with; nor were they lumpy. Now the barrels I have received are all very lumpy, and none of them so fine as the same. If you will take them back, and pay charges, I will with pleasure send them":—Held, that the letters did not constitute a sufficient note or memorandum of the contract. *Archer* v. *Baynes*, 5 Ex. 625; 20 L. J., Ex. 54.

In an action for non-delivery of oil-cake upon a contract of sale of 100 tons at 9*l.* per ton, to be of the same quality as the last 100 tons before sold by defendant to plaintiff:—Held, that from the letters of plaintiff, to defendant, in which this contract was truly stated by plaintiff, and in reply to which defendant said that he would fulfil all contracts literally and in the spirit in which they were made and which letters were duly signed, there was a sufficient memorandum of the contract in writing to satisfy the Statute of Frauds. *Fison* v. *Kitton*, 3 C. L. R. 705; 3 W. R. 233.

Invoices.]—An invoice of hops described the names of the seller and buyer; the latter, after the receipt of the invoice, wrote to say the hops had not as yet been received, and that if they did not arrive soon he must buy some elsewhere:—Held, that the invoice and the letter taken together did not constitute a sufficient memorandum. *Richardson* v. *Porter*, 6 B. & C. 437; 9 D. & R. 497; 5 L. J. (O.S.) K. B. 175.

A. ordered of B. two looking-glass frames, to be filled with the best plate-glass. He sent to A. an invoice enumerating the articles, without mention of the glass to be supplied, of which invoice A. acknowledged the receipt, without taking exception thereto in respect of any of the articles to be sold:—Held, that the invoice and answer together did not constitute a memorandum to satisfy the statute. *M'Lean* v. *Nicoll*, 7 Jur. (N.S.) 999; 4 L. T. 863; 9 W. R. 811.

The plaintiff sent to the defendant, with certain cheese and candles, an invoice, specifying the names of the plaintiff and of the defendant as seller and buyer respectively, the quantity of the goods and their price. The defendant returned the invoice with a signed memorandum on the back, saying that the cheese had arrived badly crushed, and therefore both the cheese and candles were returned:—Held, a sufficient memorandum of the bargain. *Wilkinson* v. *Evans*, 1 H. & R. 552; 35 L. J., C. P. 224; L. R. 1 C. P. 407; 12 Jur. (N.S.) 600; 14 W. R. 963.

Catalogue.]—Where goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, on the printed catalogue; and the principal afterwards in a letter to the agent recognised the purchase:—Held, that the entry in the catalogue and the letter coupled together, were a sufficient memorandum of the contract within the statute. *Phillimore* v. *Barry*, 1 Camp. 513; 10 R. R. 742.

—— **Conditions of Sale.**]—The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as Lot 49. The defendant had a sales ledger, which was headed "Sales by auction 28th March, 1872," in which the plaintiff's mare was also numbered 49: but neither was the catalogue nor were the conditions of sale annexed to the sales ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for 33*l.*, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose the name of M. as purchaser and the price. M. afterwards refused to take the mare:—Held, that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy s. 17 of the Statute of Frauds. *Peirce* v. *Corf*, 43 L. J., Q. B. 52; L. R. 9 Q. B. 210; 29 L. T. 919; 22 W. R. 299.

Where, at a public sale of goods by auction, the conditions of sale were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down the price (103

guineas) and the name of the agent opposite the lot in the sale catalogue:—Held, that this was not a sufficient memorandum in writing of the bargain to satisfy the statute: but if the conditions of sale had been annexed to the catalogue, the putting down the agent's name would have been sufficient to bind his principal. *Kenworthy* v. *Schofield*, 4 D. & R. 556; 2 B. & C. 945; 2 L. J. (o.s.) K. B. 175; 26 R. R. 600.

Upon a sale by auction subject to conditions of sale, the auctioneer's entry in his book is void under the Statute of Frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein. *Rishton* v. *Whatmore*, 47 L. J., Ch. 629; 8 Ch. D. 467; 26 W. R. 827.

Other Documents.]—Two distinct written instruments may be coupled together, so as to constitute a memorandum of a contract, to satisfy the statute. *Jackson* v. *Lowe*, 7 Moore, 219; 1 Bing. 9; 25 R. R. 567.

An order for goods, written and signed by the seller in a book of the buyer's but not naming the buyer, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract. *Allen* v. *Bennet*, 3 Taunt, 169; 12 R. R. 633.

A memorandum of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by his rider in his common order-book in these terms:—"19th February, 1811, of John Smith, 64*l.*" (which was explained by the witness to mean, so much received by the defendant in satisfaction of a former order), "do 40 of 3—58" (which was explained to mean a new order for 40 sacks of flour, called thirds, at 58*s.* a sack), and this, without any signature, is not a sufficient memorandum within the statute to bind the defendant, though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognized the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it. And it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. *Cooper* v. *Smith*, 15 East, 103; 13 R. R. 397.

A subsequent letter, written and signed by the vendor, referring to the order, may be connected with a bill of parcels having the vendor's name printed. *Saunderson* v. *Jackson*, 2 Bos. & P. 238; 3 Esp. 180; 5 R. R. 580.

3. Part Payment.

A. being indebted to B. in 4*l.* 14*s.* 6*d.*, a parol bargain was made between them for the sale, by sample, from A. to B. of goods above the value of 10*l.*; and it was at the same time agreed, that the 4*l.* 14*s.* 6*d.* should be taken in part payment. The goods were accordingly afterwards delivered but were returned by the buyer, as not according with the sample:—Held, that these facts did not amount either to a part payment or a payment by way of earnest. *Walker* v. *Nussey*, 16 M. & W. 302; 16 L. J., Ex. 120; 11 Jur. 23.

The defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned:—Held, that this contract was not a sufficient compliance with the statute. *Blenkinsop* v. *Clayton*, 1 Moore, 328; 7 Taunt. 597; 18 R. R. 602.

The Statute of Frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them. *Alexander* v. *Comber*, 1 H. Bl. 20.

4. Acceptance and Receipt.

a. Generally.

The acceptance and actual receipt of goods, which made a written agreement unnecessary, are not such an acceptance and a receipt as will preclude the purchaser from questioning the quantity or quality of the goods, or in any way disputing the fact of the performance of the contract by the vendor. *Morton* v. *Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382; 14 Jur. 669.

The effect of such statutory acceptances and receipt is merely to dispense with the necessity of a written memorandum of the contract. *Ib.*

But there can be no acceptance and actual receipt of goods within the statute, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order. *Hunt* v. *Hecht*, 8 Ex. 814; 22 L. J., Ex. 293.

Sufficiency of.]—The defendant verbally agreed to purchase a specific quantity of barley from the plaintiff, on the terms that the bulk should be well dressed and equal to sample. The plaintiff accordingly delivered an instalment of the barley to the defendant, whose foreman received it and gave a receipt marked "Not equal to sample." Next morning the defendant himself inspected the bulk, and wrote immediately to the plaintiff refusing to accept on the ground that the barley was not well dressed nor equal to sample:—Held, in an action by the plaintiff for goods sold and delivered to the defendant, that there was evidence of an acceptance sufficient to satisfy s. 17 of the Statute of Frauds. *Kibble* v. *Gough*, 38 L. T. 204—C. A.

The plaintiff verbally sold to the defendant six bales of wool. On the 31st July the goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken to his own premises by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff stating that two of the bales were inferior to sample, and adding, "Please say what is to be done in the matter." The plaintiff replied by a letter of 1st August denying that the bales were not equal to sample. On 4th August the defendant, who had been from home since 1st August, returned, and having seen the plaintiff's letter, sent the goods back to the railway station, and telegraphed to the plaintiff refusing to accept them. Between 31st July and 4th August the defendant offered the goods for sale in the market, stating, however (according to his own evidence), that he had not accepted the goods, and that he would have to make other arrangements before he could sell. The plaintiff having brought an action to recover the price of the goods from the defendant, the jury at the trial found that two of the bales were not equal to sample; and the judge thereupon directed a verdict, and gave judgment for the defendant:—Held, that judgment was rightly entered for the defendant, as there was no evidence of a sufficient

acceptance and receipt of the goods within s. 17 of the Statute of Frauds to take the case out of the statute; and the defendant's conduct had precluded him from rejecting the goods as not equal to sample. *Rickard* v. *Moore*, 38 L. T. 841—C. A.

The plaintiff verbally agreed to sell to the defendant trees growing upon the plaintiff's land, "to be got away as soon as possible." The defendant thereupon cut down some of the trees, and lopped off the stumps and branches. The plaintiff afterwards countermanded the sale, but the defendant cut down the remaining trees and carried them away:—Held, that as the trees were to be felled forthwith after the agreement to buy them, the contract did not relate to an interest in land within s. 4 of the statute of frauds: that the contract was for the sale of goods, and that there had been a sufficient acceptance and actual receipt to satisfy s. 17 of the statute of frauds. *Marshall* v. *Green*, 45 L. J., C. P. 153; 1 C. P. D. 35; 33 L. T. 404; 24 W. R. 175.

In order to satisfy the statute, there must be both an acceptance of the goods, or part of them, and an actual receipt of them. *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261; 7 Jur. (N.S.) 542; 4 L. T. 506; 9 W. R. 735.

But it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them: an acceptance prior to the receipt will suffice. *Ib.*

In order to satisfy the statute of frauds there must be an acceptance and actual receipt of the goods, or part of them, with the consent of the vendor; and if before such acceptance the vendor rescinds the contract, the assignees of the buyer, in the case of his bankruptcy, cannot claim them. *Smith* v. *Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.

There must be such an acceptance of goods as to show that the person to whom they have been delivered has received them under a contract of sale. *Barnett* v. *Farley*, 11 L. T. 107; 12 W. R. 748.

It is not necessary that the acceptance should be on all the terms of the contract of sale. *Tomkinson* v. *Staight*, 17 C. B. 698; 25 L. J., C. P. 85; 2 Jur. (N.S.) 354; 4 W. R. 299.

The bare acceptance of the goods by the vendee as owner is sufficient, although the vendee, immediately after accepting them, states that he does so on terms different from those on which the vendor delivered them. *Ib.*

The acceptance must be by some act or conduct on the part of the buyer indicating an intention to retain the goods; or such as reasonably would lead the seller to think they are accepted, and this may be by retention of them for such a time as reasonably might lead to that conclusion. *Bowes* v. *Pontifex*, 3 F. & F. 739.

The acceptance of goods by the buyer, if they are above the value of 10*l.*, and there has been no written memorandum of the contract, must be clear and unequivocal; and the court will not allow a constructive acceptance to be sufficient. *Nicholle* v. *Plume*, 1 Car. & P. 272.

Where goods of the value of 10*l.* or upwards are sold by a verbal contract and delivered, and the purchaser retains them, and deals with them in such a way as to prove that he admits the existence of a contract, and admits that the goods were delivered under the contract, this is a sufficient acceptance to satisfy s. 17 of the statute of frauds, although the purchaser afterwards rejects the goods on the ground that they are not equal to sample, and if the goods prove equal to sample the purchaser is liable. *Page* v. *Morgan*, 54 L. J., Q. B. 434; 15 Q. B. D. 228; 53 L. T. 126; 33 W. R. 793—C. A.

—— **Recognition of Pre-existing Contract.**]—The defendant agreed to purchase from the plaintiffs goods exceeding 10*l.* in value to be delivered on July 21, or the order to be cancelled. The goods were not delivered on July 21, and it was orally agreed that the defendant should take delivery on August 8. On that day the goods were sent, and a receiving note was handed to the buyer. The latter looked at the goods and drew out a sample, and declaring that it was not up to his sample refused to take delivery:—Held, that there was evidence upon which it could be found that there was an acceptance within the meaning of sub-s. 3 of s. 4 of the Sale of Goods Act, 1893. *Abbott* v. *Wolsey*, 64 L. J., Q. B. 587; [1895] 2 Q. B. 97; 14 R. 455; 72 L. T. 581; 43 W. R. 513; 59 J. P. 500—C. A.

Goods already Delivered.]—Under a parol contract for the sale of goods, within the statute of frauds, made with a party already in possession of the goods, there may be a sufficient acceptance to satisfy the statute without a redelivery to the buyer. *Edan* v. *Dudfield*, 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.

Where D. had been employed by E. to enter the goods at the custom-house, and sell them for him, and agreed by parol to buy certain portions of them from E., and afterwards sold them, and sent in an account of them to E.:—Held, that it was a question for the jury, whether D. had accepted and resold the goods as purchaser, and that parol evidence of such acceptance was admissible. *Ib.*

Intention in Accepting.]—Where, by one of the printed conditions in a catalogue of a sale by auction, the purchaser was to pay 30*l.* per cent. upon being declared the highest bidder, and the residue before the goods were removed; and a person attending such sale bid for a lot, and, having been declared the highest bidder, the article was immediately delivered to him; but in a few minutes afterwards he returned it, stating that he had been mistaken in the price, and refused to take it, and no part of the price for which it was knocked down having been paid:—Held, that it was a question of fact for the jury, whether there had been such a delivery by the seller and acceptance of the article by the buyer, as would take the case out of the statute, so as to show that it was the intention of both parties to be bound by the sale, no deposit upon the price having been made by the vendee, agreeably to one of the printed conditions in the catalogue. *Phillips* v. *Bistolli*, 3 D. & R. 822; 2 B. & C. 511; 2 L. J. (O.S.) K. B. 116; 26 R. R. 433.

Vendor Agent for Vendee.]—The plaintiff bought of the defendant and paid for hops, which lay at the warehouse of F., having been placed there by a party who had sold them to the defendant. After the sale, the plaintiff was informed that the hops were at F.'s, had them weighed there, and took away part. Some days after he applied for the residue, but they had been taken away in the meantime by a creditor

of the first seller. The defendant had not given the plaintiff a delivery order, nor had he demanded one :—Held, that F. had the residue of the hops in his possession as agent to the plaintiff, and that the defendant was not liable to the plaintiff for the non-delivery of them. *Wood* v. *Tassell*, 6 Q. B. 234.

Goods left with Vendor as Pledge for Price.]—Teas are sold, to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as pledge for full payment with the vendor, who in case of non-payment is at liberty to resell, and charge the loss to the original purchaser. The purchase-money is not paid at the appointed time; the purchaser becomes bankrupt, and the vendor, having sold part of the teas before the fiat and the rest afterwards, gives the estate credit for the clear proceeds of the sales :—Held, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the vendors were entitled to prove for the residue of the purchase-money unsatisfied by the sale. *Moffat, Ex parte, Tate, In re*, 2 Mont. D. & D. 170. *And see* 1 Mont. D. & D. 282.

On the question whether there has been a delivery and an acceptance of goods, the existence of a lien is a circumstance to be considered by the jury, but is not a perfect test of acceptance. *Wright* v. *Percival*, 8 L. J., Q. B. 258.

User by Vendee.]—A. agreed to purchase of B. a carriage, then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, the 14th November, A. called at the shop, and requested B. to hire a horse and a man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it, A. having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the custom-house as a second-hand carriage. The carriage was accordingly sent to and used by A. on the Saturday, A. paying for the hire of the horse and man. A. afterwards refused to take or pay for the carriage :—Held, that there was a sufficient acceptance of the carriage by A. before Sunday, the 15th November, to entitle B. to recover upon a count for goods bargained and sold. *Beaumont* v. *Brengeri*, 5 C. B. 301.

Defendant having agreed to buy a carriage of plaintiffs, came after it was finished to the plaintiffs' manufactory, bringing with her a cover for the hind seat, and a set of traces, which the carriage had been previously made to fit. One of the plaintiffs said the carriage was complete. Defendant got into it and said it was a very nice one. She then desired plaintiffs to order post-horses to take it home, stating that she would call at half-past four in the afternoon; she added that she had brought a cover to put over the hind seat and directed it should be put over twice doubled. The cover was accordingly put over the seat in her presence and agreeably to her directions. The afternoon being wet, at five o'clock the defendant came to the plaintiffs and said that she would not take the carriage home that evening. Defendant afterwards refused to pay the price asked by plaintiffs, and did not take the carriage away :—Held, a sufficient acceptance to satisfy the Statute of Frauds. *Wright* v. *Percival*, 8 L. J., Q. B. 258.

—— **Sale of Furniture to Tenant.**]—A., being himself yearly tenant of a house to B., underlet the house and furniture at a weekly rent to C. A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for 50*l.*, which C. thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant, instead of A. The furniture was valued at 80*l.*, which C. refused to give, but offered the 50*l.* Before the expiration of the year, an agent of A. took the key out of the door and gave it to C., telling him that he must settle with A. himself about the furniture; B. refused to accept C. as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after the lapse of three months, C. sent it to a broker's :—Held, that there was no evidence of an acceptance by C. of the furniture under a contract of sale, to satisfy the Statute of Frauds. *Lillywhite* v. *Devereux*, 15 M. & W. 285.

And see cases, infra, col. 432.

Agistment.]—The defendant verbally agreed to buy of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his cheque-book, in order to pay for the cattle, but finding that he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done :—Held, that there was no evidence of an acceptance of the cattle. *Holmes* v. *Hoskins*, 9 Ex. 753; 2 W. R. 376.

Where it was agreed, by parol, between A. and B., that A. should sell B. a mare and a foal, and should, at his own expense, keep them until a certain day, and that A. should also, for a given time, keep and feed a mare and a foal belonging to B., and that in consideration of all this, B. should fetch away A.'s mare and foal on the day named, and pay him 30*l.* :—Held, that this, so far as it related to the sale of A.'s mare and foal, was a contract within the 17th section of the Statute of Frauds, and void for want of being in writing, no point having been made at the trial as to the value. *Harman* v. *Reeve*, 18 C. B. 587; 25 L. J., C. P. 257; 4 W. R. 599.

Setting apart for Vendee.]—A vendee agreed verbally at a public market with the agent of the vendor to purchase twelve bushels of tares, constituting part of a larger quantity in bulk, then in the possession of the vendor, and they were to remain with him till called for. The agent afterwards measured the quantity of twelve bushels, and set them apart for the vendee, but no memorandum in writing was made, nor was anything paid by way of earnest, or sample given :—Held, that this did not amount to an acceptance by the vendee, so as to take the agreement out of the statute. *Howe* v. *Palmer*, 3 B. & Ald. 321.

Goods on Land of Third Party.]—A. sold to B. a rick of hay, standing on land in the occupation

of C., at an entire price, undertaking to deliver it to B. before a certain day, upon request, B. engaging to take it away on or before that day; C. having previously acknowledged the hay to be the property of A., and consented that it should remain on the premises until that day. A. gave an order to C. to permit B. to remove the hay, which C. refused to do:—Held, a sufficient delivery of the hay as between A. and B. *Salter* v. *Woollams*, 2 Man. & G. 650; 3 Scott, (N.R.) 59; 10 L. J., C. P. 145.

On Agreement to Return.]—The plaintiff entered into a parol agreement to sell to the defendant a mare for 20*l.*, subject to the condition, that, if it should prove to be in foal, he should, on receiving 12*l.* from the plaintiff, return it on request. The plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered the defendant 12*l.*, and requested him to return the mare, which he refused to do:—Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to the defendant, and that the delivery of the mare to the defendant took the whole agreement out of the statute, so as to enable the plaintiff to sue for the refusal to return it. *Williams* v. *Burgess*, 10 A. & E. 499; 2 P. & D. 422; 8 L. J., Q. B. 286.

Order to Wharfinger.]—A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them, is a sufficient delivery within the Statute of Frauds. *Searle* v. *Keeves*, 2 Esp. 598.

Where goods above the value of 10*l.*, lying in the London Docks, were sold without any written contract, and a delivery order given to the buyer:—Held, that the buyer's acceptance of the delivery order was not an actual acceptance of the goods, so as to take the case out of the Statute of Frauds. *Bentall* v. *Burn*, 5 D. & R. 284; 3 B. & C. 423; R. & M. 107; 3 L. J., (O.S.) K. B. 42; 27 R. R. 391.

Acceptance of Warrant.]—The defendant verbally ordered goods of the plaintiff's agent in London, the price of which was 15*l.* The goods were accordingly sent from abroad to the agent, who warehoused them with a wharfinger, and received from him a warrant, by which the goods were made deliverable to the agent or his assignees by endorsement, on payment of rent and charges from a certain day. This warrant the agent indorsed to and sent to the defendant; the defendant kept the warrant for ten months, and was repeatedly applied to for the charges and the price of the goods, which he did not pay, nor did he return the warrant, but said he had sent it to his solicitor, and meant to defend the action as he had not ordered the goods, and the goods would remain at present in bond:—Held, that although there was sufficient evidence of the acceptance of the goods, if they had been delivered to the defendant, there was no evidence of the receipt of the goods, sufficient to satisfy the Statute of Frauds. *Farina* v. *Home*, 16 M. & W. 119; 16 L. J., Ex. 73.

Delivery to Warehouse of Third Party.]—On the 19th March, 1842, W., a miller, residing near Hereford, gave a parol order to A., a manufacturer of iron goods at Bristol, for some mill machinery to be forwarded by the Hereford sloop, commanded by B., the usual mode of conveying goods by water from Bristol to Hereford. On the 23rd April the machinery was so forwarded, and on the 25th an invoice was sent, with a letter of advice, by the post, and a printed notice that the goods were supplied at three months' credit. On the arrival of the machinery at Hereford, it was put into a warehouse of B., and W. was informed of that fact. Six or seven months after, W. told the warehouseman that he did not intend to take the machinery, and it was taken back to Bristol:—Held, that there was evidence of an acceptance sufficient to satisfy the statute. *Bushel* v. *Wheeler*, 15 Q. B. 443, n.; 8 Jur. 532. S. P., *Morton* v. *Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382; 14 Jur. 669.

—— **Packing by Vendee.**]—The defendant, having bargained with the plaintiff for the purchase of wool from the plaintiff at a certain price, removed it to a warehouse used by the defendant for that purpose, but belonging to a third party; there the wool was weighed and packed in sheeting of the defendant's. The course of dealing was, that the wool remained on these premises till paid for. The wool was not removed or paid for:—Held, that there was not a sufficient delivery and acceptance of the goods to ground an action for goods sold and delivered, though the seller retained a special interest in them (not properly a lien) in respect of the understood engagement not to remove them till paid for. *Dodsley* v. *Varley*, 12 A. & E. 632; 4 P. & D. 448.

Delivery to Carriers.]—Goods were delivered by the vendor, in Cornwall, on board a ship not named by the purchaser, and a bill of lading was signed by the captain, making them deliverable to carriers at Liverpool, named by the purchaser, for the purpose of receiving and forwarding the goods to him in Staffordshire. A copy of the bill of lading was sent to the carriers at Liverpool, and on the 25th April the purchaser received notice of the shipment of the goods, and did not repudiate the contract before the 6th May, when he received information from the vendor that the ship and the goods were lost before they reached Liverpool:—Held, that there was no evidence of an acceptance and actual receipt of the goods by the purchaser. *Meredith* v. *Meigh*, 2 El. & Bl. 364; 22 L. J., Q. B. 401; 17 Jur. 649; 1 W. R. 368.

The defendant, a builder at Wallingford, gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington Station of the Great Western Railway, to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, and arrived at the Wallingford station on the 19th April, and the defendant was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the plaintiff himself until the 28th May, when he informed the plaintiff that he declined taking the timber:—Held, that although there might be a scintilla of evidence for the jury of an acceptance of the timber, yet that there was not sufficient to warrant them in finding that there was such an acceptance, and the court set aside a verdict found for the plaintiff, as not warranted by the evidence. *Norman* v. *Phillips*, 14 M. & W. 277; 14 L. J., Ex. 306; 9 Jur. 832.

Where a party in England refuses to accept goods which he has agreed to buy abroad, the delivery of them abroad, on board a ship chartered by him, is not a sufficient delivery to render a memorandum of the bargain in writing unnecessary. *Acebal* v. *Levy*, 10 Bing. 376; 4 M. & Sc. 217; 3 L. J., C. P. 98.

The defendant, an Irish tradesman, gave a verbal order for goods to the plaintiff, who carried on business in England, and the goods were sent by the route agreed upon by the parties. The invoice was forwarded at the same time, but was immediately returned by the defendant, with a letter stating that it did not correspond with the agreement, and notifying his refusal to take the goods:—Held, that there was no evidence of any receipt and acceptance of the goods by the defendant, and that an action against him for the price could not be maintained. *Hopton* v. *M'Carthy*, 10 L. R., Ir. 266.

Where goods were ordered by parol by a country dealer of a London wholesale house, and the latter delivered them at a wharf to be forwarded to their place of destination by sea, and the ship in which they were sent was lost, and the goods were never received in the country:—Held, that the acceptance of the goods by the wharfinger was not such an acceptance as would satisfy the words of the 17th section of the statute, which, to make him liable in the absence of a written contract, requires an acceptance by the party himself. *Hanson* v. *Armitage*, 1 D. & R. 128; 5 B. & Ald. 557; 24 R. R. 478.

The defendant verbally ordered goods of the value of more than 10*l.* to be sent to him at Lancaster from London by the plaintiff, and directed that the goods should be sent by sea from G.'s wharf. The plaintiff sent the goods to G.'s wharf; whence the wharfinger sent them by a ship selected by himself for Liverpool; but the cargo was lost by the ship being wrecked; an invoice was sent by the plaintiff to the defendant, which he never received:—Held, that the defendant did not accept, and actually receive, the goods within the meaning of the statute. *Hart* v. *Bush*, El. Bl. & El. 494; 27 L. J., Q. B. 271; 4 Jur. (N.S.) 633.

Conduct of Consignee—Evidence of Assent.]—A written contract was entered into for the purchase of 200 or 300 tons of coals, to be sent by the Navigation or other vessel. The vendor residing at Stockton-on-Tees, on the 31st December, 1838, shipped 127 tons of coals by the George and Henry, and on that day wrote to the vendee at Southampton to state what he had done, and that he should draw on him for the amount. The George and Henry was sunk at sea on the 6th January, 1839, which fact the vendor, on the 10th January, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor:—Held, that this his silence, after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for. *Richardson* v. *Dunn*, 1 G. & D. 417; 2 Q. B. 218; 10 L. J., Q. B. 282.

Goods were purchased of plaintiffs by defendant, and were, by defendant's order, delivered on a certain ship, together with other goods of the defendant, which had been forwarded by defendant to plaintiffs. The bill of lading was made out according to defendant's directions, and delivered to him. After more than a year defendant returned the bill of lading to plaintiffs, and informed them that the goods were lost, requesting them at the same time to see after them, and stating his opinion that the master was liable:—Held, in an action to recover the price of the goods that there was here sufficient evidence to warrant the jury in finding that there had been an actual receipt and acceptance within s. 17, of the Statute of Frauds. *Currie* v. *Anderson*, 2 El. & El. 592; 29 L. J., Q. B. 87; 6 Jur. (N.S.) 442; 8 W. R. 274.

To Artificer.]—A. agreed to buy some articles of plate of B., who was to get A.'s arms engraved on them, and to pay for the engraving:—Held, that a delivery to the engraver for that purpose was not a delivery to A., so as to defeat B.'s right of stopping the goods in transitu, the price of the goods not being paid by A. *Owenson* v. *Morse*, 7 Term Rep. 64.

Delivery at Inn named by Buyer.]—A. bought of B. 5 cwt. of clover seed, to be delivered at the Plough Inn, Banbury, on the 27th April. The seed was delivered on the 27th to one of the servants of the Plough Inn, at which A. was in the habit of putting up, and there remained till the 13th May, when he refused to take it:—Held, that as the place where the seed was delivered was a place appointed by the buyer, and was moreover the inn at which he generally put up, this was such an acceptance as would satisfy the words of the statute. *Harris* v. *Matthews*, 3 Jur. 1192.

Assent to Appropriation.]—The defendant, who had ordered a machine to be made, without any agreement as to price, paid money on account when he saw it was complete; admitted it was made to order; and requested the maker to send it home, but refused to pay the price demanded by him. The maker refused to deliver the machine without receiving the full amount; for which he ordered his attorney to proceed, when the defendant said he would endeavour to arrange, if they would give him time:—Held, a sufficient acceptance to entitle the maker to sue for goods bargained and sold. *Elliott* v. *Pybus*, 10 Bing. 512; 4 M. & Sc. 389; 3 L. J., C. P. 182.

b. Acts of Ownership by Purchaser.

Re-sale—When Sufficient.]—After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee. *Chaplin* v. *Rogers*, 1 East, 192; 6 R. R. 249.

A., by parol, sold to B. the timber of certain growing trees at a price exceeding 10*l.*; B. gave directions for cutting the trees, and offered to sell the butts to C. A., by letter, required B. to pay for the timber. B., by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so:—Held, that there had been no part acceptance or actual receipt of the goods to satisfy the statute, inas-

much as there was nothing to show that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price. *Smith* v. *Surman*, 9 B. & C. 561; 4 M. & Ry. 455; 7 L. J. (O.S.) K. B. 296.

The plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbeach, a quantity of oil-cake, which was delivered to him there in December, 1841. The defendant conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs; and requiring them to take it back, which they refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal; and that, if no directions were given by them, it would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered, that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name; and, in July, sold it, in his own name, to a third party:—Held, that these facts sufficiently showed an acceptance of the goods by the defendant, after which he could not treat the contract as rescinded, and that he was not to be considered an agent of the plaintiffs from necessity, to dispose of the goods. *Chapman* v. *Morton*, 11 M. & W. 534; 12 L. J., Ex. 292.

—— **Without Inspecting.**]—The defendant purchased wheat of the plaintiff by sample, and directed that the bulk should be delivered on the next morning by a carrier named by himself, who was to convey it to the market town of W., and the defendant himself took the sample away with him. On the following morning the bulk was delivered to the carrier, and the defendant resold it at W. on that day by the same sample. The carrier conveyed the wheat by order of the defendant, who had never seen it, to the subvendee, who rejected it as not corresponding with the sample, and the defendant, on notice of this, repudiated his contract with the plaintiff on the same ground:—Held, that there was evidence to warrant a jury in finding an acceptance and actual receipt by the defendant. *Morton* v. *Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382; 14 Jur. 669.

Above £10—Verbal Agreement—Subsequent Loan to Seller.]—The plaintiff sold a horse to the defendant, by verbal agreement, for a sum above 10*l*. The bargain was for immediate delivery, but the plaintiff requested the defendant to lend the horse to him, and, by the defendant's consent, the plaintiff kept the horse. Afterwards the defendant refused to take the horse. The jury, on the question being put to them, found that the bargain was complete before the arrangement as to the loan took place:—Held, that there was an acceptance of the horse by the defendant within the exception of s. 17 of the Statute of Frauds. *Marvin* v. *Wallace*, 6 El. & Bl. 726; 25 L. J., Q. B. 369; 2 Jur. (N.S.) 689; 4 W. R. 611.

Weighing.]—Hops were sold by sample, and before prompt-day the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted allowances on some which he objected to:—Held, that this was a sufficient acceptance. *Simmonds* v. *Humble*, 13 C. B. (N.S.) 258; 1 N. R. 27; 9 L. T. 168.

Marking the Article.]—If the purchaser of goods at the time of the sale writes his name upon a particular article, with the intent of showing that he has purchased it, and appropriated it to his own use, it is enough to take the sale, as to the article written upon, out of the Statute of Frauds, but not as to other articles bought at the same time. *Hodgson* v. *Le Bret*, 1 Camp. 233.

Where a person selected various articles in a tradesman's shop, some of which he marked with a pencil, and others were cut from piece goods, and laid aside for him (the whole amounting to more than 10*l*.), and he desired them to be sent to his house; and when sent he refused to take them:—Held, that there was no acceptance. *Baldey* v. *Parker*, 3 D. & R. 220; 2 B. & C. 37; 1 L. J. (O.S.) K. B. 229; 26 R. R. 260.

Where a person agreed by parol to pay a certain price for several pipes of wine, and the seller's clerk cut off the spills and marked the purchaser's initials on the casks in the presence of both parties:—Held, to amount to a delivery. *Anderson* v. *Scot*, 1 Camp. 235, n.

The marking by the vendor of casks of wine, lying in the docks, with the initials of the purchaser at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance. *Proctor* v. *Jones*, 2 Car. & P. 532; 31 R. R. 693.

Package by Purchaser.]—Goods were sold for ready money, and packed up at the seller's house in boxes furnished by the purchaser, who saw the packing, and requested the seller to keep them for him till he could call, pay for, and take them away:—Held, that, on a count for goods sold and delivered, the plaintiff was rightly non-suited. *Boulter* v. *Arnott*, 3 Tyr. 267; 1 C. & M. 333; 2 L. J., Ex. 97.

If A. agrees to sell goods to B., who pays a certain sum of money as earnest, and the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them: but A. declares at the same time that they shall not be carried away till he is paid: this is not a delivery to B. *Goodall* v. *Skelton*, 2 H. Bl. 316; 3 R. R. 379.

—— **Delivery to Packer.**]—Where goods are delivered to the vendee's packer, to be forwarded to any part the latter may appoint, and they are opened and examined by his agent, the delivery is complete. *Leeds* v. *Wright*, 3 Bos. & P. 320; 4 Esp. 243; 7 R. R. 779.

The defendant having bargained with the plaintiff for the purchase of wool from the plaintiff at a certain price, removed it to a warehouse used by the defendant for that purpose, but belonging to a third party; there the wool was weighed and packed in sheeting of the defendant's. The course of dealing was that the wool remained on their premises till paid for. The wool was not removed nor paid for:—Held, that there was not a sufficient delivery and acceptance of the goods to satisfy the statute, though the seller retained a special interest in them (not properly a lien) in respect

of the understood engagement not to remove them till paid for. *Dodsley* v. *Varley*, 12 A. & E. 632; 4 P. & D. 448.

The property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, revests in the vendor, so as to avoid the attachment, by the vendee having countermanded the purchase by letter to his agent dated before such delivery, though not received till afterwards; the vendor assenting to take back the goods. *Salte* v. *Field*, 5 Term Rep. 211; 2 R. R. 568.

B. & Co. verbally agreed to purchase of A. four sacks of cotton waste, then in his warehouse, at 1*s.* 9*d.* per pound. B. & Co. sent their packer and sacks, and their cart, to remove it. The packer packed the waste into eighty-one sacks, twenty-one of which were weighed, and taken in B. & Co.'s cart to their premises, with a delivery order, stating the weight; the remainder was not weighed. On the same day they returned the twenty-one sacks to A., alleging that the waste was of inferior quality, and he replaced them in his warehouse:—Held, that there was evidence of an acceptance and actual receipt of part of the goods. *Kershaw* v. *Ogden*, 3 H. & C. 717; 34 L. J., Ex. 159; 11 Jur. (N.S.) 642; 12 L. T. 573; 13 W. R. 755.

Receiving Warehouse Rent.]—If after goods are sold they remain in the warehouse of the vendor, and he receives warehouse rent for them, it amounts to a delivery of the goods to the vendee, so as to put an end to the vendor's right of stopping them in transitu. *Hurry* v. *Mangles*, 1 Camp. 452; 10 R. R. 727.

So, where they are deposited in a warehouse for which the vendee pays warehouse rent, even though they may not have reached their ultimate destination. *Wright* v. *Lawes*, 4 Esp. 82.

But it is otherwise if anything remains to be done to the goods (for example, weighing, &c.), before the delivery can be perfected. *Withers* v. *Lys*, Holt, N. P. 18; 4 Camp. 237; 16 R. R. 781.

Depositing in Warehouse.]—In trover the defendant pleaded that the assignees of a bankrupt were jointly interested with the plaintiff, and that the defendant converted by their licence. It appeared that the contract was between the plaintiff and the defendant, and that under this contract the goods, by the defendant's direction, were transferred from his name to the plaintiff in the warehouse where they were deposited:—Held, that the property in the goods passed to the plaintiff by the transfer, and that it was not competent to the defendant to prove that other parties were jointly interested with the plaintiff. *Kieran* v. *Saunders*, 1 N. & P. 625; 6 A. & E. 515; 6 L. J., K. B. 145.

Wheat purchased by sample was consigned from Peterborough to P., at a railway station in London. On the arrival of the wheat at the station on the 4th May, P. received notice from the railway company that it had been warehoused at the company's warehouse, and entered in their books in the name of P. The company allowed consignees to use their warehouse for fourteen days without charge. On the morning of Saturday, the 9th May, the carman of P. brought a bulk sample from the station, and P. having examined it, and found it equal to sample, said, "Don't cart the wheat to the mill at present." In the afternoon P. found himself in difficulties, and on Monday morning stopped payment. On Monday P. gave the vendor an order for the wheat, which he took to the railway station. On an issue to try whether the wheat was the property of the assignees of P. or of the vendor:—Held, that there was no acceptance of the wheat by P. *Nicholson* v. *Bower*, 1 El. & El. 172; 28 L. J., Q. B. 97; 5 Jur. (N.S.) 246.

If a purchaser, receiving goods in his warehouse, and intending to examine into their quality, treats them in a manner which materially alters their condition (as by removing glue from hogsheads into bags), it is not necessarily to be inferred from that fact alone that he finally accepts the goods. *Curtis* v. *Pugh*, 10 Q. B. 111; 16 L. J., Q. B. 199.

The plaintiffs, wine and spirit merchants, kept a bonded warehouse, where they took in other persons' goods as well their own, charging warehouse rent. Of this warehouse the plaintiffs had one key and the custom-house officer another. The defendant agreed to buy of the plaintiffs two puncheons of rum, which were to remain in bond till wanted, the defendant to have six months' further credit. The plaintiffs sent to the defendant an invoice describing the puncheons by marks and numbers with the words "free six months," which was explained to mean that they might remain in the warehouse without charge for six months. The plaintiffs entered in the rum book of their warehouse the puncheons of rum as sold to the defendant, and proved that after this entry they had no power to get the goods out. The rum remained in the warehouse for two years, during which time the defendant on several occasions asked the plaintiffs to take back the goods or buy them of him:—Held, that there was evidence that the character in which the plaintiffs held the goods was changed: and that, if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant so as to satisfy the statute of frauds. *Castle* v. *Sworder*, 6 H. & N. 828; 30 L. J., Ex. 310; 8 Jur. (N.S.) 233; 4 L. T. 865; 9 W. R. 697—Ex. Ch.

In an action to recover the price of ten hogsheads of claret, it appeared that the defendants having verbally ordered certain hogsheads of the plaintiff, the latter in October sent them fifteen, whereupon the defendants by letter informed the plaintiff that they had ordered only ten, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. The plaintiff replied describing the character of the wine, and concluding thus, "You will ascertain in the spring whether you have room for it, and you have seen that we are not stringent with old customers as to credit." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, disapproved of it, and gave the plaintiff notice in the early part of April that they would not take any part of it:—Held, that there had been no acceptance, inasmuch as the defendants, under the contract, had the option of rejecting the wine in the spring, and they had availed themselves of that option. *Cunliffe* v. *Harrison*, 6 Ex. 903; 20 L. J., Ex. 325.

User of Horse.]—The plaintiff sold a horse to the defendant for 30*l.* by parol agreement; and the horse was to be fired and remain in the

plaintiff's possession until he was fit to be sent to grass. At the end of twenty-two days the horse was, by the defendant's directions, sent to graze at Kimpton Park, and there entered in the plaintiff's name :—Held, that there was no delivery to or acceptance of the horse by the defendant. *Carter* v. *Toussaint*, 1 D. & R. 515; 5 B. & Ald. 855; 24 R. R. 589.

The defendant verbally agreed to purchase of the plaintiff a horse. Before there had been an actual delivery, the plaintiff requested the defendant to lend it to him for a short time, as he had to take two or three journeys; the defendant assented, and the horse remained with the plaintiff for a fortnight, during which time he went three journeys, and was then sent to the defendant, who refused to receive it. The jury found that the defendant, as owner of the horse, gave the plaintiff permission to keep it :—Held, that there was evidence of an acceptance and receipt of the horse to satisfy the Statute of Frauds. *Marvin* v. *Wallace*, 6 El. & Bl. 726; 25 L. J., Q. B. 369; 2 Jur. (N.S.) 689.

A. agreed to purchase a horse from B. for ready money, and to fetch him away on a given day. Two days before that day A. rode the horse, and gave directions as to his exercise and future treatment, &c., but requested that he might remain in B.'s possession for a further time, at the expiration of which he promised to fetch him away and pay the price; to which B. assented. The horse died before A. paid the price, or took him away :—Held, that there was no acceptance of the horse, so as to make the bargain executed within the statute. *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680; 22 R. R. 526.

User of Carriage.]—A chariot was built to the plaintiff's order, and paid for by him; when finished in other respects the plaintiff ordered a front seat to be added; but the builder being slow in making this addition, the plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. The plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot :—Held, that the plaintiff had sufficient property to maintain trover. *Carruthers* v. *Payne*, 5 Bing. 270; 2 M. & P. 429; 7 L. J. (O.S.) C. P. 84; 30 R. R. 592.

The plaintiff built a waggon for the defendant. The latter employed a smith to affix thereon the iron work, and a tilt-maker to put on a tilt. The waggon remained in the possession of the plaintiff :—Held, that the affixing of these articles was not a sufficient acceptance of the waggon by the defendant to satisfy the statute. *Maberly* v. *Sheppard*, 3 M. & Scott, 436; 10 Bing. 99; 2 L. J., C. P. 181. See also *Beaumont* v. *Brengeri*, ante, col. 427.

Inspection and Acknowledgment of Ownership.]—In an action for the price of a fire-engine, defendant pleaded the Statute of Frauds, and plaintiff replied an acceptance. It appeared that defendant, after the sale of the fire-engine to him, had taken a person to look at it, and had mentioned parties who were likely to want to buy it, and that to another person defendant said: "I know that I am going to do it," and that to a third he said, "I have a concern in the engine" :—Held, that it was for the jury to consider on this evidence whether defendant had treated the engine as his, and dealt with it as such. *Baines* v. *Jevons*, 7 Car. & P. 288.

Examination.]—The defendant verbally agreed to buy some sheep, which he selected from the plaintiff's flock, and directed them to be sent to a field of his, which was accordingly done. Two days afterwards he sent his man to remove the sheep from the field to his farm, which was some miles distant, and, on their arrival, he counted them over, and said, "It is all right:"—Held, that this was evidence of his acceptance of the sheep, so as to satisfy the statute, notwithstanding he afterwards repudiated the purchase, and sent the sheep back to the plaintiff. *Saunders* v. *Topp*, 4 Ex. 390; 18 L. J., Ex. 374.

Unpacking.]—Where goods have been sent on a contract for sale, and the jury finds they did not correspond with the sample contracted for: —Semble, that the mere unpacking of them by the vendee will not, under any circumstances, amount to an acceptance. *Curtis* v. *Pugh*, 10 Q. B. 111; 16 L. J., Q. B. 199.

Aliter, if the goods are kept by the vendee an unreasonable time. *Ib.*

The plaintiff sent twenty sacks of seed to the defendants in part performance of a verbal contract for the sale of seed to the value of more than 10*l*. On the same day, one of the defendants informed the plaintiff that he had heard the seed had arrived out of condition. The plaintiff asserted it was in condition. Immediately afterwards, the defendants wrote to the plaintiff, rejecting the seed, and in one of the letters, informed him that "the twenty sacks which you authorized us to receive for you, and to lay out thin, in consequence of its being hot and mouldy," would be returned. On the trial, the facts being proved by the plaintiff, who gave evidence that he gave no authority to spread it out, and that the seed was not hot and mouldy, the judge directed a nonsuit, with leave to enter a verdict if there was any evidence of an acceptance and actual receipt of part of the goods :—Held, by Lord Campbell, C.J., Erle and Crompton, JJ.; dissentiente, Wightman, J.; that there being evidence to go to the jury that the seed was spread out thin neither because it was out of condition, nor by the plaintiff's authority, there was evidence that it was spread out thin as an act of acceptance; and, therefore, the nonsuit was wrong. But the court thought the evidence too slight to justify them in entering a verdict for the plaintiff, and directed a new trial. *Parker* v. *Wallis*, 5 El. & Bl. 21; 3 W. R. 417.

Taking to Goods after Repudiation.]—It was verbally agreed, between the owner of goods and a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding 10*l*., but was not to take them till the money was paid. At the expiration of the tenancy the buyer tendered the price, but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take away the goods; the vendor prevented him, and took possession of them. In trover by the buyer against the vendor: —Held, that there was no evidence of an acceptance and actual receipt to bind the bargain, as at the time when the buyer took to the goods the parol contract had been already disaffirmed by

the vendor. *Taylor* v. *Wakefield*, 6 El. & Bl. 765; 2 Jur. (N.S.) 1086.

Requesting Retention for Special Purpose.]—If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods. *Elmore* v. *Stone*, 1 Taunt. 458; 10 R. R. 578.

—— **Giving Security.**]—Giving a promissory note, together with an agreement by the seller, to let the goods stay for a certain time on his premises, and an affirmation of the sale afterwards:—Held, to be a complete sale and delivery to the purchaser, so as to enable him to maintain trover against the seller. *Atkinson* v. *Barnes*, Lofft, 325.

c. Part Delivery.

i. *What is.*

Of Sample.]—If a sample is taken as a part of the bulk sold, it is a delivery within the statute. *Talver* v. *West*, Holt, N. P. 178.

Even if done by the agent of the purchaser. *Klinitz* v. *Surry*, 5 Esp. 267; 8 R. R. 853.

Where samples of sugar were produced at a sale by auction, and, after the biddings had closed, the samples were delivered to and accepted by the purchaser as part of the purchase, and a fire consumed the bulk before the delivery thereof to the purchaser:—Held, that the delivery to and acceptance by the buyer of the samples, as part of the sugars purchased, took the case out of the statute. *Hinde* v. *Whitehouse*, 7 East, 558; 3 Smith, 528; 8 R. R. 676.

So, where wool was sold for a bill at nine months, and weighed and sample taken, and several bags delivered, but no bill was drawn:—Held, that the delivery was complete. *Green* v. *Haythorne*, 1 Stark. 447; 18 R. R. 805.

A. gave B. a written order for ten firkins of butter, which were to be sent to A. by a particular carrier; B. sent by that carrier twelve firkins instead of ten; A. refused to receive more than ten firkins, and as the carrier would not deliver less than the whole he refused to take the butter at all: he, however, drew a sample from one of the firkins:—Held, that there had been neither an actual nor a constructive delivery of the butter to A., and consequently no acceptance by him, so as to satisfy the statute of frauds. *Gorman* v. *Boddy*, 2 Car. & K. 145.

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of a usage or a custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of s. 17 of the statute of frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner* v. *Grout*, 2 C. B. (N.S.) 340.

Class.]—Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole. *Elliott* v. *Thomas*, 3 M. & W. 170; 7 L. J., Ex. 129.

Appropriation.]—A. agreed by parol to sell to B. twenty hogsheads of sugar out of a larger quantity which he had in bulk. A. filled four hogsheads, and delivered them to B., who accepted them. A. afterwards filled sixteen other hogsheads, and requested B. to fetch them away, who promised to do so:—Held, that the property in the sixteen hogsheads thereby passed to B., that his acceptance of the four was an acceptance of part of the twenty within the exception of the Statute of Frauds, and that A. might recover the value of the whole from B. in an action for goods bargained and sold. *Rhode* v. *Thwaites*, 9 D. & R. 293; 6 B. & C. 388; 5 L. J. (O.S.) K. B. 163; 30 R. R. 363.

Where goods to the value of 144*l.* were made pursuant to order, but continued, by desire of the vendee, upon the premises of the vendor, excepting a part to the value of 2*l.* 10*s.* which the former took away:—Held, that there was no delivery and acceptance of the goods within the meaning of the statute. *Thompson* v. *Macironi*, 4 D. & R. 619; 3 B. & C. 1; 2 L. J. (O.S.) K. B. 208.

Where Vendor's duties not Determined.]—A. contracted with B. to purchase of him the trunks of oak trees, then felled and lying at Hadnock, about twenty miles from Chepstow. The course was, for A.'s agent to select and mark those portions which he intended to purchase, and for B. to sever the tops and sidings, and float the trunks down the river Wye to A.'s wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, B. became bankrupt, whereupon A. sent his men to B.'s premises at Hadnock, and severed and carried away the marked portions of certain trees:—Held, that no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; and that there was no delivery or acceptance; and, consequently, that the assignees of B. were entitled to recover the value in trover. *Acraman* v. *Morrice*, 8 C. B. 449; 19 L. J., C. P. 57; 14 Jur. 69.

Custom to Detain.]—Where it is the custom to detain until certain disbursements are paid, a delivery of part is not a delivery of the whole. *Holderness* v. *Shackells*, 8 B. & C. 618; 3 M. & Ry. 25; 7 L. J. (O.S.) K. B. 80.

Not Equal to Contract.]—A. bought wheat in value above 10*l.*, which wheat was to be reduced to a certain standard by dressing. After the making of the contract, A. sent for a portion of the wheat, which was sent to him, but not dressed, whereby it fell short of the standard agreed upon, but he retained it without objection:—Held, a part acceptance, and the retention of the portion sent amounted to a waiver of the full performance of the contract by the plaintiff as to such portion. *Gilliat* v. *Roberts*, 19 L. J., Ex. 410.

Goods of the value of more than 10*l.* were in the hands of a warehouseman; the purchaser having a delivery order, sent for a portion of them, which were duly removed to his premises, but, on examining them, he sent them back, as not being such as he had agreed for:—Held, a sufficient acceptance. *Baylis* v. *Lundy*, 4 L. T. 176; 9 W. R. 556.

Consumption of Part.]—A., by parol agreed to buy of B. all the potatoes in a field of his, at so much a ton, and to dig and remove them at his own expense. He employed and paid labourers to dig them, and sent his own sacks to the field, in which sacks the potatoes, as they were dug, were placed by his men, and the sacks were then

carried to another part of the field, and the potatoes there emptied out of them in heaps, or clamped on the ground. During the digging one sackful of the potatoes was, by the buyer's authority, taken by one of the men employed, and consumed by him for food. Before the whole was dug, the seller refused to complete his contract, or to permit the residue of the potatoes to be dug, or those which had been dug to be removed from his field:—Held, that there was evidence of a part delivery and acceptance. *Smith* v. *Hudson*, 8 L. T. 253.

The plaintiff sold a hogshead of cider to the defendant by sample as being good draught cider. After the arrival of the cask the defendant, on the 21st May, wrote to the plaintiff: "The cider differs from the sample, and the little I have sold has been complained of in every instance; should this continue I shall be obliged to return it." The plaintiff in trying to sell it used 20 gallons, but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff. The 20 gallons were more than sufficient to enable the defendant to test the quality of the bulk:—Held, that the defendant had not so accepted the bulk as to be bound to pay for the whole. *Lucy* v. *Mouflet*, 5 H. & N. 229; 29 L. J., Ex. 110.

To Sub-Vendees.]—A., at Bristol, sold goods to B., to be paid for by B.'s acceptance of a bill to be drawn by A.; the goods were weighed, but remained in A.'s warehouse, who omitted to draw the bill. B. sold a specific and ascertained portion of these goods to C. in London, who paid for them, and transmitted B.'s order to A. for the delivery of them. On the fourth day after A.'s receipt of the order B. became bankrupt, and then, and not before, A. refused to deliver the goods to C., insisting that he had a lien upon them for the price:—Held, that C. might maintain trover against A., for he was bound, at all events, to notify his refusal immediately: and semble, that having neglected to draw the bill, and having furnished B. with samples to go into the market with, and having obeyed several orders of B.'s for the delivery of portions of the goods to different sub-vendees, he could not have insisted upon any lien even if he had given immediate notice. *Green* v. *Haythorne*, 1 Stark. 447; 18 R. R. 805.

ii. *Recovery of Price for.*

In what Cases.]—One who has agreed for one hundred sacks of flour, cannot, after the delivery of part, recover for that part, the defendant being willing to receive and pay for the whole. *Walker* v. *Dixon*, 2 Stark. 281. But this ruling was set aside by the court. *See* 9 B. & C. 387.

A contract to deliver one hundred bags of hemp at a certain price by a certain time is entire and cannot be split. *Waddington* v. *Oliver*, 2 Bos. & P. (N.R.) 61; 9 R. R. 614.

The seller of two hundred and fifty bushels of wheat, to be delivered within a certain time, delivering one hundred and thirty bushels only, which the purchaser accepts and retains after the expiration of the stipulated time of delivery, may recover the price of the part delivered. *Oxendale* v. *Wetherell*, 4 M. & Ry. 429; 9 B. & C. 386; 7 L. J. (O.S.) K. B. 264.

Where the defendant agreed to purchase a lot of trees, and pay for the same according to the conditions of sale, and he afterwards felled and carried away part of them without making such payment, and refused to do so until the remainder had been delivered:—Held, that the executors of the vendor, having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant under a count for goods sold and delivered, as the latter by such taking had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, 6 Moore, 114.

R. agreed to supply W. with straw, to be delivered at his premises, at the rate of three loads in a fortnight, during a specified time; and W. agreed "to pay R. 33*s.* per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time, W. refused to pay for the last load delivered, and insisted on always keeping one payment in arrear:—Held, that, according to the true effect of the agreement, each load was to be paid for on delivery, and that on W.'s refusal so to pay for them, R. was not bound to send any more. *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L. J., K. B. 30.

If a person orders several articles from a tradesman at the same time, though at distinct prices, he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accepts of any one article, he is precluded from saying that the contract was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract. *Champion* v. *Short*, 1 Camp. 53; 10 R. R. 631.

See also cases, ante, col. 391.

d. Refusal of Goods.

Of Part.]—Where the traveller of a mercantile house in London received an order from a country manufacturer for a cask of cream of tartar, and also an offer to purchase two chests of lac dye at a given price; and the traveller undertook to send both articles, but stipulated on the part of his principals that they should be at liberty to refuse to fulfil the contract as to the lac dye, on the terms proposed, by writing to the vendee to that effect by return of post, or the post following; and no answer was sent back, but shortly after the goods were delivered; and the vendee accepted the cream of tartar, but refused to take the lac dye:—Held, that this was not an acceptance to take the case out of the statute, and render the vendee liable for the latter article; the contract not being entire. *Price* v. *Lea*, 2 D. & R. 295; 1 B. & C. 156.

A., upon one and the same occasion, bought several parcels of goods from B., one parcel consisting of chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, for ready money, the rest on credit. The goods were sent to the purchaser at different times. The chimney-glasses being damaged in the carriage, he declined so receive them. A. afterwards, on an application by B. for payment of all the goods, wrote to him in substance as follows: "The only parcel of goods selected for ready-money was the chimney-glasses, which goods I have never received, and have long since declined to have, for reasons made known to you at the time; with regard to the rest I am ready to pay":—Held, that the letter, inasmuch as it contained an admission of the bargain and of all the substantial terms of it, was a sufficient note or memorandum of the contract, notwithstanding the subsequent attempted repudiation of

liability. *Bailey* v. *Sweeting*, 9 C. B. (N.S.) 843; 30 L. J., C. P. 150; 9 W. R. 273.

Of Whole.]—A. having sent to B. a bag of sponge (under a verbal order from the latter), for which he charged 11*s.* per pound, B. returned it, and at the same time wrote a letter to A. stating that he had examined the sponge, and finding that it was not worth more than 6*s.* per pound, he had sent it back:—Held, that this letter did not amount to such an acceptance of the goods as would take the case out of the statute. *Kent* v. *Huskinson*, 3 Bos. & P. 233; 6 R. R. 777.

Bulk samples, and invoice of some hops, were sent to a vendee by coach, pursuant to contract, but he returned them, as not answering to the samples by which he bought. The jury, in an action for the price of the hops, found that the samples did not answer the contract:—Held, that there was no acceptance af the goods within the Statute of Frauds. *Johnson* v. *Dodgson*, 2 M. & W. 653; 6 L. J., Ex. 185.

Time for.]—A party to whom goods to the amount of 10*l.* and upwards are delivered, subject to approval under a parol order, must refuse to accept them within a reasonable time; if he does not, he is to be treated as having accepted them. *Coleman* v. *Gibson*, 1 M. & Rob. 168.

There may be actual receipt by acquiescence; and whenever such a case is set up, it is a question for the jury. *Bushel* v. *Wheeler*, 15 Q. B. 442, n; 8 Jur. 532. S. P., *Morton* v. *Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382.

Lapse of time before refusal or rejection is some evidence of acceptance. *Smith* v. *Hudson*, 6 B. & S. 481; 34 L. J., Q. B. 145; 11 Jur. (N.S.) 623; 12 L. T. 377; 13 W. R. 683.

C. WHEN PROPERTY PASSES.

1. GENERALLY.

Statute.]—*The Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71) *ss.* 16—26, *contains provisions as to the transfer of property in goods sold.*

—— **Factors' Act.**]—*See* PRINCIPAL AND AGENT.

Completion of Sale.]—Where the sale has been completed within the statute the property vests in the purchaser immediately, and is at his risk. *Phillimore* v. *Barry*, 1 Camp. 513; 10 R. R. 742.

There may be a complete contract, so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed upon between them. *Joyce* v. *Swann*, 8 D. & R. 343; 5 B. & C. 583.

Subsequent Letter of Acknowledgment.]—A. and B. verbally treated for the purchase of a horse by the former of the latter. A few days afterwards B. wrote to A. that he had been informed that there was a misunderstanding as to the price, A. having imagined that he had bought the horse for 30*l.*, B. that he had sold it for 30 guineas. A. thereupon wrote to B., proposing to split the difference, adding, "If I hear no more about him I consider the horse is mine at 30*l.* 15*s.*" No reply was sent; no money was paid, and the horse remained in B.'s possession. Six weeks afterwards an auctioneer who was employed by B. to sell his farming stock, and who had been directed by B. to reserve the horse, as it had already been sold, by mistake put it up with the rest and sold it. After the sale B. wrote to A. a letter, which substantially amounted to an acknowledgment that the horse had been sold to him:—Held, that A. could not maintain an action against the auctioneer for the conversion of the horse, he having no property in it at the time the auctioneer sold it,—B.'s subsequent letter not having (as between A. and a stranger) any relation back to A.'s proposal. *Felthouse* v. *Bindley*, 11 C. B. (N.S.) 869; 31 L. J., C. P. 204; 6 L. T. 157; 10 W. R. 423. Affirmed 7 L. T. 835; 11 W. R. 429—Ex. Ch.

Validity of Title.]—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy* v. *Lindsay*, 47 L. J., Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406; 14 Cox, C. C. 93—H. L.

When the original owner has parted with the chattel to A. upon a de facto contract, though there may be circumstances which enable that owner to set aside that contract, the bonâ fide purchaser from A. will obtain an indefeasible title. *Ib.*

The question, therefore, in many such cases will be, Was there a contract between the original owner and the intermediate person? *Ib.*

—— **Sale in Market Overt.**]—By a purchase in market overt the title obtained is good against all the world. *Ib.*

If not so purchased, though purchased bonâ fide, the title obtained may not be good against the real owner. *Ib.*

The real owner of goods does not lose his property, though the possessor makes a sale of them, unless it be in market overt; but there is no instance where a sale, made by the mere possessor, has been held to change the property, where it has marks by which it may be known. *Hartop* v. *Hoare*, 3 Atk. 49.

Jewellery, stolen from the plaintiff, was sold to the defendants, jewellers in the City of London. The sale took place in a showroom above the defendants' shop, to which access could only be obtained by their special permission:—Held, that the sale was not a sale in market overt, and that the plaintiff was therefore entitled to recover back the jewellery from the defendants. Semble, that the doctrine as to sales in market overt in the City of London does not apply to a sale by a customer to a shopkeeper. *Hargreave* v. *Spink*, 61 L. J., Q. B. 318; [1892] 1 Q. B. 25; 65 L. T. 650; 40 W. R. 254.

A sale of goods (being those in which he usually deals) made to a tradesman in his warehouse or shop, in the City of London, is a sale in market overt, notwithstanding the construction of the premises be such that a person from the outside cannot see what is going on within. *Lyons* v. *De Pass*, 9 Car. & P. 68.

A sale by public auction at a horse repository, out of the city of London, is not a sale in market overt. *Lee* v. *Bayes* or *Robinson*, 18 C. B. 599; 25 L. J., C. P. 249; 2 Jur. (N.S.) 1093.

A ship is not like an ordinary chattel, which passes by delivery, and there is no market overt for ships. *Hooper* v. *Gumm*, 36 L. J., Ch. 605; L. R. 2 Ch. 282; 16 L. T. 107; 15 W. R. 464.

See further MARKETS AND FAIRS.

Mistake as to Parties—Fraud.]—L. was a manufacturer in Ireland. Alfred Blenkarn, who

occupied a room in a house looking into Wood-street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letter used this address—"37, Wood-street, Cheapside," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood-street. L. sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood-street." The goods were received by Blenkarn at that place, and disposed of to a purchaser, who was entirely ignorant of the fraud:—Held, that no contract was made with Blenkarn; that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to this purchaser, who was consequently liable to L. for the value of the goods. *Cundy* v. *Lindsay*, supra.

Merchants in London were in the habit of dealing with Reed Brothers, of Old Town-street, Plymouth. On receipt of an order from Joseph Reed & Sons, of Mincing-lane, Plymouth, they forwarded the goods asked for, under the mistaken belief that they were dealing with their old customers. The person trading as Joseph Reed & Sons was an uncertificated bankrupt, and his trustee at once seized the goods:—Held, that the trustee was bound to restore the goods, or to pay the amount due for them. *Barnett, Ex parte, Reed, In re*, 45 L. J., Bk. 120; 3 Ch. D. 123; 34 L. T. 664; 24 W. R. 904.

H., believing he was dealing with a firm carrying on business as G. & Co., agreed to sell goods to a person of the same name as one of the firm of G. & Co. The goods were deposited with an auctioneer, who advanced money on them. In an action of trover by the plaintiff to recover the goods from the auctioneer, the court held that there was no contract with the person who was of the same name as the firm, and consequently that trover would not lie at the suit of the plaintiff, to recover his goods. *Hardman* v. *Booth*, 1 H. & C. 803; 32 L. J., Ex. 105; 9 Jur. (N.S.) 81; 7 L. T. 638; 11 W. R. 239.

Sale of Stolen Beasts in Market overt—Conviction—Claim for Keep.]—The bonâ fide purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counterclaim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner. *Walker* v. *Matthews*, 51 L. J., Q. B. 243; 8 Q. B. D. 109; 46 L. T. 915; 30 W. R. 338.

Effect of Conviction of Vendor—For False Pretences.]—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale, which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce* v. *Newington* (48 L. J., Q. B. 125; 4 Q. B. D. 32; 39 L. T. 535; 27 W. R. 319) overruled. *Bentley* v. *Vilmont*, 57 L. J., Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E.)

—— **For Larceny.**]—Where a hirer in possession of goods under a hire-and-purchase agreement sells them to a bonâ fide purchaser without notice before all instalments agreed upon are paid, and is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser. *Payne* v. *Wilson*, 65 L. J., Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657—C. A.

Stipulation that Property Remain in Vendor.]—A. sold iron to B., and in the contract stipulated that it should remain his property until paid for. The iron was shipped, and by the bill of lading was consigned to G., and made deliverable to his order, G. apparently being the common agent of A. and B. The iron being still unpaid for, A. consented that it should be delivered to the L. Railway Company to be used on their line, provided his rights of property were preserved. G. indorsed the bills of lading to the railway company, and the goods were delivered to them, the company having notice of the terms of the original agreement with A., and of the condition on which he had consented to the delivery of the iron. On the trial of an interpleader issue which arose between A. and an execution creditor of the railway company, the judge told the jury that if they believed that A. never parted with the property, and that the railway company, at the time of the delivery to them of the goods and the indorsement of the bill of lading, had notice of the rights of A. under his contract with B., they should find for him. The jury found for A. The judge was not asked to leave any question of fraud in A. to the jury. On motion for a new trial:—Held, that the direction was right, and that the verdict should not be disturbed. *Bateman* v. *Green*, Ir. R. 2 C. L. 166.

Goods Pledged by Buyer.]—Where goods delivered "on sale or return" are pledged by the buyer, the pledging of the goods by him is "an act adopting the transaction" within the meaning of s. 18, r. 4 (*a*) of the Sale of Goods Act, 1893, so as to pass the property in the goods to him, and consequently the pledgee obtains a good title to the goods as against the seller. *Kirkham* v. *Attenborough*, 66 L. J., Q. B. 149; [1897] 1 Q. B. 201; 75 L. T. 543; 45 W. R. 213—C. A.

Property revested by Pledgee in Pledgor through Fraud of the Latter.]—The plaintiffs made advances to D. & Sons on the security of certain flour, which was warehoused by D. & Sons in the plaintiffs' name. D. & Sons undertaking, in consideration of the plaintiffs' delivering to their order the flour as sold, to specifically pay plaintiffs the proceeds of all sales immediately on their receipt. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of

the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour :—Held, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to revest the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour remained in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to bonâ fide transferees for good consideration, the title of the latter was indefeasible. *Babcock* v. *Lawson*, 48 L. J., Q. B. 524; 4 Q. B. D. 394; 27 W. R. 866. Affirmed 49 L. J., Q. B. 408; 5 Q. B. D. 284; 42 L. T. 289; 27 W. R. 591—C. A.

Mistake as to Price.]—Commission agents, having a chattel to sell at a fixed price, and their salesman having by mistake agreed to sell it at one-third of that price, and the mistake having been explained, and the contract repudiated, before the chattel was delivered :—Held, that the purchaser could not enforce its delivery. *Isaac* v. *Boulnois*, 11 W. R. 341.

Mistake in Telegram.]—A. wrote to B. asking on what terms he could execute an order for fifty rifles. B. answered, stating terms. B. subsequently received a telegram from A. directing him to send "the" rifles. He accordingly forwarded fifty rifles. By a mistake of the telegraph clerk the word "the" was inserted instead of "three," which was the word used by A. in filling up the telegraph form. A. refused to accept more than three rifles :—Held, that he was not bound by the mistake of the clerk, and consequently an action was not maintainable against him for the price of the remainder. *Henkel* v. *Pape*, 40 L. J., Ex. 15; L. R. 6 Ex. 7; 23 L. T. 419; 19 W. R. 106.

Goods paid for by Cheque, which is subsequently Dishonoured.]—The right of property does not pass upon a sale of goods paid for by the purchaser's cheque, subsequently dishonoured, if the purchaser had not, at the time of drawing and giving the cheque, reasonable grounds for believing that there were funds to meet it as an instrument payable the instant after it was drawn. *Loughnan* v. *Barry*, Ir. R. 5 C. L. 538. See also *S. C.*, Ir. R. 6 C. L. 457.

When cattle were sold and paid for by the purchaser's cheque, which was subsequently dishonoured :—Held, in an action by the vendor for conversion, and for money had and received, that the proper question for the jury was—not whether the purchaser had reasonable grounds for believing, and did in fact believe, that the cheque would be dishonoured—but whether, at the time the cheque was drawn, he had reasonable ground for believing that there were funds to meet it. *Ib.*

If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a cheque, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the cheque he had no reasonable ground to expect that it would be paid. *Hawse* v. *Crowe*, R. & M. 414.

Payment by Worthless or Fictitious Bills.]—If goods are obtained by a party who knows himself to be insolvent, upon bills drawn upon others in the same circumstances, it will not render the contract of sale void, unless the bills are contrived for the express purpose of getting possession of the goods. *Noble* v. *Adams*, 2 Marsh. 366; 7 Taunt. 59; Holt, N. P. 248; 17 R. R. 445.

Where goods were sold on the terms "to be paid for by E.'s bill on P., without recourse to the buyer in case of its not being paid," although the vendee knew the bill to be worth nothing, he is not liable to an action for the price of the goods; the action should be trover or deceit. *Read* v. *Hutchinson*, 3 Camp. 352.

Sham Sale.]—The plaintiff, being in difficulties, and fearing that some of his creditors would issue execution against his goods, agreed with the defendant, who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out, and a receipt given to the defendant for a sum therein stated to be the purchase-money, and possession of the goods was delivered to the defendant. Afterwards the defendant sold the goods as his own; whereupon the plaintiff brought trover :—Held, that no property in the goods passed to the defendant, and that the plaintiff was not precluded from showing that no payment was in fact made, and that the transaction was not a real, but a pretended sale. *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262; 4 Jur. (N.S.) 95; 6 W. R. 257.

Bills of Lading accompanying Bills of Exchange.]—P. shipped a cargo of umber on board a ship chartered for the plaintiff. The bills of lading stated that the cargo was shipped by P., to be delivered "to order or assigns." P. drew a bill of exchange on the plaintiff, and handed it to the vendor of the umber, who discounted it with the defendants, and handed them the bills of lading, to be given up to the plaintiff on payment by him of the bill of exchange at maturity. The plaintiff refused to accept the bill of exchange without receiving the bills of lading. A new bill of exchange was substituted for the former bill, and forwarded to the defendants' agents with directions to give up the bills of lading when it was paid. The ship and the bill of exchange arrived on the same day. The plaintiff did not then accept the bill; and the cargo was entered at the custom-house in the defendants' name. The plaintiff afterwards offered to pay the bill of exchange, and receive the bills of lading, and give a guarantee for the freight, but the defendants refused, and sold the cargo :—Held, that the property in the cargo had passed to the plaintiff, and he was entitled to recover. *Mirabita* v. *Imperial Ottoman Bank*, 47 L. J., Ex. 418; 3 Ex. D. 164; 38 L. T. 597—C. A.

When a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd* v. *Harrison*, 40 L. J., Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1.

Transfer of Bill of Lading.]—When goods are at sea the parting with the bill of lading, which is the symbol of the goods, is parting with the

ownership of the goods themselves. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.

A bill of lading is not a necessary instrument of the transfer of property in goods consigned to the owner. *Meyer* v. *Sharpe*, 5 Taunt. 74; 2 Rose, 124.

Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unindorsed, will not prevent its passing. *Joyce* v. *Swann*, 17 C. B. (N.S.) 84.

A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them in transitu. *Pease* v. *Gloahec*, 35 L. J., P. C. 66; L. R. 1 P. C. 219; 15 L. T. 6; 15 W. R. 201.

Where the plaintiffs, having received an order from the defendant for goods, shipped them, and transmitted to him the bill of lading indorsed, making the goods deliverable to order or assigns; and on their arrival the captain withheld the goods, in consequence of the defendant having refused to accept a bill drawn on him for the price, and thereupon the defendant recovered in trover against the captain:—Held, that the plaintiffs might maintain an action for goods sold and delivered, for the delivery of the goods was complete as between them and the defendant, by the delivery on board the ship. *Groning* v. *Mendham*, 5 M. & S. 189.

The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. *Sewell* v. *Burdick*, 54 L. J., Q. B. 126; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L. (E.)

Payment against Bills of Lading.]—Coals were sold at Hull, and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's agent, in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that, the price being unpaid, the seller was entitled to intercept the delivery. *Moakes* v. *Nicolson*, 19 C. B. (N.S.) 290; 34 L. J., C. P. 273; 12 L. T. 573.

Held, also, that a third person, who had agreed with the vendee to purchase the coals of him, by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee. *Ib.*

A. sold goods to B., to be delivered free on board at Liverpool for Trieste. The goods were placed by A. on board a steamer, to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading, or some other document, giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly-increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. was unable to comply with the custom by producing the bill of lading:—Held, that B., by his conduct, dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading. *Green* v. *Sichel*, 7 C. B. (N.S.) 747; 29 L. J., C. P. 213; 6 Jur. (N.S.) 827; 2 L. T. 745; 8 W. R. 663.

Sub-Contract—Work not Completed—Lien on Purchase-money.]—Contractors for the erection of steel tanks to be erected on the purchasers' premises, and to be paid for after completion, employed the plaintiff as a sub-contractor to erect and fix the tanks, he also to be paid a smaller price after completion. The plaintiff had nearly finished the eretion of one tank when the contractors became insolvent. The tanks when completed would not be fixtures:—Held, that no property in the tanks so far as erected had passed to the contractors or the purchasers, and that on completion the plaintiff would not be bound to hand over the tanks, except on having his purchase-money paid or secured by a first charge on the price to be paid to the contractors. *Bellamy* v. *Davey*, 60 L. J., Ch. 778; [1891] 3 Ch. 540; 65 L. T. 308: 40 W. R. 118. Appeal dismissed by consent, W. N. (1891) 192.

—— **Retention of Inferior Article.**]—The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorised by L. to pay them. Some waggons were delivered by the waggon company to a railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies:—Held, that the property in the goods and the right to possession of them having passed to the plaintiffs, both parties were liable. *Johnson* v. *Lancashire and Yorkshire Ry.*, 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.

Sale of Illegal Manufacture.]—The plaintiff, having a quantity of apples, by contract in writing agreed with the defendant to sell him his cider at 35*s.* per hogshead, to be delivered at T. at a future time, and to lend what casks he had empty for the cider, to be manufactured on the plaintiff's premises, to be paid for before it was taken away. The plaintiff pounded his apples, and delivered the juice to the defendant's servant, who proceeded to manufacture the cider. Before the manufacture was complete, the cider and the casks, some of which belonged to the plaintiff, were seized by the excise officers for being in an unentered place, and condemned in the exchequer as the defendant's property. In Devonshire, where the parties lived, cider means the juice as expressed from the apples:—Held, that the contract was for the sale of juice, not manufactured cider; that the delivery of the

juice to the defendant's servant vested the property in the defendant; that it was his duty to have entered the premises; that his neglecting to do so rendered the plaintiff's delivering the cider at T. impossible, and therefore unnecessary; and that the plaintiff, therefore, was entitled to recover the price, both of the cider and of the casks. *Studdy* v. *Saunders*, 8 D. & R. 403; 5 B. & C. 628.

Immediate or Future Sale.]—A. on the 4th of January agreed to sell to B. a stack of hay for 145*l*., to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for:—Held, that this was a contract for an immediate and not for a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him. *Turling* v. *Baxter*, 6 B. & C. 360; 9 D. & R. 272; 5 L. J. (O.S.) K. B. 164; 30 R. R. 355.

Payment of Instalments—Agreement to Build Organ.]—A. agreed to build an organ for B., and to fix it in the parish church for 768*l*., to be paid by yearly instalments. The agreement provided, that, "in the event of the organ being completed and erected, and the sum of 768*l*. or any part thereof not being paid at the time or times thereinbefore mentioned, it was declared and agreed that the whole sum or balance, with the interest thereon, should become due and payable to A., and might be sued for and recovered accordingly; and in the meantime, and until the balance and interest should be paid and discharged, A. should have a lien on the organ; and, in default of any or either of such payments at the time or times thereinbefore mentioned, A. might either dispose of or remove the organ as he might think proper":—Held, that the property in the organ remained in A. until the instalments were paid. *Walker* v. *Clyde*, 10 C. B. (N.S.) 381.

—— **Agreement for Hiring.**]—By a written agreement, R. hired furniture of the value of 63*l*. from L. & Co. R. was to pay for it by monthly instalments. In the event of non-payment of any instalment, L. & Co. might seize and remove the furniture and retake possession of it. On payment of all the instalments, the furniture was to become his property, but until such payment it was to remain the sole property of L. & Co. This agreement was not registered as a bill of sale. The furniture comprised in the agreement was in the possession of R. at the commencement of his bankruptcy:—Held, that the property in the furniture did not pass to him until all the instalments had been paid; that neither the agreement nor the licence to seize the furniture amounted to a bill of sale by R., and therefore registration was unnecessary. *Robertson, In re, Lewin, Ex parte*, 47 L. J., Bk. 94; 9 Ch. D. 419; 39 L. T. 12; 26 W. R. 733—C. A.

Payment down of all Future Instalments—Right to demand Transfer.]—The defendants agreed to hire forty-four waggons from the plaintiffs, paying in respect of twenty specified waggons an annual rent of 285*l*. for five years, and in respect to the other twenty-four an annual rent of 249*l*. for three years. It was agreed that the said waggons should, at the expiration of the respective terms of the demise, and after payment of the rents reserved during the said terms respectively, become the absolute property of the lessees without any further payment whatsoever; and that, until full payment of the several rents respectively reserved should be actually made, the ownership of the said waggons respectively should remain and continue in the lessors. The defendants having paid the first two years' rent in respect of the twenty-four waggons, sent to the plaintiffs the whole of the remaining one year's rent with a letter stating that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear. The plaintiffs' agent declined to receive the payment upon the terms of the letter, and entered it in the plaintiffs' ledger as a payment in respect of the entire number of waggons:—Held, that the contracts in respect of the twenty-four waggons and the twenty were several, and the hirers were entitled to the property in the twenty-four waggons upon payment of all the instalments that remained to be paid in respect of them, notwithstanding that there were unpaid instalments in respect of the twenty, and that the contract, being in effect one of sale, and the provision for payment by instalments a provision solely in favour of the purchaser, he was entitled to anticipate the time fixed for the transfer of the property in the waggons by anticipating the time for payment. *Lancashire Waggon Co.* v. *Nuttall*, 42 L. T. 465; 44 J. P. 536—C. A.

Conditional Sale of Horse—Death of the Horse before Sale absolute.]—A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick* v. *Barnes*, 49 L. J., C. P. 698; 5 C. P. D. 321; 29 W. R. 139; 44 J. P. 651.

Materials used in Construction of Railway—Goods Delivered but not Fixed.]—By an agreement made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation:—Held, that the property in "materials delivered," upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury and Cheltenham Ry.* v. *Daniel*, 54 L. J., Ch. 265; 33 W. R. 321.

2. APPROPRIATION OF SPECIFIC GOODS.

Intention of Parties.]—By the law of England, under a contract of sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will

not be changed until he has done it, or waived his right to do it. *Gilmour* v. *Supple*, 11 Moore, P. C. 551; 6 W. R. 445.

The plaintiff, a salt merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant, in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent, with the invoice and a draft at four months, to De M. In November, 1863, De M. chartered the ship S. F., belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta; freight to be paid one-third by freighter's acceptance, at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the S. F., and had shipped 1,007 tons (for which he took the mate's receipts in his name), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate's receipts for the 1,007 tons, and demanded a bill of lading for that quantity, making it deliverable to his order. This the defendants refused, and the vessel sailed with the salt on board:—Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the S. F. with the intention of passing the property therein to De M.; and that (the jury having found that the plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing. *Falke* v. *Fletcher*, 18 C. B. (N.S.) 403; 34 L. J., C. P. 146; 11 Jur. (N.S.) 176; 13 W. R. 346.

If, upon a contract for the sale of goods, anything remains to be done by the buyer, such as weighing, measuring, or testing the goods, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass though he has not done the act. *Furley* v. *Bates*, 2 H. & C. 200; 33 L. J., Ex. 43; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.

Appropriation by Vendor.]—If a man bargain for the purchase of a given quantity out of a heap, when the vendor sets out that quantity, and gives notice to the vendee that he has done so, the property at common law would pass from the vendor to the vendee. *Rhode* v. *Thwaites*, 6 B. & C. 388; 9 D. & R. 293; 5 L. J. (O.S.) K. B. 163; 30 R. R. 363.

Where, after a sale of 60,000 bricks, part of a bulk of 117,000, the seller had applied all but 62,000 for other purposes, and was still using them, when seized in execution:—Held, there was no appropriation of any part of the 60,000 to the sale. *Snell* v. *Heighton*, 1 Cab. & E. 95.

It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale or on the completion of the goods. *Young* v. *Matthews*, 36 L. J., C. P. 61; L. R. 2 C. P. 127; 15 L. T. 182.

A., a brickmaker, who was in embarrassed circumstances, sold to B., to whom he was largely indebted, a large quantity of bricks. B. sent an agent to the brickfield with an order for the delivery of the bricks, and A.'s foreman told him he was ready to commence delivering them if a man, who was in possession under a distress put in by the landlord, was paid out, and he pointed out three clamps—one consisting of finished bricks, a second of bricks still burning, and a third of bricks moulded but not burnt—as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks:—Held, that the conduct of A.'s foreman was a sufficient appropriation of the bricks, and that the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties. *Ib.*

The plaintiff had effected a "floating" policy of marine insurance on "goods," upon which he sued an underwriter under the following circumstances:—By contract of the 7th of January, D. & C., sugar merchants in London, agreed to sell to B. & Co. 200 tons of sugar of a certain description, to be shipped from Hamburg to Bristol at the price of 1*l.* 1*s.* 9*d.* per cwt. net f. o. b. at Hamburg; payment to be by cash, in London, in exchange for bill of lading. By contract of the 12th of January, D. & Co. agreed to sell a similar quantity of sugar to the plaintiff upon the same terms. B. & Co. entered into the contract of the 7th of January in order to enable themselves to execute a contract previously made by them with the plaintiff for the sale of the same quantity of sugar. Until after the loss hereinafter mentioned D. & Co. were not aware of B. & Co.'s contract with the plaintiff, nor was the plaintiff aware that D. & Co. were the shippers of the 200 tons contracted to be sold to him by B. & Co. The requirements of the statute of frauds had been complied with in the case of the above-mentioned contracts of the 7th and 12th of January, but not in the case of the contract between B. & Co. and the plaintiff, there being no sufficient memorandum of that contract within the statute. D. & Co. advised their forwarding agents at Hamburg that they had sold 400 tons of sugar for Bristol, and, in pursuance of such advice, 3,900 bags of sugar were shipped at Hamburg, consigned to "order, Bristol," by such agents, who forwarded the bills of lading for the sugar indorsed in blank to bankers in London, with instructions to deliver them to D. & Co. against payment of amounts advanced in respect of the price of the sugar paid to the manufacturer in Germany. The sugar so shipped was of the description specified by the above-mentioned contracts, but was insufficient in quantity by 100 bags to satisfy the two contracts of the 7th and 12th of January. No appropriation of specific bags to each of the two contracts respectively was made by D. & Co. or their agents at the time of shipment. The ship on which such shipment was made was lost with her cargo on the voyage. Before the news of the loss reached them, D. & Co. took up the bills of lading in due course, and they then apportioned the bags of sugar shipped between the contracts of the 7th and 12th of January, appropriating certain specific bags to the number of 2,000 to the former and the remainder to the latter, and made out separate invoices in respect of each contract to B. & Co. and the plaintiff respectively, setting out the marks and numbers of the bags. The invoices were then posted by

D. & Co. to B. & Co. and the plaintiff respectively, but before they were so posted the news of the loss of the ship had reached D. & Co. and the plaintiff. The plaintiff, on learning of the loss, anticipating that sugar destined for him might have been shipped on board the ship, although without specific advice of any such shipment, declared on the ship in respect of 200 tons of sugar under the floating policy before mentioned. The plaintiff and B. & Co. subsequently, on receipt of the invoices, respectively paid the contract price of and obtained the bills of lading for the sugars specified in their respective invoices. B. & Co. then forwarded the invoice received by them to the plaintiff, who thereupon paid them for the sugar included in that invoice and received the bills of lading in respect thereof. The plaintiff then further declared under the floating policy in respect of this last-mentioned sugar:—Held, that there was no appropriation of goods so as to pass the property from D. & Co. to the plaintiff. *Stock* v. *Inglis*, 52 L. J., Q. B. 30; 9 Q. B. D. 708; 47 L. T. 416; 31 W. R. 455; 4 Asp. M. C. 596. Reversed, but not on this point, 12 Q. B. D. 564—C. A.

Assent of Vendee.]—A sale of a given number of bales out of a larger number does not vest the property in the vendee until there has been a specific appropriation by the vendor, assented to by the vendee or by his agent. *Campbell* v. *Mersey Docks and Harbour Board*, 14 C. B. (N.S.) 412; 8 L. T. 245; 11 W. R. 596.

A person at a fair orally contracted to sell at a given price per cwt. two pockets of hops which were on the spot, and which were there inspected and approved of by the intended buyer, and also two other pockets, of which samples were shown, but which were lying in a warehouse in London. The buyer took away with him, and afterwards paid for, the first two pockets, but the last two were to be forwarded to him at a future time. On his return to London the seller went to the warehouse and selected two out of three pockets which he had there, and directed the warehousekeeper to mark them "to wait the buyer's order;" but no alteration was made in the warehousekeeper's books, and he continued to hold the seller liable for the rent. He in a few days afterwards sent the buyer an invoice describing the numbers, the weight and the prices of the two pockets delivered at the fair, and also of the two which had been set apart at the warehouse, and at the same time enclosed a draft for acceptance. The buyer sent back the draft unaccepted, and refused to receive the last two pockets:—Held, that there was no evidence of the appropriation of the two pockets in the London warehouse being either originally authorised or subsequently assented to by the buyer, and that consequently the property in them did not pass by the contract. *Jenner* v. *Smith*, L. R. 4 C. P. 270.

Tea in Specified Chests—Warrants still in Vendor's Possession.]—A policy expressed the insurance to be on "merchandise the assured's own, in trust, or on commission for which they are responsible," in or on certain specified warehouses, vaults, cellars, wharves, yards, or quays. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been endorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy. *North British and Mercantile Insurance Co.* v. *Moffatt*, 41 L. J., C. P. 1; L. R. 7 C. P. 25; 25 L. T. 662; 20 W. R. 114.

Timber—Advance in respect of certain Deliveries.]—A. & Co. contracted with B. & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B. & Co. in timbers of length sufficient, when sawn asunder, to make each two sleepers. After several deliveries had taken place, one of the firm of B. & Co. called at the office of A. & Co. and obtained from A. an advance of 600*l.* on account of the last cargo of timber, which he represented to be, and which then was, at the wharf of B. & Co., and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A. & Co. (who had possessed themselves of them), as to entitle them to retain them as against the assignees of B. & C., who had become bankrupt after the advance. *Langton* v. *Waring*, 18 C. B. (N.S.) 315; 11 L. T. 633; 13 W. R. 347.

Advance by Warehouseman on Security of Goods sold — "Delivery" — "Transfer of Documents of Title."]—Where a vendor sells goods which are warehoused, and agrees with the purchasers to retain the goods until demanded, and after the sale writes letters to the warehouseman, appropriating the goods as security for money advanced by the warehouseman, these letters do not amount to "a delivery of the goods" or "a transfer of the documents of title" within s. 25 of the Sale of Goods Act, 1893. *Nicholson* v. *Harper*, 64 L. J., Ch. 672; [1895] 2 Ch. 415; 13 R. 567; 73 L. T. 19; 43 W. R. 550; 59 J. P. 727.

More Goods Sent than Ordered—No Appropriation.]—In an action to recover the price of ten hogsheads of claret, it appeared that the defendants having verbally ordered certain hogsheads of the plaintiff, the latter, in October, sent them fifteen, whereupon the defendants, by letter, informed the plaintiff that they had requested ten only should be shipped, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. In answer to this the plaintiff replied by letter, which, after stating that he regretted that any misunderstanding as to the defendants' order should have taken place, and after stating that other vintages were inferior, and that the wine sent was of superior character, concluded thus: "You will ascertain in the spring whether you have room for it, and you have seen that we are not stringent with old cus-

tomers as to credit." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, and disapproved of it, and gave the plaintiff notice in the early part of April that they would not take any part of it:—Held, that, supposing there was a written contract by which the defendants were bound to take ten hogsheads of claret, that contract was not executed, as fifteen and not ten hogsheads had been delivered, and no particular ten had been selected out of the fifteen. *Cunliffe* v. *Harrison*, 6 Ex. 903; 20 L. J., Ex. 325.

Appropriation to Buyer—Approximate Price Paid—Weighing.]—In a contract of sale where the goods have been ascertained and appropriated to the buyer, and an approximate price has been paid in respect of them, although they have not been weighed, it is a question of intention whether the property or the risk in the goods passes to the buyer. *Martineau* v. *Kitching*, 41 L. J., Q. B. 227; L. R. 7 Q. B. 436; 26 L. T. 336; 20 W. R. 769.

The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or titlers each, the terms always being "prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiff's premises, and were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the prompt day payment was made by the purchaser by bill or cash at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared. The defendant, who was an old customer of the plaintiffs', had bought four fillings, consisting of specific titlers, each marked, on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of two months from the dates of sale to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed;" but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to the defendant:—Held (by Cockburn, C.J., on the ground that the property in the titlers undelivered had passed to the defendant; by Blackburn, Lush, and Quain, JJ., whether it had passed or not), that, by the terms of the contract of sale, the risk, after the lapse of the two months, was in the buyer, and the loss was, therefore, his. *Ib.*

See also cases post 7 (cols. 470, et seq.).

Goods Mixed with Vendor's after Appropriation.]—Agreement between the plaintiff and K. for the exchange of part of a quantity of barley, which the plaintiff had seen in K.'s granary, for a number of bullocks; the plaintiff to send his own sacks, and K. to fill them with the barley, take them to a railway, and place them upon trucks. The plaintiff delivered the bullocks to K., and sent 200 sacks, and a few days after K. filled 155 of them with the barley from his granary. A delay occurred in sending the barley, and the plaintiff demanded it. K. becoming embarrassed, the barley was by his orders turned out of the sacks on to the heap from which it had been taken. Soon after K. was adjudicated bankrupt, and the assignees took possession of the barley and removed it:—Held, that the property in the barley put into the sacks passed to the plaintiff by reason of the authority of appropriation conferred on K. by the agreement, as well as by the subsequent assent of the plaintiff. *Aldridge* v. *Johnson*, 7 El. & Bl. 885; 26 L. J., Q. B. 296; 3 Jur. (N.S.) 913; 5 W. R. 703.

Held, also, that the property in the barley was not divested by the act of K. in mixing it again with the bulk; and that there was evidence of a conversion by the assignees, notwithstanding the prior conversion by K. *Ib.*

Sale of Crop of Oil—Bottling.]—In January, 1858, C. agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in the year at 21*s.* per pound. In September C. wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and C., having weighed the oil, put it in those bottles, labelled them with the weight, and made out invoices. Before, however, he had completed the filling of the bottles, he sold and delivered several of them to the defendant. The plaintiff had for many years past bought of C. his crop of oil of peppermint, and it was usual for C. when the bottles were filled to deliver them to a carrier to take to a railway station. In detinue by the plaintiff against the defendant for the bottles of oil of peppermint delivered to him:—Held, that the putting the oil in the bottles was an act of appropriation which vested the property in the plaintiff. *Langton* v. *Higgins*, 4 H. & N. 402; 28 L. J., Ex. 252; 7 W. R. 489.

Sale of Goods "on Arrival."]—On a contract for the sale of goods to be paid for after conclusion of the landing, "to be delivered by the seller to the purchaser on safe arrival" of the ship, at the time of the contract on her passage from Calcutta to London:—Held, that no property in the goods passed to the purchaser by the sale. *Hale* v. *Rawson*, 4 C. B. (N.S.) 85; 27 L. J., C. P. 189; 4 Jur. (N.S.) 363; 6 W. R. 339.

Vendor cannot dispute Sub-vendee's Title after Recognition.]—Where on a contract of sale of a portion of a large quantity of goods in a warehouse of the vendor, the vendee has resold the goods to a third person, whose title to them the vendor has recognised, he cannot afterwards dispute the title of such third person, although the specific goods have never been appropriated to him. *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185; 9 Jur. (N.S.) 548; 8 L. T. 249; 11 W. R. 599.

Implied Condition as to Refusal of Deliveries.]—In an action on a contract by the defendant to deliver goods at the wharf of third parties

in equal portions, in four months, to be made to the satisfaction of an inspector of such parties, and if not so made to be removed by the defendant, and others substituted in the time named; averments of performance on the plaintiff's part and breach that the goods delivered were not made to the satisfaction of the inspector, whereby they were rejected and the plaintiff lost the benefit of a contract with the third parties mentioned. Pleas, denying the contract, and the breach, and alleging that the contract was subject to a condition that the disapproval of each portion should be notified in a reasonable time after delivery. The contract as stated being proved in fact, and it not appearing that there was any such condition in fact:—Held, that there was no such condition implied in law from the contract as stated or proved; nor that the disapproval should be notified within the time named, or the four months. *Coulson* v. *Attwood*, 26 L. J., Ex. 244.

3. Delivery to Carriers.

Named or not Named by Vendee.]—Where a vendee of goods orders a particular mode of conveyance, he must stand to the loss if any happens. *Vale* v. *Bayle*, Cowp. 294.

A delivery of goods by the vendor on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee. *Dutton* v. *Solomonson*, 3 Bos. & P. 582; 7 R. R. 883.

A tradesman of London, by order of a tradesman in the country, sends goods to the latter, who does not appoint or name the carrier: afterwards the carrier embezzles the goods; the trader in the country must stand the loss. *Godfrey* v. *Furzo*, 3 P. Wms. 185.

If goods are delivered to a carrier to be delivered to A., and are lost by the carrier, the consignee only can bring the action. *Snee* v. *Prescott*, 1 Atk. 248.

A., in London, received an order from B., living in Bristol, to send goods to him by any conveyance which would reach Bristol (as B. lived only six miles from thence), informing B. when he sent them, that B. might know when to expect them. A. sent the goods to a wharf, whence vessels for Bristol sailed, and informed B., as he was told at the wharf, that the goods would come by the ship Commerce; in fact the goods were not sent on board the Commerce, which happened to be fully laden, but some time afterwards were sent by another vessel. B., after the arrival of the Commerce at Bristol without the goods, made no further inquiry for the goods, and A. did not know till after he had required payment of the goods that they had been sent by another ship, which he then communicated to B.:—Held, that B. was liable for any loss of the goods. *Cooke* v. *Ludlow*, 2 Bos. & P. (N.R.) 119.

The plaintiff, residing at Naples, ordered goods of M. at Birmingham, "to be despatched on insurance being effected. Terms, three months' credit from the time of arrival." M. effected an insurance, declaring the interest to be in the plaintiff, and having marked the goods with the plaintiff's initials, sent them to Liverpool, where they were delivered by M.'s agent to the owner of a vessel loading for Naples, by whose negligence they were damaged:—Held, that the property in the goods vested in the plaintiff as soon as they left Birmingham; that he was liable to pay for them whether they arrived or not; and therefore that he was entitled to sue the shipowner for the damage done to them by his negligence. *Fragano* v. *Long*, 6 D. & R. 283; 4 B. & C. 219; 3 L. J. (O.S.) K. B. 177.

Where a person in Aberystwith gave an order for goods to a traveller of the plaintiff, resident in London:—Held, that it must be presumed that such goods were to be sent in the usual way, and that, on their delivery to a carrier in London, a cause of action arose there. *Copeland* v. *Lewis*, 2 Stark. 33.

The plaintiff, at G., within the jurisdiction of the G. county court, received from the defendant at L. an order for plants, the description of which was taken from a price list of the plaintiff, in which also the plaintiff undertook to pay the carriage of goods ordered from him. The defendant ordered the plants by letter, and requested that they should be sent by a particular carrier. The defendant resided more than twenty miles from the plaintiff, and within the jurisdiction of another county court. The plaintiff having sent the goods to the defendant by carrier, brought an action in the county court of G. to recover a balance alleged to be due in respect of them:—Held, that the cause of action did not arise wholly in the jurisdiction of the county court of G., as the delivery to the carrier there was not a delivery to the defendant, and that the court therefore had not jurisdiction. *Wheeler* v. *Pearson*, 5 W. R. 227.

See also Carriers (Actions against).

4. Delivery on Board Ship.

Cargo to be Loaded.]—A. contracted for the purchase of rice in the following terms: "Bought for account of A., of B. and Co., the cargo of new crop Rangoon rice, per Sunbeam." The day after making this contract, A. insured the rice at and from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, and after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, and the rice already shipped was wholly lost. In an action on the policy:—Held, that A. had no insurable interest in the rice, it not being at his risk till the cargo was completed. *Anderson* v. *Morice*, 46 L. J., C. P. 11; 1 App. Cas. 713; 35 L. T. 566; 25 W. R. 14—H. L. (E.)

Acceptance against Bills of Lading—Cargo not on Board.]—T., a corn-merchant at Longford, who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors, for sale at Liverpool, and obtaining from them acceptances on the faith of such consignments, on the 31st January obtained from the masters of two canal boats (No. 604 and No. 54) receipts signed by them for full cargoes of oats, therein stated to be shipped on board the boats, deliverable to the agent of T., in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board 54. On the 2nd February, T. indorsed these receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the 7th, and paid when due. On the 6th February, W., an agent of the defendant, who was factor for sale in London, arrived at Longford, and pressed T. for security for previous

advances. T. on that day, gave W. an order on T.'s agent in Dublin, to deliver to W. the cargoes of boats 604 and 54, on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T. then transmitted to W., in Dublin, a receipt signed by the master of the boat (in the same form as those sent to the plaintiffs), making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin, W. took possession of both cargoes for the defendant:—Held, that the property in the cargo of boat 604 vested in the plaintiffs, on their acceptance of the bills, and that they were entitled to maintain trover for it, but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs when the receipt for the cargo of that boat was given by the master. *Bryans* v. *Nix*, 4 M. & W. 775; 1 H. & H. 480; 8 L. J., Ex. 137.

—— **Bill of Lading taken to Order of Vendors.**]—P. shipped a cargo of umber on board a ship chartered for the plaintiff. The bills of lading stated that the cargo was shipped by P., to be delivered "to order or assigns." P. drew a bill of exchange on the plaintiff, and handed it to the vendor of the umber, who discounted it with the defendants, and handed them the bills of lading, to be given up to the plaintiff on payment by him of the bill of exchange at maturity. The plaintiff refused to accept the bill of exchange without receiving the bills of lading. A new bill of exchange was substituted for the former bill, and forwarded to the defendants' agents with directions to give up the bills of lading when it was paid. The ship and the bill of exchange arrived on the same day. The plaintiff did not then accept the bill; and the cargo was entered at the custom-house in the defendants' name. The plaintiff afterwards offered to pay the bill of exchange, and receive the bills of lading, and give a guarantee for the freight, but the defendants refused, and sold the cargo:—Held, that the property in the cargo had passed to the plaintiff, and he was entitled to recover. *Mirabita* v. *Imperial Ottoman Bank*, 47 L. J., Ex. 418; 3 Ex. D. 164; 38 L. T. 597—C. A.

—— **Condition Precedent.**]—B., a merchant in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs, in Russia, desiring them to draw upon H. & Co. in London for the amount, and he chartered a ship belonging to the defendants, in Russia, to be freighted. On the 28th July, B. wrote a letter cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs imformed B. that they had purchased a cargo for the ship, and would dispatch it as soon as possible, addressed to H. & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an indorsed bill of lading to H. & Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they inclosed an unindorsed bill of lading to B., and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange inclosed in this letter were dishonoured, whereupon the plaintiffs' agent, in London, delivered the indorsed bill of lading to H. & Co. On the 2nd of October, B. confirmed the revocation of his order, and on the 24th November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped delivered it to B.'s orders, and not to H. & Co., pursuant to the bill of lading. In an action brought against the shipowners, for not delivering pursuant to the plaintiffs' orders, it was contended that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment:—Held, however, that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted, and that, in default of acceptance, it never did vest in him; and consequently that the plaintiffs were entitled to recover the value of the wheat, at the time when it was delivered to B.'s order. *Brunt* v. *Bowlby*, 2 B. & Ad. 932.

When a bill of lading, indorsed in blank, was sent to the consignee, accompanied by a bill of exchange drawn against the cargo, for acceptance by him:—Held, that it was the duty of the consignee, either to approbate or reprobate the transaction in toto; and that he could not accept the bill of lading and the cargo, unless he also accepted the bill of exchange for its value. *Shepherd* v. *Harrison*, 40 L. J., Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1.

Held, also, that it was not necessary for the shipper to advise the consignee expressly that he was not to use the bill of lading unless he accepted the bill of exchange. *Ib.*

—— **Where Goods Delivered.**]—A. consigned goods to B. abroad, and ordered a cargo in return, for which he sent his own ship. The return cargo was delivered to A.'s captain, B. stating it to be delivered to A. The return cargo consisting of more goods than the proceeds of those consigned to B., B. drew bills on A., for the difference, which he sent to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refused to accept the bills, and the bill of lading was accordingly indorsed to C. The ship arrived, and C. demanded the cargo, as indorsee of the bill of lading; the captain, however, refused, and delivered them to A., who deposited them with D. as his warehouseman. D. then received notice from B. to hold the goods for B. as his property; in consequence of which D. refused to re-deliver them to A. In an action of trover by A. against D.:—Held, that A. having rested his claim on the supposition that the property had vested in him, could not, if he failed in that defence, set up his lien on the goods for freight. But that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, that as such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in A. *Ogle* v. *Atkinson*, 1 Marsh. 323; 5 Taunt. 759; 15 R. R. 647.

Payment of Part Price — Guaranteeing Remainder.]—In a contract for the sale of a quan

tity of tobacco, then on board a vessel bound from A. to B., it was stipulated "that one-fifth of the contract price should be paid in ready money on a specified day; and that for the other four-fifths the sellers were to look to their correspondents abroad, to whom the property was consigned." It was, nevertheless, understood between the parties, that interest was to be calculated as if the sale was made at two and three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average. One-fifth of the contract price was paid in ready money; and on the arrival of the tobacco at B. it met with an unfavourable sale, and a loss of two-fifths of the estimated value took place:—Held, that the buyer was liable to the seller upon this contract for the amount of such loss. *Hoffman* v. *Heyman*, 2 D. & R. 74; 1 B. & C. 7; 1 L. J. (O.S.) K. B. 3.

Payment upon Handing over Documents.]—A. bought of B. "300 tons old bridge rails, at 5*l.* 14*s.* 6*d.* per ton, delivered at Harburgh, cost, freight, and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance, or dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped":—Held, that B. did not undertake to deliver the iron at Yarburgh, but that when he put it on board a ship bound for that place, and handed to A. the policy of insurance and other documents, his liability ceased, and the goods were at the risk of the purchaser. *Tregelles* v. *Sewell*, 7 H. & N. 574—Ex. Ch.

Special Indorsement to Vendee.]—A contract was entered into, through a broker, between vendors at R. and vendees at B., for the sale of goods, to be shipped free on board at R. in September, to be paid for on delivery to the vendees of the bills of lading; and the vendees, on the 3rd September, wrote, desiring the vendors to send part of the goods by the first vessel leaving R., which part was accordingly shipped by the vendors on a ship answering that description. The bill of lading made the goods to be delivered unto shippers' order, or their assigns, and was indorsed by the vendors, "deliver the contents to the order" of the vendees. The vendors inclosed the invoice, bill of lading, and bill of exchange for the price, to be accepted by the vendees, according to the contract, to the broker; but the ship, with the goods on board, was lost before the documents reached the vendees:—Held, that under those circumstances, the property in the goods had passed to the vendees by the shipment, and that the loss must fall upon them. *Hare* v. *Browne*, 4 H. & N. 822; 29 L. J., Ex. 6; 5 Jur. (N.S.) 711; 7 W. R. 619—Ex. Ch.

Receipt of Bill of Lading and Policy.]—Contract between A. and a company for the sale of coals: A. to supply the company with 1,000 tons of coal delivered at Rangoon, alongside craft steamer, floating depôt, or piers, as might be directed by the company's agent at that port. The price to be 45*s.* per ton of 20 cwt., delivered at Rangoon. Payment, one-half of invoice value by bill at three months on handing bills of lading, and policies of insurance to cover the amount, or in cash under discount at the rate of five per cent. at A.'s option, the balance by the company's Rangoon agent's drafts on the company in London on completion at Rangoon. A., in pursuance of the contract, shipped on board a ship, chartered by him for the purpose, a cargo of 1,166 tons of coal, and handed over to the company the bill of lading and a policy of insurance, and received from them a payment in cash of half the invoice price less discount. The ship having encountered bad weather on the voyage, and being unfit to proceed, the captain chartered another vessel to carry the coals on to Rangoon, and shipped on board this vessel 850 tons, part of the original cargo. On the arrival of this vessel at Rangoon, the master declined to deliver up the coal to the company's agent unless his freight was first paid, and, payment being refused, he proceeded to sell the coals by auction, when the whole was bought by the company, who were the only bidders, at 1*l.* 5*s.* per ton:—Held, that the property in the coals passed to the company upon the same being put on board, and the handing of the bill of lading and policy of insurance. *British and India Steam Navigation Co.* v. *De Mattos*, 33 L. J., Q. B. 214; 10 L. T. 246; 12 W. R. 560—Ex. Ch.

"Free on Board."]—If the goods dealt with by the contract are specific goods, the words "free on board," according to the general understanding of merchants, mean that the shipper is to put them on board at his expense on account of the person for whom they are shipped, and I can see no reason why a person should not agree to sell so much out of a bulk cargo on board or ex such a ship upon the terms that if the cargo be lost the loss shall fall upon the purchaser and not upon the seller. Where the terms "free on board" are used in such a contract, the same meaning must be given to them as is given to them with regard to goods attributed to the contract—Per Brett, M.R. *Stock* v. *Inglis*, 53 L. J., Q. B. 356; 12 Q. B. D. 573; 51 L. T. 449; 5 Asp. M. C. 294—C. A.

Defendants, merchants at B., through a broker contracted to buy of plaintiffs, merchants at R., ten tons of best refined rape oil to be shipped "free on board" at R. in September, 1857, at 48*l.* 15*s.* per ton, to be paid for on delivery to defendants of the bills of lading, by bill of exchange, to be accepted by defendants, payable three months after date, and to be dated on the day of shipment of the oil. On 8th September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between R. and B., five tons of the oil. The master signed a bill of lading by which the oil was deliverable "unto shipper's order" and plaintiffs indorsed the bill of lading specially to the defendants. On the same day the plaintiffs enclosed in a letter to the broker the bill of lading, invoice, and a bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th, the ship with the oil on board was run down in the B. channel and the oil totally lost. Plaintiff's letter of the 8th arrived at B. on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th the broker left with defendants the bill of lading, invoice and bill of exchange, for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them on the ground that in the circumstances they were not liable to pay for the

oil. In an action for not accepting the bill of exchange, and for goods sold and delivered:—Held, that the property in the oil vested in defendants on its delivery free on board the ship, and, consequently, that plaintiffs could recover on both counts; and that the form in which the bill of lading was taken did not prevent the property from passing. *Browne* v. *Hare*, 4 H. & N. 822; 7 W. R. 619.

"Free on Board a Foreign Ship."]—Where in a contract for the sale of sugar there was the following term—"free on board a foreign ship":—Held, that the seller was not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it was, but only to put it on board a foreign ship, which it was the duty of the purchaser to name. *Wackerbarth* v. *Masson*, 3 Camp. 270. S. P., *Wetherell* v. *Coape*, 3 Camp. 272, n.

5. Delivery Orders.

a. Nature of.

Negotiability.]—An iron-master gave to his vendee a note in these words: "I will deliver 1,000 tons of iron when required, after the 18th September next, to the party lodging this document with me:"—Held, that this document was not a negotiable instrument of mercantile exchange. *Dixon* v. *Borill*, 3 Macq. H. L. 1; 2 Jur. (N.S.) 933; 4 W. R. 813.

If A. gives an iron scrip note to B., and B. sells it to a third party, that third party may prove that the document has, in the usage of trade, an import not expressed on the face of it. *Mackenzie* v. *Dunlop*, 3 Macq. H. L. 22; 2 Jur. (N.S.) 957; 4 W. R. 815.

But such third party cannot put a special construction on the document by proving that in the contract between A. and B. there was a specialty not actually appearing on the face of the document. *Ib.*

By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418; 5 Ch. D. 205; 36 L. T. 395; 25 W. R. 457. *See also cases infra*, sub. tit. Rights of Unpaid Vendor.

Title Conferred by—Custom.]—By the custom of trade in Liverpool, the transfer of a delivery order from the vendor to the vendee of goods, enables the latter to go into the market and dispose of such goods. Where the vendee had thus disposed of part which had been delivered according to his order, and then became bankrupt, the rest of the goods remaining in the warehouse of the vendor:—Held, that the latter was entitled to retain them; the giving of the delivery order not operating as between the original vendor and vendee as a complete transfer of the goods. *Townley* v. *Crump*, 5 N. & M. 606; 4 A. & E. 58; 1 H. & W. 564; 5 L. J., K. B. 14.

The mere possession of goods, with no other indicium of title than a delivery order, is not sufficient to entitle the bonâ fide pawnee of the person fraudulently obtaining possession from the true owner, to resist the claim of the latter in trover. *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L. J., Ex. 83; 3 Jur. (N.S.) 68; 5 W. R. 151—Ex. Ch.

—— **Estoppel.**]—A delivery order given by the vendor of goods is a mere promise to do something in future, and is not a representation upon which to found an estoppel. *Gillman* v. *Carbutt*, 61 L. T. 281; 37 W. R. 437—C. A.

A broker on the 6th of February, bought goods from the defendants on account of the plaintiffs without their authority, and without ever informing them of the fact. On the 22nd of March, he sold the same goods to the plaintiffs, "on account of his principals," at a different price and upon different terms. He thereupon obtained from the defendants a delivery order, which was marked with a reference to the contract of the 6th February, and obtained payment from the plaintiffs, upon giving them that order, under the contract of the 22nd March. He absconded with the money, and the defendants refused to deliver the goods under the contract of the 6th February. The defendants carried on separate business as merchants, and as wharfingers, and the delivery order was given by them as merchants directed to the superintendent of their business of wharfingers:—Held, that the defendants were not estopped from denying that the goods were the property of the plaintiffs. *Ib.*

Purchaser taking Order without Payment or Consent of Vendor.]—A., having a quantity of rape oil at Humphery's wharf, contracted to sell five tons thereof to B. The bought note was as follows: "Bought for account of B., of Mr. A., five tons of first quality foreign refined rape oil, at 53*s.* per cwt.; usual allowances; to be free, delivered, and paid for in fourteen days, in cash, less 2½ per cent discount." A. sent an order to the wharf, directing the wharfinger to transfer into B.'s name five tons of oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer order to B.'s counting-house, and offered them to him, at the same time demanding a cheque for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered. In trover by A. against B. for the oil and the transfer order:—Held, that, under the circumstances, neither the property nor the right to the possession thereof passed to B. *Godts* v. *Rose*, 17 C. B. 229; 25 L. J., C. P. 61; 1 Jur. (N.S.) 1173; 4 W. R. 129.

Sub-sale.]—Where a sub-vendee has a delivery order from a vendee of goods lying at a warehouse of the original vendor, and such vendor accepts the delivery order, he becomes the agent of the sub-vendee and cannot set up any lien for the price due to him on the original sale. *Pearson* v. *Dawson*, El. Bl. & El. 448; 27 L. J., Q. B. 248; 4 Jur. (N.S.) 1015.

Vendor Paying Warehouse Rent.]—By the usage of Liverpool, the vendor of goods was to pay warehouse rent for two months after the sale, if the goods remained there so long:—Held, however, that where the vendor of such goods

had within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, and that he became responsible for all accidents which might happen to them, and that the circumstance of the goods having within that time been distrained for warehouse rent was an accident which must fall on the vendee, and such rent having been paid by the vendee's agent in order to redeem the goods:—Held, that the latter could not recover the same from the vendor as money paid to his use. *Greaves* v. *Hepke*, 2 B. & Ald. 131; 20 R. R. 381.

As to Effect under Statute of Frauds.]—*See* ante, col. 429.

b. To Wharfingers.

Effect of.]—The lodging a delivery order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any re-weighing or re-housing. *Tucker* v. *Ruston*, 2 Car. & P. 86.

An order sent by the vendor to the wharfinger to deliver the goods to the vendee is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery; but if anything remains to be done, for example, weighing, &c., the property does not pass, and the right of stoppage in transitu is not defeated till that is done. *Withers* v. *Lyss*, Holt, N. P. 18; 4 Camp. 237; 16 R. R. 781.

Acknowledgment of.]—A warehouseman, who on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up as a defence for not delivering to the purchaser, that, by the usage of trade, the property in malt sold is not transferred till it is re-measured, and that before the malt in question was re-measured the seller became bankrupt. *Stonard* v. *Dunkin*, 2 Camp. 344; 11 R. R. 724.

Transfer in Books.]—Where the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them in transitu is gone, and the wharfinger is bound to hold them as the agent of the purchaser. *Hammond* v. *Anderson*, 1 Bos. & P. (N.R.) 69; 2 Camp. 243; 8 R. R. 763.

And the same effect is produced by the delivery note being lodged with the wharfinger without a transfer in his books. *Lucas* v. *Dorrien*, 7 Taunt. 278; 1 Moore, 29; 18 R. R. 480.

Stoppage in Transitu.]—A., of London, being in danger of insolvency, went to Glasgow, and obtained goods from B., for which he paid by a bill on a house in London, which he knew to be insolvent; the goods were shipped at Leith (the invoice and receipt from the shipowners being made out to A.), and were delivered to C., a wharfinger in London, who afterwards received notice to hold them for B.; A. became bankrupt; in an action of trover by A. against C. for the benefit of the assignees:—Held, first, that the receipt, being made out to A., operated as a delivery to him, and therefore that B.'s right of stoppage in transitu was gone; and secondly, that there was not such conclusive evidence of fraud on the part of A. as to avoid the contract. *Noble* v. *Adams*, 2 Marsh. 366; 7 Taunt. 59; Holt, N. P. 248; 17 R. R. 445.

Where a consignee, on the arrival of goods at a wharfinger's, said he would not have them, and directed an attorney to do what was necessary to stop them, and the attorney, on the 3rd November, gave the wharfinger an order not to deliver them to the consignee, which order the consignee wrote to confirm on the 6th; upon the goods being claimed on the 7th by an execution creditor of the consignee:—Held, that such acts amounted to a rescinding of the contract of sale, and that the transitus was not ended by the arrival of the goods at the wharf and the order given by the consignee, and that therefore the consignor had a right to stop them in transitu. *Bartram* v. *Farebrother*, 4 Bing. 579; 1 M. & P. 515; 6 L. J. (O.S.) C. P. 125; 29 R. R. 639.

The vendor of goods having ascertained whilst they were in the hands of a wharfinger, that the purchaser to whom they had been originally consigned had stopped payment, indorsed the bill of lading to the plaintiff, and directed him to take possession of the goods, and he accordingly demanded them from the wharfinger:—Held, that the plaintiff had a sufficient special property in the goods to enable him to maintain trover, on the ground that the right of stoppage in transitu by the vendor was not at an end when the plaintiff made the demand. *Morison* v. *Gray*, 9 Moore, 484; 2 Bing. 260; 3 L. J. (O.S.) C. P. 261.

Where A. on the 26th September sold to B. by contract 100 casks of tallow, then lying at a wharf, at so much per cwt., and on the same day gave him a written order to the wharfingers "to weigh, deliver, transfer, and re-house" the same: and, on the next day, B., who had previously entered into a contract with C. & Co. for the sale of 300 casks of tallow, in part fulfilment of that contract, obtained from the wharfingers, and sent to C. & Co. the following acknowledgment: "Messrs. C. & Co., we have this day transferred to your account (by virtue of an order from B.) 100 casks of tallow, &c., with charges from the 10th October": and upon the receipt of this, C. & Co. paid B. the full amount of the tallow; and shortly afterwards the wharfingers delivered twenty-one of the casks to the order of C. & Co.; and on the 11th October, B. stopped payment, and, on the 14th, A., the original vendor, sent notice to the wharfingers not to deliver the remainder of the tallow to B. or his order, although the tallow had not been weighed:—Held, in trover by C. & Co., against the wharfingers, that after their acknowledgment that they had transferred the tallow to their account, they held it as the agents of C. & Co.; and therefore were estopped, and could not set up as a defence, a right in A. to stop it in transitu. *Hawes* v. *Watson*, 4 D. & R. 22; 2 B. & C. 540; R. & M. 6; 2 L. J. (O.S.) K. B. 83; 26 R. R. 448. S. P., *Hammond* v. *Anderson*, supra.

Custom—About the Quantity.]—Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving a delivery order of about the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not accepting delivery orders in any other form being admissible. *Moore* v. *Campbell*, 10 Ex. 323; 2 C. L. R. 1084; 23 L. J., Ex. 310.

Bill of Lading in Several Parts—Delivery Order to Third Party.]—Goods shipped to C., as

owner, were before arrival pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading marked "first," to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading, should default be made in the repayment of the advance. The vessel went, on arrival, into the dock of the defendants. C. duly entered the goods at the custom-house, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorised the defendants to deliver the goods to the holders of the bill of lading. On the following day, the captain lodged with the defendants a stop order for freight, pursuant to the Merchant Shipping Act, 1862. C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendants. In an action for conversion:—Held, that the Dock Company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 52 L. J., Q. B. 146; 7 App. Cas. 592; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C. 580—H. L. (E.)

6. Dock Warrants.

Nature of Instrument.]—The defendant bought a quantity of iron of the plaintiff. The iron was in the possession of H. & Co., who had signed a warrant undertaking to deliver the same to the plaintiff's order on the presentation of such warrant, duly indorsed by the plaintiff. At the time of the sale the plaintiff indorsed the warrant to the defendant:—Held, that presentation had in this case the meaning of "delivery over," and that therefore, before the iron was delivered, the defendant was to deliver over to H. & C. the warrant indorsed by the plaintiff. *Bartlett* v. *Holmes*, 13 C. B. 630; 1 C. L. R. 159; 22 L. J., C. P. 182; 17 Jur. 858; 1 W. R. 334.

Held, also, in an action for the price of the iron, that a refusal by H. & Co., after an action brought, to deliver the iron at all, could not be given in evidence in reduction of damages. *Ib.*

The warrants of the West India Dock Company are equally negotiable as bills of lading, and when indorsed for a bonâ fide consideration are deemed equivalent to a delivery of the goods in the company's warehouse. *Zwinger* v. *Samuda*, 1 Moore, 12; 7 Taunt. 265; Holt, N. P. 395; 18 R. R. 476.

Delivery obtained by Fraud.]—S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.; the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with a dock company, who issued warrants for the same; some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiff to secure advances. L. afterwards served notice upon the dock company not to part with the wine; thereupon the company refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:—Held, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons who before the fraudulent contract was annulled could confer a title upon the plaintiff, and that L. must be barred upon the plaintiff's undertaking to account to him for the value of the wine after deducting his advances. *Attenborough* v. *London and St. Katharine's Dock Co.*, 47 L. J., C. P. 763; 3 C. P. D. 450; 38 L. T. 404; 26 W. R. 583—C. A.

Transfer of.]—Goods being entered in the books of the West India Dock Company in the name of A., he received a check for them, which having sold the goods to B., he indorsed and delivered to him. B. sold the goods, and delivered the check to C. on credit. On C.'s insolvency A. could not take possession of the goods, although they continued to stand in his name, and the check had not been lodged with the dock company. *Spear* v. *Travers*, 4 Camp. 251.

A., having entered goods in the books of the West India Dock Company, received two dock warrants or delivery orders in blank for them, which he delivered to B. on a sale of the goods to him, and B. having sold the goods to C., delivered the dock warrants to that person, and C. employed D. as his broker to effect a sale of the goods, and delivered over the dock warrants, one of which was signed by C., but the blank intended for the name of the purchaser remained, and D., after having effected a sale on credit, delivered the dock warrants to the purchaser, one of which (viz., the one in which the blank for the name of the purchaser remained) the purchaser deposited with E. as a security for money advanced on the faith of that warrant:—Held that C. had no right to put a stop upon the goods in the event of the purchaser not paying for them, since the transfer of the warrant by D., his broker, operated as a constructive delivery of the goods, so as to defeat C.'s right of stoppage in transitu. *Keyser* v. *Suse*, Gow, 58.

7. Ascertaining Quantity or Quality.

Where a Necessary Preliminary.]—By a bargain and sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, in divers places, no property passes; there must be a separation of the part sold from the rest of the stock. *White* v. *Wilks*, 5 Taunt. 176; 1 Marsh. 2; 14 R. R. 735.

The defendant contracted to sell to K. fifty hogsheads of sugar, called double loaves, at 100*s.* per cwt., to be delivered free on board a British

ship; K. sold to the plaintiff by the same description, and the defendant assented to the resale; the sugar not having been delivered or weighed:—Held, that the plaintiff could not recover for it in trover against the defendant, the first vendor. *Austen* v. *Craven*, 4 Taunt. 644; 1 Marsh. 4, n.; 13 R. R. 714.

A., having a quantity of hemp in the hands of B., sold part of it to C. at a certain price, payable by C.'s acceptance at a stated time, fourteen days allowed for delivery, and gave to C. an order upon B. to weigh and deliver the hemp so sold to C., or bearer; before the fourteen days expired, A. gave B. notice not to deliver the hemp to C., the hemp not having been weighed off, and no bill of exchange having been given in payment for it:—Held, that the sale of it to C. was incomplete, and that B. was liable for it in an action of trover by A. *Shepley* v. *Davis*, 1 Marsh. 252; 5 Taunt. 617; 15 R. R. 598.

Where the plaintiff sold ten out of eighteen tons of flax, then lying in mats at a wharf, at so much per ton, to be paid for by the vendee's acceptance at three months, and gave the vendee an order on the wharfingers, to deliver ten tons to vendee or order, which they entered in their books; but the quantity to be delivered was to be ascertained by the wharfingers weighing it, the mats being of unequal quantities, so that a fraction of a mat might be required, and an allowance for tare and draft was to be made by the weight:—Held, that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made, and that the plaintiff, upon the insolvency of the vendee, might countermand the delivery. *Busk* v. *Davis*, 2 M. & S. 397; 1 Marsh. 258, n.; 5 Taunt. 622, n.; 15 R. R. 288.

On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of goods to him in the warehouseman's book, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as the weighing of an article forming part of a bulk, and sold by weight. *Sandwick* v. *Suthern*, 9 A. & E. 895; 1 P. & D. 648.

But if the identity and quantity are ascertained, as where the oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu; although the delivery order describes the goods by the weight as well as the bin ("1028 bushels of oats in bin 40"), and directs the warehouseman to weigh them over. *Ib.*

—— **Custom to Measure.**]—Where a sale note for the purchase of fifty tons of Greenland oil was delivered by the sellers' broker to the purchasers to be paid for by their acceptance payable at a future day, and they afterwards received from the sellers an order on their wharfingers for the delivery of the fifty out of ninety tons of their oil, yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the foot-dirt and water in each (for which allowance was to be made), and then the casks were to be filled up by the sellers' cooper at their expense, all which was to precede the delivery to the buyers:—Held, that the sale was not complete to pass the property, but that the sellers, on the insolvency and subsequent bankruptcy of the buyers before such acts done and delivery made, might countermand it, *Wallace* v. *Breeds*, 13 East, 522; 1 Rose, 109; 12 R. R. 423.

Sub-sale.]—A., having forty tons of oil secured in the same cistern, sold ten tons to B., and received the price, and B. sold the same to C., and took his acceptance for the price at four months, and gave him a written order for delivery on A., who wrote and signed his acceptance upon the order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A.'s cistern:—Held, that this was a complete sale and delivery in law of the ten tons by B. to C., nothing remaining to be done on the part of the seller, though, as between him and A., it remained to be measured off, and therefore that the seller could not, upon the bankruptcy of the buyer before his acceptance became due, countermand the measuring off and delivery in fact of the ten tons to the buyer, nor were the goods in transitu so as to enable the seller to stop them. *Whitehouse* v. *Frost*, 12 East, 614; 11 R. R. 491.

Acceptance of Smaller Quantity.]—On the 14th of April the defendant signed the following bought note:—"I have this day bought you the following: 500 piculs China cotton, at 17*d.* per lb., June or July delivery, 1864. To be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided that it cannot be made merchantable." On the 24th of June, the plaintiff bought from W. 420 piculs China cotton ex Queensbury, and on the 25th sent to the defendant a declaration of the names and marks of those 420 piculs, and also 80 ex Princess Royal. The defendant sold the cotton to C. The plaintiff received from W. notice that the 420 piculs would be weighed, which he sent to the defendant. The 420 piculs were afterwards weighed, the price ascertained, and an invoice made out, but neither the defendant nor the plaintiff attended the weighing. The plaintiff received a sampling order from W., and forwarded it to the defendant:—Held, that there was evidence that he had accepted the 420 piculs, and that the property in them passed to him, so that the plaintiff was entitled to recover the price in an action of goods bargained and sold. *Morgan* v. *Gath*, 3 H. & C. 748; 34 L. J., Ex. 165: 11 Jur. (N.S.) 654; 11 L. T. 96; 13 W. R. 756.

Completed in Part.]—Where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the two last casks were to be sold at uncertain quantities, and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days of the goods being delivered, and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent, and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to gauge them, but, before he could fill up the rest,

a fire consumed the whole in the warehouse, within the thirty days :—Held, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller, for it was the business of the buyers to get them gauged, without which they could not have been removed, and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was; but the property in the casks not filled up remained in the seller, at whose risk they continued. *Rugg* v. *Minett*, 11 East, 210; 10 R. R. 475.

Upon a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards, and fourteen days were to be allowed for the delivery, and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch :—Held, that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expense of the vendor. *Hanson* v. *Meyer*, 6 East, 614; 2 Smith, 670; 8 R. R. 572.

Where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him :—Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid, and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. *Simmons* v. *Swift*, 5 B. & C. 857; 8 D. & R. 693; 5 L. J. (O.S.) K. B. 10; 29 R. R. 438.

Vendor's Duty to Count.]—Goods sold remain at the risk of the seller, while anything is to be done to them by him, to ascertain the amount of the price. Therefore where 289 bales of skins (stated in the contract to contain five dozen in each bale) were sold at 57*s.* 6*d.* a dozen, and it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any enumeration took place the whole was consumed by fire :—Held, that an action could not be maintained against the purchaser for the value of the skins, and the loss fell entirely upon the seller. *Zagury* v. *Furnell*, 2 Camp. 240; 11 R. R. 704.

—— **And Deliver.**]—If the terms of a contract of sale do not show an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done. And although, where the sale was of a specific chattel for a fixed price, assuming it to contain a certain quantity, and the price was paid, but, according to the terms of the contract, the seller was to retain possession, to carry the chattel to a certain place, there to deliver it at a certain time, and that if, upon measurement, the quantity should turn out more than as assumed, the surplus was to be paid for at a fixed rate by the purchasers on delivery, but that, should it fall short, the difference was to be refunded by the sellers :—Held, that, until measurement and delivery, the sale was not complete; and that part of the property having been lost by a storm, the risk remained with the sellers. *Logan* v. *Le Mesurier*, 6 Moore, P. C. 116; 11 Jur. 1091.

After the day stated in the contract of sale for the delivery of goods, and before delivery, a storm dispersed the goods (timber), and the purchasers took possession of a large portion of them which were saved, and paid salvage :—Held, that this taking possession of a part could not be considered as showing, by the parties' admission, that the property in the goods had passed to the purchasers before the loss, where the terms of the contract showed that it did not so pass. *Ib.*

Where Prior Public Measurement.]—J. S., of Quebec, entered into a contract in writing for the sale to "A. G. & Co. of a raft of timber, the quantity about 71,000 feet to be delivered at Indian Cove booms, price for the whole, 7¾*d.* per foot." Before the contract was signed the raft was measured by a public officer, and a specification made by him, making a total of 71,443 feet, was given to the buyer. The raft was towed to the place of delivery and the buyer's servants assisted in fastening it to the booms. The raft was dispersed by a storm. In an action by J. S. to recover its value :—Held, that as nothing remained to be done by the seller, on his own behalf or for the buyer, nor anything in which both were to concur, the property in the goods had wholly passed to the buyer and the loss must be borne by him. *Gilmour* v. *Supple*, 11 Moore, P. C. 551; 6 W. R. 445.

D. WARRANTIES AND SALE BY SAMPLE.

1. WARRANTIES.

a. Implied.

i. *Generally.*

As to Title.]—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy* v. *Lindsay*, 47 L. J., Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406; 14 Cox, C. C. 93—H. L. (E.)

In the case of goods sold in an open shop or a warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise, as, where the goods are claimed by the true owner, from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed. *Eichholz* or *Eicholtz* v. *Bannister*, 17 C. B. (N.S.) 708; 34 L. J., C. P. 105; 11 Jur. (N.S.) 15; 12 L. T. 76; 13 W. R. 96.

The doctrine of caveat emptor does not make it incumbent on a vendee to inquire into the vendor's title to the goods. *Allen* v. *Hopkins*, 13 M. & W. 94; 13 L. J., Ex. 316.

—— **Specific Chattel.**]—There is no implied warranty of title on the sale of a specified ascertained chattel; in order to render the seller liable for a bad title he must have given either an express warranty or an equivalent to it by declarations or conduct; or have practised fraud, as by concealing from the purchaser that he had no title. *Morley* v. *Attenborough*, 3 Ex. 500; 18 L. J., Ex. 148; 13 Jur. 282.

Such express warranty may be inferred from usage of trade proved in fact; or from the nature of a trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; as, for instance, when goods are bought in a shop professedly carried on for the sale of goods. *Ib.*

—— **Sheriff's Auctioneer.**]—To an action founded on the implied promise, that the vendor of goods did not know his title to them was bad, it is no defence that the vendor was a sheriff's auctioneer, and desired the plaintiff to give him a written notice not to pay over the proceeds, and that the plaintiff having omitted to give such notice, the defendant paid over. *Peto* v. *Blades*, 5 Taunt. 657; 15 R. R. 609.

—— **Purchase at Sheriff's Sale.**]—The defendant having bought goods at a sale under an execution by the sheriff, for 18*l.*, the plaintiff, who had equal knowledge with the defendant of the sale and of the title to the goods, and who was present at the sale, bought from the defendant his purchase for 23*l.* The goods were afterwards claimed and taken under a superior title, and the plaintiff was prevented from keeping possession:—Held, that there was no implied warranty of title by the defendant, and that the plaintiff could not recover his money as paid on a consideration that had failed. *Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239; 14 Jur. 625.

Sale of Fixtures.]—On a contract for the transfer by a lessee of "all his interest in a house, with the fixtures, as held by him," for an entire sum, an action for falsely warranting the fixtures to be the lessee's, is maintainable, on evidence that the seller, at the time of the agreement, handed the purchaser an inventory of them, and afterwards, being taxed with selling them, said he "thought they were his." *Snell* v. *Bickley*, 2 F. & F. 56.

A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress for a poor-rate due from the occupier, and bought at a public auction by the defendant, and resold by him to the plaintiffs at an advanced price, with notice of the circumstances under which the defendant had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises upon which the boiler stood having prevented the plaintiffs from carrying it away, they brought an action against the defendant, relying upon an alleged implied warranty that he had good title to the boiler, and that they should be permitted to remove it:—Held, that there was no evidence of a warranty. *Baguley* v. *Hawley*, 36 L. J., C. P. 328; L. R. 2 C. P. 625; 17 L. T. 116.

Existence of Subject-matter of Sale.]—A cargo of corn was shipped by A. at Salonica in February, 1848, for delivery in London. On the 15th of May it was sold by a factor, who made the sale on a del credere commission. The contract described the corn as of average quality when shipped, and the sale was made at 27*s.* per quarter, "free on board, and including freight and insurance to a safe port in the United Kingdom, payment at two months, or in cash less discount, upon handing shipping documents." In fact, the corn had, in a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract, and in an action for the price brought against the factor:—Held, that the contract contemplated that there was an existing something to be sold and bought and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable. *Couturier* v. *Hastie*, 5 H. L. Cas. 673; 25 L. J., Ex. 253; 2 Jur. (N.S.) 1241.

—— **Sale of Specific Crop.**]—When from the nature of a contract the parties must from the beginning have known that it could not be fulfilled unless when the time of fulfilment arrived some particular specified subject-matter continued to exist, no warranty that the subject-matter should so continue to exist is to be implied from the fact that the subject-matter was not in existence at the time of making the contract. The contract in such a case is therefore subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible by the perishing of the subject-matter without default of the contractor. *Howell* v. *Coupland*, 46 L. J., Q. B. 147; 1 Q. B. D. 258; 33 L. T. 832; 24 W. R. 470—C. A.

And see CONTRACT (IMPOSSIBLE CONTRACTS).

That Goods are of Vendor's Make, if he be a Manufacturer—Evidence of Custom.]—On the sale of goods by the manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make. The plaintiffs, who were manufacturers, but not dealers in iron, by a written contract, on the margin of which was their trade-mark (a crown with their initials), contracted to buy of the plaintiffs, 2,000 tons of ship-plates of the quality known as "crown," to pass Lloyd's survey, to be delivered monthly at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract. At the trial the defendants tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for

the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. The judge at the trial rejected this evidence, and gave judgment for the plaintiffs:—Held, that such evidence was improperly rejected. *Johnson* v. *Raylton*, 50 L. J., Q. B. 753; 7 Q. B. D. 438; 45 L. T. 374—C. A.

Held, also, by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that without such evidence the defendants were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of the plaintiffs, and that, therefore, the plaintiffs could not require the defendants to accept plates not of their own manufacture, even though of the quality contracted for and as good as those made by the plaintiffs themselves. *Ib.*

Readiness for Delivery—Goods Sold in Third Person's Possession.]—Where there is a contract for a sale of goods, although described as lying in the possession of wharfingers or carriers, subject to their lien for charges, yet there is an implied undertaking on the part of the seller that they shall be delivered to the purchaser, on his application, within a reasonable time, and readiness to pay the charges thereon; and if the delivery is refused, the seller will be liable for damages to the purchaser. *Buddle* v. *Green*, 27 L. J., Ex. 33.

Merchantable.]—In every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. *Laing* v. *Fidgeon*, 6 Taunt. 108; 4 Camp. 169; 16 R. R. 589.

On the 14th of April the defendant signed the following bought note:—"I have this day bought from you the following: 500 piculs China cotton, at 17*d.* per lb., June or July delivery, 1864. Guaranteed fair marks to be given when the cotton is ready for delivery. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers for settlement, who shall decide as to quality, and the allowance, if any, to be made. The cotton to be taken from the warehouse with customary allowances of tare and draft, and the invoice to be dated from the date of the notice being given that the cotton is ready for delivery. To be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided that it cannot be made merchantable. Payment within ten days from date of invoice, or before delivery if required, equal to cash in ten days and three months." On the 24th of June, the plaintiff bought from W. 420 piculs China cotton ex-Queensbury, and on the 25th sent to the defendant a declaration of the names and marks of those 420 piculs, and also of eighty ex-Princess Royal. The defendant sold the cotton to C. The plaintiff received from W. notice that the 420 piculs would be weighed, which he sent to the defendant. The 420 piculs were afterwards weighed, the price ascertained, and an invoice made out, but neither the defendant nor the plaintiff attended the weighing. The plaintiff received a sampling order from W., and forwarded it to the defendant. C. objected that the cotton was not merchantable, and required an arbitration, which resulted in the allowance of one-eighth of a penny per lb., and the invoice was altered accordingly, and returned to the defendant. On the 27th of July, W. not having been paid, put a stop-order on the cotton. The plaintiff was never in a position to deliver the eighty piculs:—Held, that according to the true construction of the contract, the defendant was not bound to accept the cotton unless it was in a merchantable condition at the time the plaintiff was ready to deliver it, notwithstanding it might be made merchantable. *Morgan* v. *Gath*, 3 H. & C. 748; 34 L. J., Ex. 165; 11 Jur. (N.S.) 654; 11 L. T. 96; 13 W. R. 756.

And see cases, infra, sub. tit. Fitness for Purpose.

On Exchange of Goods.]—There is no implied warranty upon an exchange of goods. *La Neuville* v. *Nourse*, 3 Camp. 351.

If money and a horse are given in exchange for another horse warranted sound, which was unsound at the time, an action for money had and received is not a proper action to try the warranty; nor will trover lie for the horse given in exchange, because the property is altered. *Power* v. *Wells*, Cowp. 818; 1 Dougl. 24, n. And see *Cooke* v. *Munstone*, 1 Bos. & P. (N.R.) 351.

The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver:—Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel* v. *Dane*, 3 Camp. 299.

ii. *Fitness for Purpose.*

Condition or Warranty.]—A representation is a statement, or an assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it. *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. *Ib.*

With respects to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word; viz., a stipulation by way of

agreement, for the breach of which a compensation must be sought in damages. *Ib.*

In April and July, 1843, B. purchased of A. a material called oropholithe, of which A. was the patentee. The portion purchased in April was described in the invoice as roofing, and was put on a building belonging to B. by A.'s workmen. That supplied in July was described as material, and was put on by B.'s workmen. There had been a previous purchase in October, 1842, which had been described as flooring, and was so applied, and as to which money was paid into court. In an action upon a bill of exchange given by B. in payment of the goods, B. pleaded that he accepted the bill in consideration of goods called oropholithe, which A. had warranted fit for the roofing of buildings, but which proved to be useless. At the trial B. proved that, in September, 1842, his agent had a conversation with A.'s agent about roofing premises he was building with the patent article; on which occasion the latter gave the former a prospectus, which described it as fit for external roofing. The judge ruled that there was no evidence to be left to the jury in support of the plea:—Held, that the direction was right, inasmuch as there was no evidence to show that the contract for the goods subsequently supplied was made with reference to the treaty for roofing, which took place in September, 1842; or, at all events, nothing to show that the material sold in July, 1843, was sold for roofing, rather than flooring; and that the plea, failing as to part, failed altogether. *Camac* v. *Warriner*, 1 C. B. 356; 9 Jur. 162.

Upon a treaty for the sale of hops (by sample), the proposed buyer asked the seller if any sulphur had been used in the growth or treatment of them, adding that he would not ask the price if sulphur had been used. The seller thereupon asserted that no sulphur had been used. After the hops had been inspected, weighed, and delivered, the buyer discovered that sulphur had been used in the cultivation of a portion of the hops, five acres out of 300. The whole growth, however, was so mixed up together that it was impossible to separate the sulphured from the unsulphured hops. The jury having found that the representation had been made, and was false (but without fraud), and that the buyer had entered into the contract entirely on the faith of that representation:—Held, that the representation amounted to a condition, and therefore that the buyer was entitled to repudiate the contract. *Bannerman* v. *White*, 10 C. B. (N.S.) 844; 31 L. J., C. P. 28; 8 Jur. (N.S.) 282; 4 L. T. 740; 9 W. R. 784.

Where One Purpose Known.]—The production of garrancine is known to be the only purpose for which spent madder can be used. The defendant bought of the plaintiff a boat-load of spent madder, and it proved insufficient in the production of garrancine. On an action for the price:—Held, that the judge rightly asked the jury to find whether the article sold could reasonably be said to be spent madder, and rightly refused to ask whether it was fit to make garrancine. *Turner* v. *Mucklow*, 8 Jur. (N.S.) 870; 6 L. T. 690; 10 W. R. 663.

Where Express Warranty also.]—The plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the defendant undertook to supply the plaintiffs with troop stores, "guaranteed to pass survey of the East India Company's officers":—Held, that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended. *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L. J., Ex. 301; 8 Jur. (N.S.) 1014; 7 L. T. 92; 10 W. R. 349—Ex. Ch.

By Description.]—A count setting out a memorandum of agreement for the sale by the defendant to the plaintiff of a stack of "Cumberland and small Welsh coal, mixed," then lying in a certain yard of the defendant, and alleging as a breach that the stack was not in fact a stack of Cumberland and small Welsh coal, but was in a great part composed of material inferior in value either to Cumberland or small Welsh coal, and almost worthless to the plaintiff, is bad, as not showing that the admixture of the inferior substance rendered the stack essentially different from the description of it contained in the document. *Kirkpatrick* v. *Gowan*, Ir. R. 9 C. L. 521.

When, on the sale of goods, the quality of the subject-matter of the sale is ascertainable, irrespectively of any general description, as where such goods are stored in a certain place and are open for inspection, to entitle the purchaser to recover damages for alleged inferiority in the state of the articles supplied, it must be shown that the description was of the essence of the contract. *Ib.*

If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described. *Bowes* v. *Shand*, 46 L. J., Q. B. 561; 2 App. Cas. 455; 36 L. T. 857; 25 W. R. 730—H. L. (E.)

Where goods are sold under a certain description the buyer is entitled to have goods delivered to him that come within that description as used in commercial circles, though he may have bought after inspection and without a warranty. *Josling* v. *Kingsford*, 13 C. B. (N.S.) 447; 32 L. J., C. P. 94; 9 Jur. (N.S.) 947; 7 L. T. 790; 11 W. R. 377.

Upon a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description. *Jones* v. *Just*, 9 B. & S. 141; 37 L. J., Q. B. 89; L. R. 3 Q. B. 197; 18 L. T. 208; 16 W. R. 643.

Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the court, and not the jury, must determine. *Behn* v. *Burness*, supra.

Latent Defects.]—On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects. *Randell* v. *Newsom*, 46 L. J., Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 25 W. R. 313—C. A.

The limitation as to latent defects introduced by *Readhead* v. *Midland Ry.* (38 L. J., Q. B. 169; L. R. 4 Q. B. 379) does not apply to the sale of a chattel. *Ib.*

The plaintiff ordered and bought of the defendant, a coach builder, a pole for the plaintiff's carriage. The pole broke in use and the horses

became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence :—Held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. *Ib. And see succeeding cases.*

Bill of Exchange.]—An unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect : —Held, that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold. Though it would have been otherwise (the sale being without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill. *Gompertz* v. *Bartlett*, 2 El. & Bl. 849 ; 2 C. L. R. 395 ; 23 L. J., Q. B. 65 ; 18 Jur. 266 ; 2 W. R. 43.

Particular Purpose.]—If an article is sold for a particular purpose, and at the usual market price, and it turns out to be defective, an action is maintainable against the seller, though there was no warranty at the time of the sale. *Gray* v. *Cox*, 6 D. & R. 200 ; 4 B. & C. 108 ; 1 Car. & P. 184 ; 28 R. R. 769. And see *S. C.*, 8 D. & R. 220 ; 5 B. & C. 458.

But where upon a contract for the sale of copper sheathing, the vendor undertook that it should be good, sound, substantial and serviceable copper, and there was no proof that he had given a warranty such as that declared upon : —Held, that he was not liable for any latent defects in the sheathing, although it was sold as "copper sheathing." *Ib.*

Where a person manufactures an article and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose ; therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the jury found that the decay was by some intrinsic defect in the quality :— Held, that the plaintiff was entitled to recover damages, although no fraud was imputed to the defendant ; for as he manufactured the copper, and knew the purpose for which it was to be applied, and said, "he would supply the plaintiff well," it amounted to a warranty that it should be fit for the purpose. *Jones* v. *Bright*, 3 M. & P. 155 ; 5 Bing. 533 ; 7 L. J. (O.S.) C. P. 213 ; 30 R. R. 728.

Upon a sale of a barge by a builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased is implied, notwithstanding a written instrument containing the terms of the sale is silent as to any warranty. *Shepherd* v. *Pybus*, 4 Scott (N.R.) 434 ; 3 Man. & G. 68 ; 11 L. J., C. P. 101.

A., a wine merchant, ordered a crane-rope of B., a dealer in, and who represented himself as a manufacturer of, ropes ; B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that it was wanted to raise pipes of wine from the cellar, said that a rope must be made on purpose. B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope :—Held, in an action by A. against B., to recover damages resulting from the insufficiency of the rope, that B., as between him and A., was to be considered as the manufacturer of the rope ; and that an implied warranty arose out of the contract, that the rope was a fit and proper one for the purpose for which it was ordered. *Brown* v. *Edgington*, 2 Man. & G. 279 ; 2 Scott (N.R.) 496 ; 1 Drink. 106 ; 10 L. J., C. P. 66.

If an order be given for the manufacture or supply of an article to satisfy a required purpose, the purpose and not any specific article being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. *Oliphant* v. *Bailey*, 5 Q. B. 288 ; 1 D. & M. 373 ; 13 L. J., Q. B. 34 ; 7 Jur. 1130.

The plaintiff having heard that the defendant had some barley to sell, went to his countinghouse, when his agent produced a sample which he said was "seed barley," offered to the defendant at 39*s.*, and if the plaintiff would take it at 40*s.* he might have it. The plaintiff looked at the barley, and said it was a good sample of seed barley, and agreed to buy it. At the plaintiff's request, the defendant wrote to the person who had offered it to him, saying that he would accept it, and asking what it was, as it would do well for seed. The plaintiff afterwards sold it, under a warranty in writing, as "Chevalier seed barley." It turned out that it was "barley bigg," a species of barley unfit for malting purposes ; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty :—Held, first, that there was no warranty by the defendant that the barley was "seed barley." *Carter* v. *Crick*, 4 H. & N. 412 ; 28 L. J., Ex. 238 ; 7 W. R. 507.

Held, secondly, that the contract was satisfied by the delivery of barley fit for sowing ; and that if the term "seed barley" meant barley fit for malting purposes, that ought to be shown by clear and irresistible evidence. *Ib.*

A., after inspection of the separate parts, bought of B. soap frames, which were, by the contract, warranted to be "new frames, with all the nuts and bolts complete." The declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap ; and it was proved, and found by the jury, that though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap :—Held, that the evidence sustained the declaration. *Mallan* v. *Radcliff*, 17 C. B. (N.S.) 588 ; 10 Jur. (N.S.) 1132 ; 11 L. T. 381 ; 13 W. R. 139.

A company of merchants ordered, and a company of distillers agreed to furnish, a cargo of whisky to be coloured like rum for the African market. It was stipulated that the colouring should be harmless. The whisky produced alarming, though not deleterious, effects, and consequently proved unmarketable :—Held, that the distillers were liable in damages. *Macfarlane* v. *Taylor*, L. R. 1 H. L. Sc. 245 ; 18 L. T. 214.

Per the L.C. : "The article has been sold for a specified purpose ; and the seller must be considered to warrant that it is fit for that purpose." *Ib.*

Defendants, a firm of distillers, were in the habit of selling what remained of the corn used in the manufacture of their whisky under the name of "distillery grains," of which plaintiff for several years (pursuant to a continuing contract) purchased twenty bushels per week for the purpose, as they knew, of feeding cattle. The course of dealing was to deliver the weekly load without examination by the purchaser. Part of defendants' premises having been destroyed by fire, the sales were suspended for a week, and on their resumption the arrangements as to delivery were necessarily altered for the time being, and on the occasion next after the fire, plaintiff's servant was admitted to defendants' yard, and had an opportunity of seeing the bulk from which his load was taken. The quantity then delivered was thirty instead of twenty bushels, but was paid for at the usual rate. It contained an admixture of deleterious matter, from which several of plaintiff's cattle died:—Held, first, that the liability of defendants being as dealers and not as manufacturers, there was not on the sales preceding the last a warranty that the grain supplied was fit for feeding cattle; secondly, that it was properly left to the jury whether the last sale was on the same terms as the preceding. *Wilson* v. *Dunville*, 4 L. R. Ir. 249.

—— **Specified Article.**]—Where a dealer contracts to supply a known and defined article, though for a particular purpose, there is no implied warranty that it shall answer such purpose. Secus, if the contract be not for a known and defined article, but relates to merchandise in the selection of which, for a particular purpose, the buyer, according to the contract, necessarily trusts to the judgment or skill of the seller. *Ib.*

The plaintiff, a master mariner, contracted with the defendants, for a lump sum to be paid him by the defendants, to take a certain specified steam-tug of the defendants, towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—Held, by Brett and Cotton, L.JJ., that as the contract related to a specified vessel, there was no implied undertaking by the defendants, that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract. *Robertson* v. *Amazon Tug and Lighterage Co.*, 51 L. J., Q. B. 68; 7 Q. B. D. 598; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496—C. A.

Held, contra, by Bramwell, L.J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. *Ib.*

—— **Purpose for which Goods Supplied not Disclosed to Manufacturer—Sample.**]—A woollen merchant ordered from a woollen manufacturer piece-dyed indigo-blue cloth by sample, and, being also a tailor, made the cloth supplied into liveries. The cloth was unfit for this purpose, and the liveries were consequently returned. The manufacturer did not know that the merchant was also a tailor, nor the purpose for which the cloth was to be used. There was evidence that the cloth was fit for caps, boots, and carriage-linings. In an action by the merchant to recover damages for breach of contract, the jury were directed to find a verdict for the manufacturer, if the cloth was merchantable as supplied to a woollen merchant:—Held, that the direction was right, since an implied warranty that an article is fit for a particular purpose only arises when the purpose for which the goods are supplied is known to the manufacturer; and in the absence of evidence that a particular use of an article is so usual as to affect the manufacturer with knowledge of the purpose for which it is required, there is no implied warranty that the article is fit for every ordinary purpose for which an article of the description is used. *Drummond* v. *Van Ingen* (12 App. Cas. 284, post, col. 508) discussed. *Jones* v. *Padgett*, 59 L. J., Q. B. 261; 24 Q. B. D. 650; 62 L. T. 934; 38 W. R. 782.

—— **Evidence.**]—In an action for breach of warranty of quality brought upon a contract for the sale of goods which is silent as to the purpose for which the goods are required, the antecedent course of conduct of the buyer and seller, and the fact that a document stating the purpose for which the goods are required was brought to the knowledge of the seller by the buyer, are admissible in evidence to show that the buyer relied on the seller's skill or judgment, and that there is by virtue of s. 14 of the Sale of Goods Act, 1893, an implied condition that the goods shall be reasonably fit for such purpose. *Gillespie* v. *Cheney*, 65 L. J., Q. B. 552; [1896] 2 Q. B. 59.

Where a contract for the sale of goods is made under such circumstances that there is an implied condition of fitness of the goods for a particular purpose, and it contains a provision that the goods are to be delivered abroad, but that the seller's responsibility is to cease upon shipment of the cargo, the seller's responsibility ceases only upon shipment of goods of the stipulated character. *Ib.*

A contract for the sale of goods by description is not "a contract for the sale of a specified article under its patent or other trade name" within the proviso to s. 14 of the Sale of Goods Act, 1893. *Ib.*

In an action by a tradesman against the manufacturers of an iron safe for the breach of an alleged warranty that it was strong enough to resist all attempts that might be thereafter made to force it open, it having, in fact, been broken up by burglars more than six years after the sale and delivery, and there being evidence that it was broken open easily, and that it was far less strong and secure than it ought to have been:—Held, that the warranty was an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required cogent evidence of express warranty to that extent, and was not sustained by proof of mere representations that the safe would be strong enough to resist burglars. *Walker* v. *Milner*, 4 F. & F. 745.

Steam Engine.]—The plaintiffs agreed with the defendants to manufacture for them locomotive engines, under the following contract: "Each engine and tender to be subject to a performance of a distance of 1,000 miles, with proper loads; during which trial Messrs. S. & Co. are to be liable to any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for nor liable to the repair of any breakage or damage, whether resulting from collision, neglect, or mismanagement of any of the company's servants, or any other circumstances, save and except defective materials or workmanship. The performance to which each engine is to be subjected, to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of such engine." It was also agreed, that the fire-boxes should be made of copper, of the thickness of 7-16ths of an inch (and they were accordingly so made); and that the best materials and workmanship were to be used. The engines were accordingly delivered to the defendants, and performed the distance of 1,000 miles within the month of trial, but nine months afterwards the fire-box of one of them burst, when it was discovered that the copper had been considerably reduced in thickness:—Held, in an action against the defendants for the balance from them, that they could not give evidence of an inherent defect in the copper (no fraud being alleged), since, by the terms of the contract, the month's trial, if satisfactory, was to release them from all responsibility in respect of bad materials and bad workmanship. *Sharp* v. *G. W. Ry.*, 9 M. & W. 7; 2 Railw. Cas. 722; 11 L. J., Ex. 17.

—— **After Approval.**]—Where a contract between A. and B. was, the one to deliver, and the other to accept, a steam-engine of fourteen-horse power, and the foreman of B. went over to the premises of A., and there saw a steam-engine in pieces, which he approved of, and which steam-engine was afterwards delivered by A.:—Held, that this was the case of the sale of a specific chattel, and that, upon action brought for the price, it was no answer to say, that the power of the engine was not a fourteen-horse power, although that fact might be given in evidence for the purpose of reducing the damages. *Parsons* v. *Sexton*, 4 C. B. 899; 16 L. J., C. P. 181; 11 Jur. 849.

Inspection.]—If a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect. *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322; 8 Jur. (N.S.) 721; 6 L. T. 462; 10 W. R. 650.

Upon a sale (not by sample, and without warranty) of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Wieler* v. *Schilizzi*, 17 C. B. 619; 25 L. J., C. P. 89; 4 W. R. 209.

Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the good must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. *Jones* v. *Just*, 9 B. & S. 141; 37 L. J., Q. B. 89; L. R. 3 Q. B. 197; 18 L. T. 208; 16 W. R. 643.

The maxim of caveat emptor does not apply to a sale of goods where the buyer has no opportunity of inspection. *Ib.*

Although a vendor is informed of the purpose for which a material is required, yet, if the vendee inspects it, its unsoundness or unfitness for the purpose, in the absence of any express warranty, is no defence to an action for the full price. *Fitzgerald* v. *Ireson*, 1 F. & F. 410.

After Carriage of Goods.]—Where a contract was entered into in the month of December for the manufacture of iron hoops in Staffordshire, to be delivered at Liverpool by canal, and the iron sweated by reason of its detention on the canal during a long frost:—Held, in an action against the vendee for not accepting the iron, that though the contract implied a warranty that the iron, when delivered at Liverpool, should be merchantable, yet that the deterioration necessarily consequent on its passage to Liverpool was at the risk of the vendee, and that the question for the jury under the circumstances was not simply whether the iron was merchantable when tendered at Liverpool, but whether it was merchantable, reference being had to the necessary consequences of transit, and to the mode of passage selected by the vendee himself. *Bull* v. *Robinson*, 10 Ex. 342; 2 C. L. R. 1276; 24 L. J., Ex. 165; 2 W. R. 623. See also *Beer* v. *Walker*, post, col. 492.

Warranty where Sale by Sample.]—*See* post, col. 507.

Liability for Consequences of Breach.]—The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot-and-mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question:—Held, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer and that he would or probably might place the infected cow with others. *Smith* v. *Green*, 45 L. J., C. P. 28; 1 C. P. D. 92; 33 L. T. 572; 24 W. R. 142. But see *Ward* v. *Hobbs*, post, col. 493.

—— **Injury to Third Persons.**]—A declaration stated that the father of the plaintiff, bought of the defendant a gun for the use of himself and his sons; and the defendant, by falsely warranting the gun to have been made by Nock, and to be a sound gun, sold the gun to the father, for the use of himself and his sons, for 24*l.*, whereas the gun was not made by Nock, nor was a sound gun, but was made by an inferior maker to Nock, and was a dangerous gun, and wholly unsound and of inferior materials, of which the defendant at the time of the sale had notice; and that the plaintiff, knowing and confiding in the warranty, used the gun, which, but for the warranty, he would never have done; and that the gun, being in the hands of the plaintiff, by reason of its dangerous and insufficient construction and materials, burst, whereby he was severely injured:

—Held, after verdict, that the action was maintainable, the damage being a consequence of the fraud, whilst the instrument was in the possession of a party, to whom the defendant's representation was either directly or indirectly communicated, and for whose use he knew the instrument was purchased. *Levy* v. *Langridge*, 2 M. & W. 519. Affirmed, 4 M. & W. 337; 1 H. & H. 325; 7 L. J., Ex. 387—Ex. Ch.

A tradesman who sells an article which he at the time of sale believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person not a party to the contract of sale, in consequence of such unsoundness. *Longmeid* v. *Holliday*, 6 Ex. 761; 20 L. J., Ex. 430.

A declaration by husband and wife stated, that the defendant, who was the maker and seller of lamps called "Holiday's lamps," sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed it exploded and burnt her. At the trial the jury found that the accident had been caused by the defective nature of the lamp, but that the defendant was ignorant of this unsoundness, and had sold the article in good faith: —Held, that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Ib.*

The vendor of an article manufactured by himself of ingredients known only to himself is liable to the person for whose use he knows it is bought if damage results to that person in consequence of the article being, through the vendor's negligence, unfit for the purpose for which he professed to sell it. *George* v. *Skivington*, 39 L. J., Ex. 8; L. R. 5 Ex. 1; 21 L. T. 495; 18 W. R. 118.

A declaration by husband and wife alleged that the defendant was a chemist, and sold to the husband, to be used by the wife, a compound, the ingredients of which were known only to himself, and which he professed was fit for washing the hair, and could be used without personal injury; but that he acted so unskilfully, negligently and improperly in and about making the compound that it was not fit to be used for the purpose, and through his negligence the wife's hair was destroyed:—Held, that the wife had a cause of action, and that the declaration was good. *Ib.*

Whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. *Heaven* v. *Pender*, 52 L. J., Q. B. 702; 11 Q. B. D. 503; 49 L. T. 357; 47 J. P. 709—C. A. Reversing 30 W. R. 749.

iii. *On Sale of Cargo.*

Bills of Lading—Mistake and Misdescription as to Weights.]—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (the Bills of Lading Act), to show that the cargo actually received by him differs in weight from that signed for in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet* v. *Powell's Llantirit Collieries Co.*, 43 L. J., Ex. 50; L. R. 9 Ex. 74; 30 L. T. 28; 22 W. R. 490.

—— **Effect of Signing by Master.**]—Bills of lading signed by the master are primâ facie evidence that the quantities named therein were received on board by him: the onus of rebutting this presumption, and of showing that a less quantity than that specified was received, lies on the shipowner. *M'Lean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317.

A shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods or some of them were never actually put on board. *Brown* v. *Powell Duffryn Steam Coal Co.*, 44 L. J., C. P. 289; L. R. 10 C. P. 562; 32 L. T. 621; 23 W. R. 549.

By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount so paid:—Held, that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was not maintainable. *Ib.*

—— **Effect of Signing "Quantity and Quality Unknown."**]—A bill of lading stating that goods were shipped in good order and condition, but also containing an indorsement by the master, "quantity and quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order and condition. *The Prosperino Palasso*, 29 L. T. 622.

Evidence of the condition of goods on delivery tending to show that the damage sustained could not be accounted for by any damage existing at the time of shipment, and that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the time of shipment, will not, where goods are shipped under a bill of lading indorsed "quantity and quality unknown," satisfy the onus cast upon the plaintiff seeking to recover against shipowners for damage to the goods. Positive evidence of the condition of the goods when shipped must be given. *Ib.*

A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words, "quality and quantity unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. *The Ida*, 32 L. T. 541—P. C.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to show that the goods were shipped in good order and condition, or fail in his suit against the shipowner for

damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to show that the damage which it sustained is traceable to causes for which the shipowner is responsible. *Ib.*

"Say about."]—"Say about" are words of estimate only, and do not amount to a warranty. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609. *See also* cases ante, col. 385.

B. contracted to sell to S. "about 500 tons of nitrate of soda in bags, of good merchantable quality," to be ready for delivery for a given day at a certain price upon certain terms. The contract proceeded: "It is understood that the nitrate of soda is to form the full and complete cargo of the 'John Phillips'": —Held, that the contract did not amount to a warranty that the 'John Phillips' should be of capacity to carry the whole 500 tons. *Bourne* v. *Seymour*, 16 C. B. 337; 24 L. J., C. P. 202; 1 Jur. (N.S.) 1001; 3 W. R. 511.

"Fair average Quality."]—In an action on a contract for so many tons of pitch pine, to arrive per the "Ion" from Savannah, warranted of a fair average quality (the action being for a breach of this warranty), it appeared that pitch pine came from another place as well as from Savannah, but that such as came from the other place was superior to that which came from Savannah, and that the cargo was of a fair average quality of Savannah pitch pine, although it was not a fair average of that which came from the other place: —Held, that the contract meant a fair average quality of such as came from Savannah. *Jones* v. *Clark*, 2 H. & N. 725; 27 L. J., Ex. 165.

The defendant, having chartered a ship, the "Severn," from Australia to Akyab, to load there, and to proceed thence to Calcutta, at the charterer's option, and expecting to have shipped for him at Akyab a cargo of rice, made the following contract with the plaintiff: "Sold" to the plaintiff "the following cargo of Arracan rice, per "Severn," now on her way to Akyab viâ Australia; the cargo to consist of fair average Nicranzi rice, the price of which is to be 11*s.* 6*d.* per cwt., with a fair allowance for Larong or any other inferior description of rice, if any; but the seller engages to deliver what is shipped on his account, and in conformity with his invoice. . . . This contract to be void provided the vessel makes the intermediate voyage between Akyab and Calcutta, agreeably with the conditions of the charterparty. Payment to be made in cash on arrival of the vessel at the port of call, in full, less freight": —Held, that the defendant, by this contract, undertook, that unless the vessel made the intermediate voyage to Calcutta, he would ship a cargo of rice, and bring it home for the plaintiff, to whom it was sold, and he warranted that such cargo should be of fair average Nicranzi rice. *Simond* v. *Braddon*, 2 C. B. (N.S.) 324; 26 L. J., C. P. 198; 3 Jur. (N.S.) 719; 5 W. R. 594.

The plaintiffs and the defendant by their agent contracted as follows: "Sold, for W., to H., 400 tons, provided the same be shipped for seller's account, more or less, Arracan Nicranzi rice, at 11*s.* 6*d.* per cwt. for Nicranzi, or 11*s.* per cwt. for Larong, the latter quantity not to exceed 50 tons, or else, at the option of buyers, to reject any excess; to be paid for by cash on arrival of the vessel at the port of call, on delivery of the bill of lading, charterparty, and policy of insurance; insurance effected to the full amount of the invoice." The vessel loaded 285 tons of Larong and 150 tons of Latoorie rice: —Held, first, that the contract did not contain a warranty that the rice should consist of Arracan Nicranzi rice, but that the contract was conditional upon a cargo of Arracan Nicranzi rice being shipped on seller's account. *Vernede* v. *Weber*, 1 H. & N. 311; 25 L. J., Ex. 326.

Held, secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong rice, because the contract was for an entire cargo which would substantially satisfy the description of Arracan Nicranzi rice. *Ib.*

"On Passage."]—A. contracted to sell to B. 1,170 bales of gambier, "now on passage from Singapore, and expected to arrive in London, viz. per 'Ravenscraig,' 805 bales; per 'Lady Agnes Duff,' 365 bales": —Held, a warranty that the goods were then on passage. *Gorrissen* v. *Perrin*, 2 C. B. (N.S.) 681; 27 L. J., C. P. 29; 3 Jur. (N.S.) 867; 5 W. R. 709.

"To Arrive."]—Action on the following bought and sold note: "Sirs,—We have this day bought, for your account, from M. & Co., a hundred tons of nitrate of soda, at 18*s.* per cwt., duty paid, to arrive ex 'Daniel Grant,' to be taken from the quay at landing weights, with the customary allowance of tare and draft; payment, four months' acceptance from the date of delivery," signed by the buyer's brokers; and, after their signature, at the bottom of the note, was the following memorandum: "N. B. Should the vessel be lost, this contract to be void": —Held, that this did not amount to a warranty, that the nitrate of soda should arrive by the "Daniel Grant," but that it was a contract of sale in the double event of the ship's arrival with the nitrate of soda on board. *Johnson* v. *Macdonald*, 9 M. & W. 600; 12 L. J., Ex. 99; 6 Jur. 264. *See also Cases*, ante, col. 387.

iv. *Sale of Ship.*

Conditions—"Ship now at Rangoon."]—In an action by the vendors against their vendees for refusal to accept, evidence was given to show the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "ship now at Rangoon" had not been fulfilled, and that it was a condition absolutely vital: —Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract. *Oppenheim* v. *Fraser*, 34 L. T. 524.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Ib.*

Age.]—A vendor of a ship represented her to have been built in 1816, when, in fact, she had been launched a year before: —Held, that the vendee was entitled to recover damages, as it was a false representation, although it was agreed that the ship should be taken with all faults. *Fletcher* v. *Bowsher*, 2 Stark. 561; 20 R. R. 735.

Fitness.]—Upon a sale of a barge by the builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased is implied, notwithstanding a written instrument containing the terms of the sale is silent as to any warranty. *Shepherd* v. *Pybus*, 4 Scott (N.R.) 434; 3 Man. & G. 68; 11 L. J., C. P. 101.

But if the vendee declares as upon a warranty, that the barge was reasonably fit for use, and assigns a breach in the barge not being reasonably fit for use, the breach is not supported by evidence that the barge was not fit for a special purpose for which builders knew that it was designed. *Ib.*

Documents Incorporated.]—An owner of a ship advertised it for sale, describing it as "The fine teak-built barque 'Intrepid,' A 1, and well adapted for a passenger ship." The plaintiff having read the advertisement, negotiated for its purchase, and a contract was signed by the plaintiff and the owner, whereby the former agreed to buy, and the latter to sell, "the barque 'Intrepid,' as she now lies in the St. Katharine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement; under that was the word "inventory," which was followed by a list of the ship's stores and tackle, and in the margin opposite to this list the owner signed his name. The document concluded thus: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatsoever." The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship:—Held, first, that the whole of the document was incorporated with the contract of sale, and not merely the list of stores headed "Inventory." *Taylor* v. *Bullen*, 5 Ex. 779; 20 L. J., Ex. 21.

Held, secondly, that there was no warranty of the vessel. *Ib.*

An advertisement of a ship for sale described her as copper-fastened, and afterwards contained an enumeration of masts, &c., which was headed "Inventory." The contract for the sale of the ship referred to the "inventory":—Held, that this reference had not the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though it was shown to be usual to designate the whole advertisement by the name of "inventory." *Freeman* v. *Baker*, 2 N. & M. 446; 5 Car. & P. 475; 5 B. & Ad. 797; 3 L. J., K. B. 17.

—— **Copper-fastened.**]—Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that she was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened:—Held, that notwithstanding the words "with all faults, without allowance for any defects whatsoever," the vendor was liable for the breach of the warranty. *Shepherd* v. *Kain*, 5 B. & Ald. 240; 24 R. R. 344.

A bill of sale in the usual form contained no warranty that the vessel sold was copper-fastened, but there had been a previous written representation that she was copper-fastened:—Held, that this prior representation formed no part of the contract, and was not a warranty. *Kain* v. *Old*, 2 B. & C. 627; 4 D. & R. 52; 2 L. J. (o.s.) K. B. 102; 26 R. R. 497.

"With all Faults."]—The seller of a ship "with all faults" is bound to disclose to the buyer a latent defect known to himself, and which the buyer could not possibly discover. *Mellish* v. *Motteux*, Peake, 115.

But it was afterwards held that a seller of a ship "with all faults" was not liable for latent defects, unless he had used some artifice to conceal them from the buyer. *Baglehole* v. *Walters*, 3 Camp. 154; 13 R. R. 778, 780.

Although a ship is sold "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. *Schneider* v. *Heath*, 3 Camp. 506; 14 R. R. 506.

v. *Sale of Provisions.*

Food.]—On a contract to supply goods for food, there is an implied warranty that the goods shall be fit to be used and consumed. *Beer* v. *Walker*, 46 L. J., C. P. 677; 37 L. T. 278; 25 W. R. 880.

Such warranty is not satisfied by delivery of the goods in the state so warranted to a railway company as the agent of the purchaser, to be forwarded to the purchaser, but is a warranty that the goods shall be fit to be used and consumed upon delivery to the purchaser himself in the ordinary course of transit. *Ib.*

B., an importer of Ostend rabbits, carrying on business in London, entered into a contract with W., a retail cheesemonger at Brighton, to send him weekly from London by railway a certain number of rabbits, the cost of carriage from London to be paid by W. Under this contract two half-casks of rabbits were forwarded from London to Brighton by rail. Shortly after arrival, the rabbits in one of the casks were found to be putrid. These rabbits on their arrival in London from Ostend at 6 p.m. in the evening had been examined by B. and his assistants and found to be in good condition, and were at once sent to the London terminus of the Brighton railway. They arrived at W.'s house in Brighton at about 9 a.m. the next morning, when he accepted them, but without examination. The above took place in the ordinary way of business and in accordance with the usual and previous course of dealing between B. and W.:—Held, that there was an implied warranty by B. that the rabbits should be in a merchantable condition and fit for consumption within a reasonable time after reaching W. at Brighton in the absence of anything exceptional in the transit. *Ib.*

In Market—Diseased Animals.]—Sheep apparently healthy and sound in every respect were sold warranted sound; two months afterwards a great part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was in the opinion of farmers and breeders an hereditary disease called the "goggles," and incapable of discovery until its fatal appearance:—Held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion that "it existed in the constitution of the sheep at that time." *Joliff* v. *Bendell*, R. & M. 136.

The Contagious Diseases (Animals) Act, 1869, s. 57, does not render the sending of diseased animals to a public market an actionable wrong,

in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation. *Ward* v. *Hobbs*, 48 L. J., C. P. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114—H. L. (E.)

A number of pigs was sold by auction in a public market, subject to conditions of sale which proved that no warranty would be given, and that the animal should be removed "with all faults." Shortly after the sale it was found that the pigs were infected with typhoid fever, from which the greater portion of them died:—Held, that the seller of the pigs had not been guilty of misrepresentation by his conduct, and was not liable in an action for misrepresentation at the suit of the purchaser. *Ib.*

Meat.]—A salesman who sells in a public market, meat which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good and wholesome meat, is not liable to an action upon an implied warranty, or for money had and received; nor is he liable, though the market is within the city of London, to an action upon a local statute regulating the sale of provisions in London. *Emmerton* v. *Mathews*, 7 H. & N. 586; 31 L. J., Ex. 139; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.

A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser. *Smith* v. *Baker*, 40 L. T. 261.

Supply of Liquor.]—Where a party enters into an agreement with another to purchase from him all the liquor to be consumed on certain premises, the law implies a condition that the liquor supplied shall be fit to be drunk, and an action may be maintained for a breach of this implied agreement; but such a breach does not justify the other contracting party in transferring his general custom, although on each particular occasion when bad liquor is supplied he has a right to return it and demand better, and, in the event of non-compliance, may for that occasion procure liquor elsewhere. *Clarke* v. *Stancliffe*, 7 Ex. 439; 21 L. J., Ex. 129; 16 Jur. 430.

Dealers in Victuals.]—Victuallers, brewers, and other common dealers in victuals, who in the course of their trade sell provisions unfit for the food of man, are liable civilly to the vendee without any fraud on their part or warranty of the soundness of the thing sold; but a private person not following any of these trades, who sells an unwholesome article for food, is not liable under such circumstances. *Burnby* v. *Bollitt*, 16 M. & W. 644; 17 L. J., Ex. 190; 11 Jur. 827.

Resale.]—On the sale of any commodity to be resold as an eatable or drinkable, the seller cannot recover if it is utterly uneatable or undrinkable, and so unsaleable. *Harman* v. *Bennett*, 1 F. & F. 460.

Refuse Oil.]—Seed crushers, who sold their refuse oil cake to graziers, without describing it or selling it as fit for the food of cattle, nor even knowing that it was bought as such, are not liable, on an implied warranty that it was so, for the consequences of the cattle being fed with it. *Jackson* v. *Harrison*, 2 F. & F. 782.

Wine fit to be laid Down.]—The defendant's traveller agreed, without sample, to sell to the plaintiff a pipe of superior port wine, fit to be laid down. The wine was afterwards bottled by the defendant, and when delivered to the plaintiff, was described in the invoice as "superior old port." The wine afterwards proved to be sour, owing to there being a deficiency of spirit at the time of bottling. A verdict having been found for the plaintiff:—Held, per Kelly, C.B., that the defendant did absolutely contract to sell wine fit to be laid down, and was bound to supply wine suitable for that purpose:—Per Martin, Pigott and Cleasby, BB., that there was evidence for the jury that the defendant had warranted the wine to be fit to be laid down:—Per Martin, B., as words of commendation do not amount to a warranty, the general rule of law is that the maxim caveat emptor applies to the sale of specific goods whenever the buyer has an opportunity of inspecting the chattel sold. *Osborne* v. *Hart*, 23 L. T. 851; 19 W. R. 331.

Sale of Specific Crop.]—In March, 1872, the defendant agreed to sell to the plaintiff 200 tons of potatoes, grown on land belonging to the defendant at W., to be delivered in the following September and October. The defendant served a sufficient quantity to meet the contract in the ordinary course of husbandry. Before the time of the performance of the contract a large portion of the crop was destroyed by disease without any default on the part of the defendant, and the remainder was insufficient to meet the contract. In an action for non-delivery:—Held, that the contract was for the sale of a specific crop, without any warranty that the crop should continue to exist at the time of performance. *Howell* v. *Coupland*, 46 L. J., Q. B. 147; 1 Q. B. D. 258; 33 L. T. 832; 24 W. R. 470—C. A.

vi. *Sale of Patented Articles.*

Specified Purpose.]—Where a person orders a machine, previously known and ascertained, for which the seller has a patent, it is no answer for the price of the machine, that it did not answer the purpose specified in the patent, although it is not shown that the buyer has had previous opportunities of exercising his judgment as to the usefulness of the machine. *Oliphant* v. *Bayley*, D. & M. 373; 5 Q. B. 288; 13 L. J., Q. B. 34; 7 Jur. 1130.

—— **Evidence of Knowledge.**]—The defendant sent to the plaintiff (the patentee of an invention known as Chanter's Smoke-consuming Furnace) the following written order: "Send me your patent hopper and apparatus, to fit up my brewing copper, with your smoke-consuming furnace: patent right 15*l.* 15*s.*; iron work not to exceed 5*l.* 5*s.* engineer's time fixing, 7*s.* 6*d.* per day." The plaintiff put up accordingly on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purpose of a brewery, and was returned to the plaintiff:—Held, (no fraud being imputed to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that the defendant having defined by the order the particular machine to be supplied, the plaintiff

performed his part of the contract by supplying that machine, and was entitled to recover the whole 15*l.* 15*s.* the price of the patent right. *Chanter* v. *Hopkins*, 4 M. & W. 399; 1 H. & H. 377; 8 L. J., Ex. 14; 3 Jur. 58.

Held, also, that parol evidence was inadmissible to show, that, at the time of making the contract, the plaintiff was aware of the purpose for which the furnace was to be used. *Ib.*

—— **Definition no Warranty.**]—The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order: "Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff, to the effect that the patent article would consume smoke, and effect a considerable saving in fuel, as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—Held, that no such warranty could be implied, but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover. *Prideaux* v. *Bunnett*, 1 C. B. (N.S.) 613.

When a man purchases a patented article, with a known title, there is no implied warranty that it will answer any particular purpose, but it is for the jury to say whether there was an express warranty, and the mere fact that in printed invoices or prospectuses the invention is described as effecting an object, is not in itself conclusive evidence of a warranty. *Prideaux* v. *M'Murray*, 2 F. & F. 225.

A farmer having by letter inquired of an agent for the sale of agricultural machines, the lowest price for which he could furnish a corn machine, the agent replied by letter as follows: "I happen to have a very good second-hand Wood's reaper, which I can offer you at 16*l.* 16*s.* It belonged to a gentleman who has retired from farming; he paid me 35*l.* for it a little time ago; it has only cut about fifty acres, and it is not one penny the worse—in fact you would hardly know it from a new one. I inclose drawings. I have sold more than thirty of these machines in this part, all of which are doing well, so that I can confidently recommend it. I do not recommend it for cutting meadow grass, but it will cut wheat, barley, oats, clover, French grass, or any grain crop efficiently." In an action to recover damages for breach of warranty, the machine having failed to perform the desired work:—Held, that the letter did not amount to a warranty or a contract that the particular machine would do the specified work, but was a mere representation and a description of Wood's patent reapers generally. *Chalmers* v. *Harding*, 17 L. T. 571.

Sale of Patent—Warranty as to Title.]—An agreement, after reciting that the plaintiff had invented a method for the prevention of boiler explosions, and had obtained a patent for it, and assigned away half of his interest in it, and that the plaintiff was desirous of taking out patents for other countries, provided that the defendant should proceed to take out such patents, and should pay 2,500*l.* in such manner as should be mutually agreed upon, in consideration whereof the plaintiff transferred to the defendant the half of those patents when they should be obtained, and the remaining half of the English patent. To a declaration on this agreement, that the defendant had refused to pay the money on request, or to enter into any agreement as to the manner of payment, the defendant pleaded that the invention was not new in England, and was worthless, and the plaintiff was not the first inventor:—Held, that there was in the agreement no warranty, expressed or implied, that the patent was indefeasible; and, no fraud being alleged, and the defendant having the same means of knowledge as to the novelty and value of the patent as the plaintiff, that the plea was bad. *Hall* v. *Conder*, 2 C. B. (N.S.) 22; 26 L. J., C. P. 138; 3 Jur. (N.S.) 366. Affirmed on appeal, 2 C. B. (N.S.) 53; 26 L. J., Ch. 288; 3 Jur. (N.S.) 963; 5 W. R. 742—Ex. Ch.

Trade Mark.]—H. & Co. carried on business as iron manufacturers, having succeeded to a firm of S. & H. The defendant asked for iron marked "S. & H.," but was told of the change in the firm. He then ordered a quantity of "S. & H. crown common bars." H. & Co. supplied the defendant with iron marked "H. & Co.," but of the same quality as "S. & H."; the defendant rejected it on account of the difference of brand. The jury found that there was no value in the brand:—Held, that there was no stipulation that the iron to be supplied should be of a particular brand, but of the particular quality, known by the letters "S. & H." *Hopkins* v. *Hitchcock*, 14 C. B. (N.S.) 65; 32 L. J., C. P. 154; 9 Jur. (N.S.) 896; 8 L. T. 204; 11 W. R. 597.

vii. *Sale of Pictures.*

Name of Artist.]—The putting down the name of an old artist in a catalogue as the painter of a particular picture is not such a warranty as will subject the seller to an action. *Jendwine* v. *Slade*, 2 Esp. 572; 5 R. R. 754.

But if the agent of the vendor of a picture, knowing the vendee labours under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion, the sale is void. *Hill* v. *Gray*, 1 Stark. 434; 18 R. R. 802.

Upon a sale of pictures, a bill of parcels of "four pictures, views in Venice, Canaletti, 160*l.*," is evidence of a warranty that the pictures were the production of that artist. *Power* v. *Barham*, 6 N. & M. 62; 7 Car. & P. 356; 1 H. & W. 683; 4 A. & E. 473; 1 M. & Rob. 507; 5 L. J., K. B. 88.

But the mere description of a picture as being the work of a particular master, in an invoice, is not a warranty that the picture was painted by that master. *Ib.*

If, in an action on a warranty of pictures, it appears that, before the sale, the vendor stated to the vendee that they were the works of a particular master, it will be for the jury to consider whether the vendor made this representation as a part of the contract of sale, or whether the vendor made the representation as matter of opinion only. *Ib.*

A. sold to B. for 95*l.* two pictures, representing them as "a couple of Poussin's"; they were, in fact, not originals, but very excellent copies; B. did not offer to return them:—Held, that, if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay whatever sum the jury might consider to be the value. *Lomi* v. *Tucker*, 4 Car. & P. 15.

A. sold a picture to B. as a Rembrandt; there was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation. The picture was kept:—Held, that, if the jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture. *De Sewhanberg* v. *Buchanan*, 5 Car. & P. 343.

viii. *Sale of Seeds.*

Adulteration.]—A. undertook to supply B. with certain parcels of linseed, which he warranted should be "Calcutta linseed," and supplied him with linseed containing 15 per cent. of other seeds. Calcutta linseed, at the time the contract was made, contained, usually, from 2 to 3 per cent. of other seed. The jury was asked, whether this was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article, and prevent its being saleable as "Calcutta linseed"; and whether this adulteration was such as might reasonably be expected:—Held, no misdirection. *Wieler* v. *Schilizzi*, 17 C. B. 619; 25 L. J., C. P. 89.

The defendant, by his agent, sold the plaintiffs a parcel of turnip seed, and gave the following sold-note:—"Mr. T. C. R." (the defendant's agent) "sold to Messrs. B. & Co." (the plaintiffs), "for Mr. C. L." (the defendant), "fourteen quarters Skirving's Swedes. at 17*s.* per bushel." The defendant's agent afterwards sold the plaintiff a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold-note was given; the invoices described it as "24½ quarters of turnips":—Held, as to the first parcel, that the jury was properly directed that the description of it in the sold-note amounted to a warranty that it was Skirving's Swedes. As to the second parcel, that the statement of the defendant's agent that it was "of the same stock" as the first, on the subsequent sale to the plaintiffs, was evidence of a warranty that the second parcel also was Skirving's Swedes. *Allan* v. *Lake*, 18 Q. B. 560.

An action is maintainable by a seed merchant against seed brokers for falsely warranting turnip seed to be rape seed, although sold by sample and of greater value than turnip seed, the purchaser having sustained actual loss and injury in his business, having resold it as rape seed, and having had to compensate his customers. *Lovegrove* v. *Fisher*, 2 F. & F. 128.

Of Good Growing Stock.]—A. contracted to sell to B. half a ton of yellow mangold wurzel seed at 9*d.* per lb., for the end of the year, the same to be grown by A., and to be of good growing stock:—Held, that the above terms contained no implied warranty that the seed when produced should be itself good, but merely that seed of a good growing stock should be sown, and everything done that could reasonably be required in the ordinary course of growing seed. *Pinder* v. *Button*, 7 L. T. 269; 11 W. R. 25.

ix. *Sale of Other Articles.*

Chain-Cable Untested and Unstamped.]—In every case of a contract for the sale of a chain-cable, whether for use on a British ship or not, there is an implied warranty that it has been properly tested and stamped in accordance with the acts. *Hall* v. *Billingham*, 54 L. T. 387; 34 W. R. 122; 5 Asp. M. C. 538.

Title—Sale of Government Bonds.]—The government of the United States in 1865 issued bonds payable to bearer, redeemable at the pleasure of the government, after 1870, and payable, at all events, in 1885. When the government wished to redeem any of these bonds, they gave notice to holders by public notification that they would be paid on presentation. After such notice, the bonds notified were called "Called Bonds." These bonds are dealt in in England for the purpose of making remittances to America. The course of business is for the seller to supply the buyer with bonds or coupons of railway companies, &c., payable in America at an agreed price, no particular bonds or coupons being specified. It was proved that whenever default was made in payment of the coupons in America, the seller returned the money paid for them, but no evidence was given of any case in which payment of a bond had been refused. A. sold to B. in accordance with the above course of business certain "Called Bonds," which had been originally stolen from American holders, and payment to B. of the bonds was refused by the American government:—Held, that there was an implied warranty of title on the sale by A. to B., and that B. was entitled to recover from A. the price paid. *Raphael* v. *Burt*, 1 Cab. & E. 325.

b. Express.

i. *On Sale of Horse.*

Knowledge.]—If a seller warrants a horse, he does it at his own peril if the horse is unsound at the time of sale, whether he knew it or not. *Anon.*, Lofft, 146.

Verbal Representation.]—A verbal representation of the seller to the buyer of a horse in the course of dealing that he may "depend upon it the horse is perfectly quiet and free from vice," is a warranty. *Cave* v. *Coleman*, 3 M. & Ry. 2; 7 L. J. (o.s.) K. B. 25.

Although a person may disclaim against making a warranty of a horse, yet, if he give him a character for a particular quality—as by saying that he is quiet in harness—and do it in such a manner as reasonably to make an impression on the mind of the buyer, that he is generally quiet in harness, he will be bound by that representation; and if it is not true, an action will lie to recover back the price of the horse. *Hart* v. *Newry*, 1 L. J. (o.s.) K. B. 237.

To the name of a mare in a printed catalogue of horses to be sold by auction were appended the words "In foal to Warlock." Other mares in the same catalogue were described as having been "served by" or "stinted to" certain

horses:—Held, that looking to the expressions used with respect to the other mares and to the nature of the fact represented, the words must be taken as intended by the parties to amount to a warranty. *Gee* v. *Lucas*, 16 L. T. 357.

Disclaimer of Knowledge.]—It is not a warranty to sell a horse as of the age stated in a written pedigree, if at the time the seller declared that he knew nothing of the horse's age but what he learnt from the written pedigree. *Dunlop* v. *Waugh*, Peake, 123.

Immaterial Representations.]—Where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from which he was brought, if the horse answered the warranty at the time of the sale, the misrepresentation as to the place from which he came would not invalidate the contract. *Geddes* v. *Pennington*, 5 Dow, 164.

Effect of Fraud.]—If a horse is sold with a warranty, any fraud at the time of the sale will avoid it, although it does not amount to a breach of the warranty. *Steward* v. *Coesvelt*, 1 Car. & P. 23.

At Time of Sale.]—A. sent his horse to Tattersall's for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable and seeing him in the act of examining the horse's legs, A. said, "You have nothing to look for, I assure you he is perfectly sound in every respect," whereupon B. replied, "If you say so, I am perfectly satisfied"; and, upon the faith of the representation so made to him by A., which was admitted to have been made in perfect good faith, became the purchaser:—Held, that there was no evidence of a warranty to go to a jury, the representation made by A. on the day preceding the auction forming no part of the contract of sale. *Hopkins* v. *Tanqueray*, 15 C. B. 130; 2 C. L. R. 842; 23 L. J., C. P. 162; 18 Jur. 608; 2 W. R. 475.

A defendant who had a horse for sale at a commission stable, meeting the plaintiff at Tattersall's, and being informed by him that he had been looking at the horse, said, "He is a good harness horse; he belonged to Baron R., who sold him because he could not match him." The plaintiff went again to the stable, and after having had the horse put into a break, agreed to purchase him for 65*l*. There was no suggestion that the defendant had intentionally misrepresented the horse; but he turned out to be a kicker. The jury having found that the representation made at Tattersall's was part of the contract, and amounted to a warranty that the horse was quiet in harness, the court refused to disturb the verdict. *Percival* v. *Oldacre*, 18 C. B. (N.S.) 398.

The general rule is, that whatever a seller represents at the time of a sale is a warranty. If a person, at the time of his selling a horse, says, "I never warrant, but he is sound as far as I know"; this is a qualified warranty, and the purchaser may maintain an action upon it, if he can show that the horse was unsound to the knowledge of the seller. *Wood* v. *Smith*, 5 M. & Ry. 124; 4 Car. & P. 45; M. & M. 539; 8 L. J. (O.S.) K. B. 50.

When Defects Manifest.]—If a horse has manifest and visible defects at the time of sale, they are not included in a general warranty. Where, therefore, on the sale of a racehorse, the seller told the purchaser that the horse was a crib-biter, and he also had a splint, which was apparent:—Held, that a warranty that the horse was sound, wind and limb, at the time of sale, did not extend to these defects. *Margetson* v. *Wright*, 5 M. & P. 606; 7 Bing. 603. *And see S. C.* 1 M. & Scott, 622; 8 Bing. 454; 1 L. J., C. P. 128.

Construction of.]—Where a plaintiff brought an action to recover the price of a horse, sold under the following warranty, viz. "To be sold, a black gelding, five years old; has been constantly driven in the plough; warranted":—Held, that such warranty applied to soundness only, although some ambiguity might be occasioned by the particular structure of the sentence. *Richardson* v. *Brown*, 8 Moore, 338; 1 Bing. 344; 2 L. J. (O.S.) C. P. 7; 25 R. R. 648.

In an action for a breach of a warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller:—"Received of A. B. (the purchaser) 10*l*. for a grey four-years-old colt, warranted sound in every respect":—Held, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description. *Budd* v. *Fairmaner*, 1 M. & Scott, 74; 8 Bing. 48; 5 Car. & P. 78; 1 L. J., C. P. 16.

Proof that a horse is a "good drawer" only, will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Coltherd* v. *Puncheon*, 2 D. & R. 10; 1 L. J. (O.S.) K. B. 2.

An averment that the defendant warranted a horse to be sound; proof that he warranted the horse to be sound everywhere, except a kick on the leg:—Held, that this was a qualified warranty. *Jones* v. *Cowley*, 6 D. & R. 533; 4 B. & C. 445; 3 L. J. (O.S.) K. B. 263. And see *Garment* v. *Barrs*, 2 Esp. 673.

"Received from A. the sum of 60*l*. for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon":—Held, not to be a warranty that the horse was quiet to ride and drive. *Anthony* v. *Halstead*, 37 L. T. 433.

ii. *In Other Cases.*

On Sale of Locomotive.]—The defendant, living at Cardiff, on the 9th November, 1874, wrote to the plaintiff, living in London, offering to sell him a second-hand locomotive engine, in good working order, for 385*l*., and asking if the plaintiff would get it inspected, and see if he could take it, to which the plaintiff, on the 10th, replied, saying, "Tell me who are the makers, what material are the fire-box and tubes made of, and how old is the engine." The defendant's answer of the 12th was as follows: "England & Co. are the makers of the locomotive, age about thirteen and a half years, fire-box and tubes are copper. Can you let someone inspect her?" In reply to which the plaintiff, on the 14th, wrote as follows: "If you can assure me that the loco. is in good working order I will, on the faith of that, send an engineer down to look at it." The defendant having on the 16th written, saying, "The engine is now in good order," the plaintiff thereupon sent an engineer to Halifax, where the engine was, to inspect and

give him an estimate of the value, with particulars of the size, and diameter of the cylinder and wheels, and their condition. The engineer inspected the engine, and in the course of his examination he cleared away the soot and smoke from one of the tubes, and, finding it to be of brass, he took for granted that all of them were of that material, and carried his examination in that respect no farther. He then sent his report, giving a detailed description of the engine to the plaintiff, stating, amongst other particulars, "copper fire-box and brass tubes," and specifying the repairs necessary to be done. Upon this the plaintiff, on the 27th November, wrote to the defendant saying, "The condition of the engine, and all things considered, I cannot offer you more than 300*l.* for it, and if you like to accept that I will take the engine." That offer the defendant accepted, and the bargain was thereupon concluded between them. Upon taking the engine to pieces some months afterwards, the plaintiff found that only five of the boiler tubes were of brass, the remaining 131 being of iron, and thereupon, on the strength of the defendant's representation, in his letter of the 12th November, that the tubes were copper, he claimed compensation from the defendant for the difference in value between the two metals, which the defendant, denying his liability, refused to make. The plaintiff then brought an action, at the trial of which a verdict was formally entered for him, with leave to the defendant to move to enter the verdict on the ground that, on the true construction of the correspondence, the defendant did not warrant as alleged, and that the representation therein contained did not enter into or form part of the subsequent contract:—Held, first, that the defendant's letter of the 12th November amounted to an express warranty by the defendant, on the faith of which the plaintiff acted in concluding the bargain, that the tubes of the engine were of brass or copper; and, secondly, that the subsequent inspection by the plaintiff's engineer, which was intended only to apply to the ascertaining the engine's working condition and state of repairs, and not to the material of the tubes, did not do away with or in any way affect such previous warranty. *Cowdy* v. *Thomas*, 36 L. T. 22.

Timber of Specified Assortment as Classified by Official Surveyors at Port of Shipment.]—The defendants, who were timber merchants at Miramichi, N.B., contracted in writing to sell to the plaintiff "wood goods of the undermentioned assortment, as classified by the official surveyors of timber at port of shipment." After containing provisions as to shipment at St. John's, and as to the mode of payment, &c., the contract provided thus:—"Assortment and prices above referred to. About 270 St. Petersburg standards of bright fresh spruce deals, and assorted about as follows." Several dimensions were specified, and bracketed opposite to these were the words "averaging second quality." In an action to recover damages for breach of the contract, the plaintiff in his statement of claim set out the contract, and alleged that until their arrival in Ireland he had no opportunity of examining them, and as a breach of the contract alleged that the standards of deal delivered were in fact materially different from the goods contracted to be sold, in that the same were not bright or fresh, nor did they average second quality, but were of inferior quality to second quality, nor were they of merchantable quality at all. Defence: That the goods were shipped from the port of Miramichi, and at the said port there were at the date of the contract official surveyors of timber duly appointed by competent authority, and whose duty it was to assort and classify all wood goods shipped from said port, to determine their quality and description, and also whether the same were bright and fresh, for the purpose of such classification. Averment: that the wood goods, the subject-matter of the action, were before shipment duly assorted and classified, and their quality and description determined, by such official surveyors of timber; and the wood goods delivered by the defendants to the plaintiff were, according to such assortment and classification, bright and fresh, and otherwise of the quality and description mentioned in the contract. Reply: That the goods were not in fact, when shipped, bright or fresh, nor did they average second quality, nor were they of merchantable quality:—Held, on demurrer to the reply, that the contract sued on was upon its true construction not a contract to deliver to the plaintiff bright fresh spruce deals, averaging second quality, absolutely, but wood goods consisting of bright fresh spruce deals of the average quality, as classified by the official surveyors, that the contract was that the goods should be of the assortment mentioned as so classified, and that, therefore, the reply was no answer to the defence. *M'Clelland* v. *Stewart*, 12 L. R. Ir. 125.

Ship "American."]—A warranty of a ship being American, does not mean that she is American built, but that she is the property of an American subject. *Wilson* v. *Backhouse*, Peake, A. C. 119.

See also Cases, ante, cols. 386, 387.

c. Authority to Warrant.

When Implied.]—If A. constitutes B. his agent for the sale of a certain article, B. is thereby invested with authority to do all that is usual in the trade to do on the sale of the article; he may, therefore, have authority to warrant the goodness of the article, so as to bind A., though A. never gave him any express authority to that effect. *Dingle* v. *Hare*, 7 C. B. (N.S.) 145; 29 L. J., C. P. 143; 6 Jur. (N.S.) 679; 1 L. T. 38.

A servant employed to sell a horse and receive the price, has an implied authority to warrant the horse to be sound; and in an action upon the warranty it is enough to prove that it was given by the servant, without calling him or showing that he had any special authority for that purpose. *Alexander* v. *Gibson*, 2 Camp. 555; 11 R. R. 797.

A servant, entrusted by his master with the sale of a horse at a fair, may have an implied authority to give a warranty to the purchaser. *Brady* v. *Todd* (9 C. B. (N.S.) 592), commented on and distinguished. *Brooks* v. *Hassell*, 49 L. T. 568.

Where a horse-dealer, on a single occasion, employs another horse-dealer, who occasionally assists in his business, to sell a horse for him, the latter has an implied authority to give a warranty of soundness; and evidence of an alleged custom among horse-dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to

contradict such implied authority. *Howard* v. *Sheward*, 36 L. J., C. P. 42; L. R. 2 C. P. 148; 12 Jur. (N.S.) 1015; 15 L. T. 183; 15 W. R. 45.

—— **Discounting Bill.**]—If an agent, employed by the indorsees of a bill to get it discounted, warrants it to be a good one, his employers are bound by this act, and are liable to refund if the bill is afterwards dishonoured by the acceptor. *Fenn* v. *Harrison*, 4 Term Rep. 177.

Statements at Time of Sale.] — Where a principal employs an agent or a servant to sell for him, what such agent says as a warranty or a representation at the time of the sale, respecting the thing sold, is evidence against the principal: but not what he has said at another time. *Helyear* v. *Hawke*, 5 Esp. 72.

Servant merely delivering Article Sold.]—Although a warranty given by a person intrusted to sell primâ facie binds the principal, the warranty of a person intrusted merely to deliver the thing sold is not primâ facie binding on the principal, but an express authority must be shown; and, therefore, where a horse had been sold by A. to B., and A.'s servant, on delivering the horse to B., made certain statements, and signed a receipt for the price of the horse, containing a warranty:—Held, that A. was not bound by the statements or receipt of the servant, as no express authority to give the warranty was shown. *Woodin* v. *Burford*, 2 C. & M. 391; 4 Tyr. 264; 3 L. J., Ex. 75.

Servant Employed on one Occasion.] — A servant of a person not making it his business to deal in horses, who is employed on a single occasion by his master to sell, by private sale, a horse, is not, by reason of such employment, authorised by law to bind his master by a warranty; the buyer, who takes the horse with the servant's warranty, must take the risk of proving the servant's authority from his master to give it. *Brady* v. *Tod*, 9 C. B. (N.S.) 592; 30 L. J., C. P. 223; 7 Jur. (N.S.) 827; 4 L. T. 212; 9 W. R. 483.

In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair:—Held, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty, and averring a breach of it, and an answer from the defendant, simply denying that there had been any breach of warranty, afforded evidence whence the jury was justified in finding that the servant had authority in fact to warrant. *Miller* v. *Lawton*, 15 C. B. (N.S.) 834.

When Forbidden.]—If a horse-dealer sends his servant to market with a horse, and desires him not to warrant it, the master is bound if he does so; but if another person (not a horse-dealer) employs his servant or an agent to sell his horse, and desires him not to warrant it, and such servant or agent does so, the master is not bound. *Bank of Scotland* v. *Watson*, 1 Dow, 45; 14 R. R. 11.

If an agent, employed by indorsees of a bill to get it discounted, warrants it to be a good one, his employers are not bound if the principal at the time of employing him said he would not warrant or indorse the bill. *Fenn* v. *Harrison*, 4 Term Rep. 177.

Alteration.]—Where, on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant, who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, warranted "sound to the regiment":—Held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. *Strode* v. *Dyson*, 1 Smith, 400.

Liability of Principal to Third Parties.]—A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business. *Barwick* v. *English Joint Stock Bank*, 36 L. J., Ex. 147; L. R. 2 Ex. 289; 16 L. T. 461; 15 W. R. 877—Ex. Ch.

A baker was desirous of disposing of his shop and the goodwill of his business, and in consequence an advertisement was inserted in a newspaper, stating that the house was doing twelve sacks a week. The advertisement was inserted by a broker, in consequence of a conversation with the baker's wife, who managed the business for him; in which conversation she told the broker that they did between nine and ten sacks a week, upon which the latter said, "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing went to the wife, and said to her, "Are you really doing anything like this business?" to which she replied, "Yes, we are doing eleven sacks"; and appealed to the man in the shop, who confirmed her statement. The baker himself did not appear at all in any part of the transaction, except that he received the purchase-money, and paid the broker his commission. In an action brought by the purchaser on the representation contained in the advertisement:—Held, that the baker was personally and individually answerable in damages, inasmuch as though he did not make any representation himself, yet he made his wife his agent, and was bound by her statements. *Taylor* v. *Green*, 8 Car. & P. 316.

The servant of the owner of a riding-school who was in the habit of buying and selling horses was entrusted to deliver for approval and to negotiate for the sale of a horse to the plaintiff. At the trial the jury found (1) that the servant warranted the horse free from disease; (2) that it was suffering from mange, which the servant well knew; and (3) that the master was aware there was something the matter with the horse, but that he did not know the nature of the disease:—Held, that the master was bound by the servant's warranty. *Baldry* v. *Bates*, 52 L. T. 620.

Liability of Agent to Third Parties — Defence to Action by Principal.]—To an action by husband and wife, in right of the wife as executrix, for money had and received, the defendant pleaded, as to 35*l.*, that that sum was part of the prices received by him upon the sales of two horses of the testator, which were in the hands of the plaintiffs to be administered, and which, under an authority given by them to the defendant, were sold by him in his own name, and warranted sound to the respective purchasers; that, at the time of the sales, the horses respectively were unsound; that the defendant, from the time of the receipt of the money until he paid the same as after mentioned, was indebted to the plaintiffs in 35*l.*,

payable on request, for the money so received by him for their use, and always was ready and willing to pay it to them; and that, after he so became indebted, and before the commencement of the suit, he was, by reason of the breaches of the warranties as to the horses, compelled by the persons who so purchased them, without any fault on his part, to repay, and did necessarily repay, to them the 35*l.*, and the residue of the prices, whereby the debt of 35*l.* was discharged: —Held, that the plea was no answer to the action. *Field* v. *Allen*, 9 M. & W. 694.

Evidence of Authority—Son acting for Father.]—In an action on the warranty of a horse sold by the son of the defendant as agent for his father, a part of the defence being that the son had no authority to warrant, it was proposed to ask a witness whether on the day on which the sale took place, the defendant's son did not, in answer to a question put by the witness as to the price of the horse, say that he would warrant the horse:—Held, inadmissible, as being a conversation with a stranger; but that, if the defendant's son, in offering the horse for sale, had offered a warranty, it might have been otherwise, as that would have been a statement accompanying an act done in the course of his agency. *Allen* v. *Denstone*, 8 Car. & P. 760.

Agent refusing to Warrant.]—In an action for money had and received, it appeared that the plaintiff had bargained with an agent of the defendant sent to a fair to sell the defendant's horse for the purchase of it, and had laid down the agreed sum, together with a piece of paper on which he had written a receipt purporting to be for a horse "warranted sound." The defendant's agent struck out the words "warranted sound"; the plaintiff then tore it up and wrote another receipt, in which the same words were introduced, and the defendant's agent again struck out the words, signed the receipt, and took up the money; to which plaintiff replied that he had both the money and the horse:—Held, that upon these facts, the plaintiff was properly non-suited. *Pearson* v. *Bardsley*, 7 W. R. 52.

See also PRINCIPAL AND AGENT.

2. SALE BY SAMPLE.

Questions for Jury.]—The plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 34*s.* per quarter. He afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shown as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and if they were of opinion that he had so believed, he directed them to find for the defendant. The jury having found for the defendant:—Held, that there must be a new trial:—Per Cockburn, C.J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract:—Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old:—and per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. *Smith* v. *Hughes*, 40 L. J., Q. B. 221; L. R. 6 Q. B. 597; 25 L. T. 329; 19 W. R. 1059.

In pursuance of an advertisement which announced that "purchasers are required to examine bulk for themselves, as sellers accept no responsibility," a corn-broker, on the plaintiff's instructions, put up for sale a quantity of maize, which was stored at a distance from the auction-room. One of the conditions of sale, which were read at the commencement of the auction, but which the defendant was not clearly proved to have heard, and which were not referred to in the auctioneer's ledger, declared that the maize would be "sold as it now lies in store (sellers being irresponsible)." Small bags labelled "ex 'Emma Peasant'" (that being the name of the vessel whose cargo the plaintiff had directed the broker to sell), and containing samples of sound maize, were exhibited at the auction; and the defendant, who had not inspected the bulk, became the purchaser, the biddings being signed by the auctioneer under the heading in his ledger —which was not shown to the defendant—"Sale of mixed maize, ex 'Emma Peasant,' by order of (the plaintiff's firm)." There was no other evidence of a written contract between the parties. The defendant having subsequently refused to accept delivery of the cargo of the "Emma Peasant," which was of an inferior quality, on the ground that it was not that which had been sold, the plaintiff effected a resale and sued him for the loss thereon, when the judge left to the jury the sole question, whether the sample shown at the auction had been taken from the bulk of the "Emma Peasant," or from that of the "Jessie Parker," a superior cargo belonging to the plaintiff, which had lain in the same store. The jury having found that the sample was in fact taken from the latter bulk, a verdict for the amount claimed was directed for the plaintiff, leave being reserved for the defendant to have the verdict entered for him if the judge should have so directed:—Held, that as the plaintiff intended to sell one bulk, and the defendant to buy another, there was no contract between them, or (per Christian, L.J.) if there was, it was a contract as to the bulk of which a sample had been exhibited at the auction; that the exhibiting of the sample amounted to a representation by the sellers that it was taken from the bulk which was about to be sold; that the meaning of the condition as to the irresponsibility of the sellers was that they guaranteed the sample was taken, though not necessarily fairly taken, from the bulk to be sold; that the heading in the auctioneer's ledger, not having been shown to the defendant before the sale, could not bind him; and that the auctioneer had no authority to sign the defendant's name to any but the real

contract. *Megaw* v. *Molloy*, 2 L. R. Ir. 530—C. A.

Nature of Guarantee.]—On the 13th January A. wrote to T. inquiring the terms on which he would supply him with Peruvian guano, and adding, "a sample, with guaranteed analysis, to accompany your offer." On the 23rd T. replied by letter as follows: "I shall be glad to do the best I can for you; I may say that my guano contains 18 per cent. of ammonia; this is the highest analysis this year." On the 1st February T. forwarded three samples of guano to A. with a letter, offering them at certain prices, viz.: "No. 1, at 14*l.* 2*s.* 6*d.*; No. 2, at 13*l.* 10*s.*; and No. 3, at 12*l.* 5*s.* per ton;" and he inclosed a copy of a printed analysis, headed, "Analysis of Government Peruvian Guano, ex 'Mindano,' now lading at Whitehaven," and said he could send three more in a day or two. This analysis T. described as "the mean of three eminent chemists, who were furnished with an average sample of the bulk of the cargo." It set out the specific proportion per 100 of the various constituent parts, and at its foot was the following note: "containing nitrogen, 14·31—equal to ammonia, 17·37," and it was signed by T. On the 4th February A. wrote informing T. that he agreed to accept his tender, according to the conditions named in his letter; and on the 8th March he wrote an order to T. for a quantity of "the best Peruvian guano, No. 1, price 14*l.* 2*s.* 6*d.*, delivered, conditions and analysis as per yours on the 1st February." The guano was delivered according to order; and after the bulk had been broken, A. had a sample of it analysed by his own analytical chemist, when it was found to contain much less ammonia than mentioned in the analysis sent, whereupon he claimed a deduction from the price, which the seller refused to allow. In an action to recover the price:—Held, that the correspondence contained not merely a guarantee that the bulk was equal to the sample; but also a guarantee that the analysis, at the time it was made, fairly represented and was a fair analysis of the bulk of the cargo out of which the goods were supplied; and that that circumstance should be taken into account so far as it might appear fairly to bear upon the question of price. *Towerson* v. *Agricultural Aspatria Co-operative Society*, 27 L. T. 276—Ex. Ch.

On the sale of an article used in a certain manufacture by a person not the manufacturer or original producer, and who sells it by sample, the purchaser carrying on a particular manufacture in which the article is used, semble, there is no implied warranty that the article is fit to be used in that manufacture, even although the sample was found to be so, and the only undertaking is that the sample was fairly taken from the bulk; but it is no defence in an action for the price, that a portion of the bulk turned out wholly unfit for the manufacture, for non constat that the bulk generally will be so, or that, even if it is so, the sample was unfairly taken. *Sayers* v. *London and Birmingham Flint Glass and Alkali Co.*, 27 L. J., Ex. 294. *S. C.*, at nisi prius, 1 F. & F. 63.

When a contract is for merchantable goods, and the sale is by sample, which represents to the buyer a merchantable article and discloses no defect, and the goods are accepted as according with the sample, there is still an implied warranty of their being merchantable, in respect of all such matters as cannot be judged of by the sample, just as there would be if bulk had been inspected, and defects could not thereby be ascertained. *Mody* v. *Gregson*, 38 L. J., Ex. 12; L. R. 4 Ex. 49; 19 L. T. 458; 17 W. R. 176—Ex. Ch.

Upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given; and, therefore, if there is a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson* v. *Lee*, 2 East, 314; 6 R. R. 429.

Where, before or at any time of sale, a specimen of the goods is exhibited to the buyer, if there is a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract. *Gardiner* v. *Gray*, 4 Camp. 144; 16 R. R. 764.

Where, upon a sale of goods, the seller produces a sample and represents that the bulk is of equal value, if there is a sale note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action for a deceitful representation. *Meyer* v. *Everth*, 4 Camp. 22; 15 R. R. 722.

Cloth merchants ordered of cloth manufacturers worsted coatings, which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent, and was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of cloth of that class:—Held, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used. *Mody* v. *Gregson* (38 L. J., Ex. 12), approved. *Drummond* v. *Van Ingen*, 56 L. J., Q. B. 563; 12 App. Cas. 284; 57 L. T. 1; 36 W. R. 20—H. L. (E.) And see *Jones* v. *Pudgett*, col. 484.

Condition of Sample.]—Semble, that if a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties. *Heilbutt* v. *Hickson*, 41 L. J., C. P. 228; L. R. 7 C. P. 438; 27 L. T. 336; 20 W. R. 1035.

Equal to Sample and Analysis of Previous Bulk.]—In June, 1852, A. employed a broker to purchase for him from B. some guano then lying in C.'s warehouse. In contemplation of this purchase, a sample was taken and an analysis made of the guano, but no contract was made. In November, 1852, A.'s broker, on behalf of A., entered into a written contract with B. for the

purchase of 300 tons of guano, then about to arrive by the ship "S.," at 5*l.* 10*s.* per ton, to be equal to sample and analysis of guano in C.'s warehouse, there being, at the time of the making of the contract, in November, some of the guano which had previously been analysed in June still lying in C.'s warehouse:—Held, that the meaning of the written contract made in November was that the guano about to arrive was to be equal to the sample and analysis of June, 1852. *Clark* v. *Schwartz*, 2 W. R. 16.

"Equal to Report and Samples."]—A contract for the sale in London of a cargo of Taganrog wheat then lying afloat at Queenstown, in Ireland, contained the following provisions: "In case of any dispute, this contract not to be void, it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. The cargo is accepted on the report and samples of Scott & Co., of Queenstown":—Held, that this latter stipulation amounted to a warranty that the bulk was equal to the report and samples, and was not merely a representation, and the report was the genuine report of Scott & Co., and the samples taken by them. *Russell* v. *Nicolopulo*, 8 C. B. (N.S.) 362; 2 L. T. 185; 8 W. R. 415.

Description or Sample.]—Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description it is not material for the vendor to show that they correspond with a sample exhibited at the time of the sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract. *Tye* v. *Fynmore*, 3 Camp. 462; 14 R. R. 809.

The sale of an article by sample, but by a particular description, does not necessarily import a warranty, if all the circumstances show that it was understood as a mere expression of opinion or belief. *Carter* v. *Crick*, 4 H. & N. 412; 28 L. J., Ex. 238; 7 W. R. 507.

An agreement for the sale and delivery of oil, described as "foreign refined rape oil, warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape oil," although it is equal to the quality of the samples. *Nichol* v. *Godts*, 10 Ex. 191; 23 L. J., Ex. 314.

Waiver.]—Where the defendant bought of the plaintiff a quantity of rice per sample, according to the conditions of sale, to be put up by the proprietors, if required, at a certain price therein mentioned, and it did not correspond with the sample, but the defendant, after seeing fresh samples, inferior in quality to the original purchase sample, put it up for sale at a limited price, and no bidding taking place to that extent, he bought it in:—Held, that he could not afterwards repudiate the contract. *Parker* v. *Palmer*, 4 B. & Ald. 387; 23 R. R. 313.

—— Acquiescence of Vendor in further Trial.]—The plaintiff sold a hogshead of cider to the defendant by sample as being good draught cider. After the arrival of the cask, the defendant, on the 28th of May, wrote to the plaintiff, "The cider differs from the sample, and the little I have sold has been complained of in every instance: should this continue, I shall be obliged to return it." The plaintiff did not answer this letter till the 24th of June. The defendant, in trying to sell it, used twenty gallons, but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff. The twenty gallons were more than sufficient to enable the defendant to test the quality of the bulk:—Held, that the omission of the defendant to answer the letter of the 28th of May was evidence from which a jury might presume that the plaintiff acquiesced in the further trial of the cider, and that the defendant had not so accepted the bulk as to be bound to pay for the whole. *Lucy* v. *Mouflet*, 5 H. & N. 229; 29 L. J., Ex. 110.

Statute of Frauds.]—Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of a usage or a custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of s. 17 of the Statute of Frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner* v. *Grout*, 2 C. B. (N.S.) 340. *And see Cases* ante, col. 439.

Right to Inspect Bulk.]—Where the defendant entered into a contract for the purchase of wheat, and the bought-note stated that the corn was sold "according to sample, and that it should be paid for in bankers' bills, if required": and the usage of the Bristol market was to sell by sample, subject to the buyer's inspection and approval of the bulk; and, a week after the contract, the defendant applied to see the bulk, but was told by the plaintiff that he would either send for a bushel on the spot, or would send him a load home the next day for his inspection, but that he could not show him the bulk, as it was in another warehouse, and he did not like to let him into his connection; and in a few days afterwards the plaintiff sent to the defendant to inform him that the wheat was ready for delivery on producing bankers' bills; but, in the meantime, the market had fallen, and the defendant repudiated the contract:—Held, that he was not liable for the breach, as he had a right to inspect the whole in bulk at any proper and convenient time after the contract was made. *Lorimer* v. *Smith*, 2 D. & R. 23; 1 B. & C. 1.

Place for Delivery—Place for Inspection—Right to Reject.]—The plaintiff sold barley by sample to the defendant, and delivered it in sacks at the T. railway station. The defendant on the same day resold the barley by the same sample. The defendant, on hearing of the arrival of the barley at T. station, directed the stationmaster to forward him a sample; and after inspecting the sample, ordered the stationmaster to send on the barley to the sub-vendees. The defendant subsequently rejected the barley as inferior to sample:—Held, that there was nothing to displace the primâ facie presumption that the place of delivery was also the place for inspection; that the property in the barley passed when the defendant ordered it to be sent on to his sub-vendees; and, consequently, that he was not entitled afterwards to reject the barley. *Perkins* v. *Bell*, 62 L. J., Q. B. 91; [1893] 1 Q. B. 193; 4 R. 212; 67 L. T. 792; 41 W. R. 195—C. A.

Satisfaction.]—A count stated, that, in consideration that the plaintiff would buy and receive, the defendant promised to make and deliver certain iron rails, to be inspected and certified as agreed upon, and to be in quality equal to any rails made in Staffordshire. Breach, that the rails, which were made and delivered, were not of that quality. Plea, that the rails were by the contract to be inspected before delivery by an agent of the plaintiff, to be appointed for that purpose, who was to be at liberty to approve and accept any of the rails, if he should think fit, and that the rails were accordingly so inspected and approved, and accepted, in performance of the agreement, by an agent of the plaintiff:—Held, that the stipulation in the contract for quality was distinct from the stipulation as to inspection and approval by an agent of the plaintiff; also, that if the effect of the contract was, that approval and acceptation by the agent should establish that the stipulation for quality had been performed, or that the defendant had been relieved from the performance thereof, the plea was not well pleaded. *Bird* v. *Smith*, 12 Q. B. 786; 17 L. J., Q. B. 309; 12 Jur. 916.

Action for Recovery of Price—Actual Value.]—If, after a sale by sample at a specific price, goods of an inferior quality are supplied, and not corresponding with the sample, the vendor cannot recover more than the actual value of the goods sold. *Germaine* v. *Burton*, 3 Stark. 32.

Customs of Trade relating to Sales by Sample.]—Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample is receivable. *Cooke* v. *Riddelien*, 1 Car. & K. 561.

But in such a case the vendee cannot claim the benefit of the custom, if he has not elected to comply with it within a reasonable time. *Ib.*

In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade all sales are by sample, although not so expressed in the bought and sold notes. *Syers* v. *Jones*, 2 Ex. 111.

A custom of the Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk and reject it, he cannot afterwards reject it or refuse to pay the whole price, is a reasonable custom. *Sanders* v. *Jameson*, 2 Car. & K. 557.

It being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are repacked, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged; the defendants, who had purchased some sea-damaged pimento, repacked and advertised it in catalogues, which did not notice that it was sea-damaged or re-packed, but referred it to be viewed, with little facility however of viewing it; they exhibited impartial samples of the quality, and sold it by auction:—Held, that this was equivalent to a sale of goods as and for goods that were not sea-damaged, and that an action lay for the fraud. *Jones* v. *Bowden*, 4 Taunt. 847; 14 R. R. 683.

If in the sale of goods by sample, the bulk does not accord with the sample, the purchaser is not bound to accept or pay for them, even on an allowance being made for the inferiority, though that is the usage in the trade. *Hibbert* v. *Shee*, 1 Camp. 113; 10 R. R. 649.

3. Rejection and Breach.

a. Duration of Warranty.

Time Limited for Returning.]—If a horse sold at a public auction is warranted sound, and six years old, and it is one of the conditions of sale that it shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. *Buchanan* v. *Parnshaw*, 2 Term Rep. 745.

Therefore, where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale, and was then offered to the seller, who refused to take him:—Held, that an action might be maintained by the buyer against the seller, and his right to recover was not affected by his having sold the horse after offering him to the seller. *Ib.*

A party may limit a warranty of soundness of a horse, by requiring it to be returned within a certain time, and if the purchaser fails to comply with the condition, he cannot recover on the warranty, although the seller may have known of the unsoundness at the time of the sale. *Bywater* v. *Richardson*, 3 N. & M. 748; 1 A. & E. 508; 3 L. J., K. B. 164.

The seller of a horse signed the following document:—"Mr. C. bought of Mr. G. G. a brown horse, six years old, warranted sound, for the sum of 180*l.*, G. G. Warranted sound for one month, G. G." The buyer sent to the seller a cheque, payable to order, with the following memorandum written on the back. "This check is received by me for a bay horse, price 90*l.*, which I warrant sound for one month from the date of delivery." The seller indorsed the cheque, but did not sign the memorandum:—Held, first, that the words "warranted sound for one month" limited the warranty to continue in force for one month from the sale. *Chapman* v. *Gwyther*, 7 B. & S. 417; 35 L. J., Q. B. 142; L. R. 1 Q. B. 463; 14 L. T. 477; 14 W. R. 671.

Held, secondly, that the memorandum on the cheque was no part of the contract. *Ib.*

—— **Latent and Patent Defects.**]—In a contract for the sale of goods, where the vendor has stipulated with the purchaser that no allowance shall be made for imperfections unless notice be given by first post after receipt of the goods, the stipulation is a general one and applies to all defects or imperfections whether latent or patent. But held on appeal that as the goods supplied were unmerchantable the condition did not apply. *Gorton* v. *Macintosh*, 31 W. R. 232. Reversed in C. A., W. N. (1883) 103.

—— **Notice of.**]—A declaration stated that in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised that she was sound, and averred as a breach that she was not sound. The defendant pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were, that "a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete and the responsibility of the seller terminate unless in the meantime a notice and certificate of

unsoundness were given": that the sale took place subject to the rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited:—Held, that the plea was good, and that it did not amount to the general issue. *Smart* v. *Hyde*, 8 M. & W. 723; 1 D. (N.S.) 60; 10 L. J., Ex. 479.

If a general warranty of a horse is proved by parol (the written contract for the sale not being forthcoming), the fact that the witnesses who proved it saw a notice board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury for them to say whether this formed any part of the original contract. *Best* v. *Osborne*, 2 Car. & P. 74; R. & M. 296.

Warranty for subsequent Period.]—Where a seller informed the buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the end of a fortnight sound, and free from blemish, and, at the expiration of that time, the horses were delivered, but one had a cough and the other a swelled leg, which was apparent at the time of the sale, and the buyer brought an action to recover the price, and a verdict was found for the seller; the court refused to disturb it, or grant a new trial, as the warranty did not apply to the time of the sale, but to a subsequent period. *Liddard* v. *Kain*, 9 Moore, 356; 2 Bing. 183; 3 L. J. (O.S.) C. P. 246; 27 R. R. 582.

b. What Amounts to Breach.

Unsoundness of Horse, What is.]—The term "sound," in a warranty of a horse or other animal, implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes, or the progress of which would diminish, the animal's natural usefulness in the work to which it would properly and ordinarily be applied. *Kiddell* v. *Burnard*, 9 M. & W. 668; 1 Car. & M. 291; 11 L. J., Ex. 268; 6 Jur. 327.

A slight disorder in a horse at the time of sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of warranty. *Bolden* v. *Brogden*, 2 M. & Rob. 113.

A warranty that a horse is sound, is not false because the horse labours under a temporary injury from an accident. *Garment* v. *Barrs*, 2 Esp. 673.

But a temporary lameness, rendering a horse less fit for service, is a breach of a warranty of soundness. *Elton* v. *Brogden*, 4 Camp. 281.

And roaring constitutes unsoundness in a horse, if he is rendered thereby less serviceable for a permanency. *Onslow* v. *Eames*, 2 Stark. 81; 19 R. R. 680.

But roaring is not unsoundness in a horse, unless it is shown to proceed from some disease or organic defect. *Bassett* v. *Collis*, 2 Camp. 523; 11 R. R. 786.

A nerved horse is unsound. *Best* v. *Osborne*, R. & M. 290; 2 Car. & P. 74.

Crib-biting is no such unsoundness in a horse as to entitle a purchaser, who has bought under a general warranty, to maintain an action for the breach of it upon this fault only. *Broennenburgh* v. *Haycock*, Holt, N. P. 630; 17 R. R. 682.

Crib-biting, which has not yet produced disease or alteration of structure, is not an unsoundness, but is a vice, under a warranty that a horse is sound and free from vice. *Scholefield* v. *Robb*, 2 M. & Rob. 210.

A cough, at the time of the sale of a horse, warranted sound, is an unsoundness, though it is afterwards cured without any permanent injury to the horse. *Coates* v. *Stephens*, 2 M. & Rob. 157.

A cough, unless proved to be of a temporary nature, is an unsoundness, and a verdict for the defendant was set aside, though the horse had, the next day after the warranty, been rode hunting. *Shillitoe* v. *Claridge*, 2 Chit. 425. And see *King* v. *Price*, 2 Chit. 416.

Bone spavin in the hock is unsoundness in a horse, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. *Watson* v. *Denton*, 7 Car. & P. 85.

Mere badness of shape, though rendering the horse incapable of work, is not unsoundness. *Dickenson* v. *Follett*, 1 M. & Rob. 299.

Some splints cause lameness, others do not; a splint, therefore, is not one of those patent defects against which a warranty is inoperative. The defendant, therefore, having warranted a horse sound at the time of the contract, and the horse having afterwards become lame from the effects of splint visible when the defendant sold him:—Held, that the defendant was liable on his warranty. *Margetson* v. *Wright*, 8 Bing. 454; 1 M. & Scott, 622; 1 L. J., C. P. 128.

Defendant sold to plaintiff a horse, but before doing so pointed out to plaintiff a splint it then had. Defendant afterwards gave a written warranty to plaintiff that the horse was sound. It soon afterwards became lame from that splint:—Held, that defendant was liable on the warranty. *Smith* v. *Bryant* or *O'Bryan*, 10 Jur. (N.S.) 1107; 11 L. T. 346; 13 W. R. 79.

Defective formation or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time (e.g. "curby hocks"), is not an unsoundness. *Brown* v. *Elkington*, 8 M. & W. 132; 10 L. J., Ex. 336.

Where a horse is warranted sound, the buyer cannot recover for a breach of the warranty unless he shows that the horse was unsound at the time of the sale; and mere defective formation, not producing lameness at that time, is not an unsoundness within the meaning of the warranty. *Bailey* v. *Forrest*, 2 Car. & K. 131.

Any defect in the structure of a horse, whether congenital or arising from subsequent disease or accident, that diminishes its natural usefulness, and renders him less than reasonably fit for present use is unsoundness. *Holiday* v. *Morgan*, 1 El. & El. 1; 28 L. J., Q. B. 9; 5 Jur. (N.S.) 69; 7 W. R. 7.

Convexity in the formation of the cornea of the eye of a horse, making him shortsighted, and so inducing a habit of shying, is such a defect. *Ib.*

Question for Jury.]—The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict for a preponderance of contrary evidence. *Lewis* v. *Peake*, 7 Taunt. 153; 2 Marsh. 431; 17 R. R. 475.

Defects due to Mismanagement.]—Where a horse was warranted "a thorough broken horse

for a gig," and the purchaser had no opportunity of using him in a gig for two months, but other persons had done so, and he had always answered the warranty, but after that time the purchaser himself drove him, when he kicked and broke the gig, but it appeared that he was an unskilful driver:—Held, that the horse answered the warranty at the time he was sold, and that his bad demeanour was owing to unskilful driving. *Geddes* v. *Pennington*, 5 Dow, 164.

c. Rights on Breach.

Action for Damages.]—The purchaser of a horse can recover for breach of a warranty in an action for damages only, and cannot sue for money had and received, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract in such event, or unless the case is one of fraud. *Gompertz* v. *Denton*, 1 C. & M. 207; 1 D. P. C. 623; 3 Tyr. 233; 2 L. J., Ex. 82.

After a warranty of a horse as sound, the vendor, in a subsequent conversation, said that if the horse was unsound (which he denied) he would take it again and return the money: this is no abandonment of the original contract, which still remains open; and though the horse is unsound, the vendee must sue upon the warranty, and cannot maintain an action to recover back the price after a tender of the horse. *Payne* v. *Whale*, 7 East, 274; 3 Smith, 130.

—— **Return of Horse.**]—Where a horse has been sold warranted sound, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness. *Fielder* v. *Starkin*, 1 H. Bl. 17; 2 R. R. 700.

Where a horse has been sold under a warranty of soundness, the seller is liable to an action, if the horse is not sound at the time of sale, though the horse is returned, and though the buyer suffers a considerable time to elapse before he complains of the unsoundness, or offers to return the horse. *Patteshall* v. *Tranter*, 4 N. & M. 649; 3 A. & E. 103; 1 H. & W. 178; 4 L. J., K. B. 162.

Recovery of Price by Buyer—Failure of Consideration.]—If goods are delivered generally of the sort ordered, but of bad quality and quite unfit for use, the price cannot be recovered back as upon a total failure of consideration. *Fortune* v. *Lingham*, 2 Camp. 416.

Conditions for Return within limited Time in Case of Breach.]—The plaintiff bought a horse by public auction at a repository, warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty, must be returned before five o'clock of the day after the sale; and shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time:—Held, on demurrer in an action on the warranty that the plaintiff's only remedy was under the condition, and that he could not maintain the action. *Hinchcliffe* v. *Barwick*, 49 L. J., Ex. 495; 5 Ex. D. 177; 42 L. T. 492; 28 W. R. 940; 44 J. P. 615—C. A.

The plaintiff bought a house of the defendant warranted quiet to ride. One of the conditions of the contract was to the effect that if the buyer contended that the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty. The horse was removed by the plaintiff, and while being ridden fell, and was so injured that it could not safely be returned on the second day after the sale, but the plaintiff gave notice to the defendant on that day that the animal was not according to warranty, and was unfit to travel:—Held, that, under these circumstances, the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty. *Chapman* v. *Withers*, 57 L. J., Q. B. 457; 20 Q. B. D. 824; 37 W. R. 29.

Though on the sale of a horse there is an express warranty by the seller that the horse is sound, yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. *Adam* v. *Richards*, 2 H. Bl. 573; 3 R. R. 568.

In such case the term "trial" means a reasonable trial. *Ib.*

Right to Return.]—The right to return a chattel sold with a warranty which proves incorrect is not taken away by the fact that the buyer before removing the chattel might have found out that the warranty was untrue, or by the fact that the chattel whilst it is in the buyer's possession is injured without his default by an accident arising from a defect inherent in the chattel. *Head* v. *Tattersall*, 41 L. J., Ex. 4; L. R. 7 Ex. 7; 25 L. T. 631; 20 W. R. 115.

The plaintiff bought of the defendant a mare warranted to have been hunted with certain packs of hounds. According to the terms of the sale, the mare if objected to was to be returned within a specified time. The plaintiff paid for the mare, but before removing her from the defendant's establishment he was informed by some person that the warranty was incorrect. The mare, whilst she was being taken away by the plaintiff's groom, became restive and received serious injury. The plaintiff returned her to the defendant within the specified time. The warranty was in fact untrue:—Held, in an action to recover the price of the mare, that nothing that had happened took away the plaintiff's right to return the mare, and that he was entitled to succeed. *Ib.*

——**Goods not Equal to Sample.**]—B. engaged to supply shoes to C., to be according to sample and to be inspected and paid for by C. before shipment, it being known that the shoes were intended for the French army; a large quantity of shoes were inspected, approved, and delivered, and a portion then sent by C. to Lille. It was subsequently discovered by C. that some of the shoes contained paper in the soles which the French authorities would not allow, and after

various communications B. engaged to take back the shoes returned because they contained paper, but not a larger quantity if only a few were so defective. The French authorities rejected all, and on cutting open a large number most were found to contain paper, which was also found in the sample; the shoes both delivered and undelivered were inferior to sample, and the defect could not be discovered by any reasonable inspection. C. gave notice that he rejected the shoes delivered and would receive no more, and brought an action:—Held, that C. was entitled to reject the shoes delivered, and throw them back on B.'s hands at Lille and in England respectively, to refuse to receive more, and to recover as damages the whole money paid, the expense of sending to and keeping at Lille, and the loss of profit on all shoes delivered or not. *Heilbutt* v. *Hickson*, 41 L. J., C. P. 228; L. R. 7 C. P. 438; 27 L. T. 336; 20 W. R. 1035.

Held, also, that the shoes could not have been thrown back on B.'s hands at Lille but for the second engagement. *Ib.*

In England, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. *Couston* v. *Chapman*, L. R. 2 H. L. (Sc.) 250.

In England, if a horse is sold with the warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in Scotland, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect—Per Lord Chelmsford. *Ib.*

Upon the sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them on the ground that they do not correspond with the sample, unless there is an express condition to that effect; but must resort to a cross action, or rely on the non-correspondence with the samples as a ground for reduction of damages. *Dawson* v. *Collis*, 10 C. B. 523; 2 L. M. & P. 14; 20 L. J., C. P. 116.

If a party purchases an article at a certain price, pursuant to a specimen exhibited, and on delivery it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority to the specimen: he should have returned it, and so have rescinded the contract. *Grimaldi* v. *White*, 4 Esp. 95.

A person bought at a price named, "413 bales of wool, to arrive ex 'Stige,' or any vessel they may be transhipped in, the wool to be guaranteed about similar to samples in the selling brokers' possession; and if any dispute arises it shall be settled by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, and the brokers awarded that the vendee should take it with a certain abatement:—Held, that as the contract was for the sale of specific goods, the guarantee was not a condition, but only a warranty, and that the buyer could not reject the wool on account of its inferiority. *Heyworth* v. *Hutchinson*, 36 L. J., Q. B. 270; L. R. 2 Q. B. 47.

Goods Returned to and Used by Seller.]—In an action for a breach of a warranty of a horse, the buyer failed to prove a warranty at the time of sale; and it appeared that he had returned the horse to the seller, who stated that he would keep it without prejudice, but afterwards used and offered to sell it to a third person:—Held, that by so doing he rescinded the original contract of sale; and the jury having found a verdict for the buyer for the sum paid for the horse, the court refused to disturb it. *Long* v. *Preston*, 2 M. & P. 262; 7 L. J. (o.s.) C. P. 14.

Not Bound to Return Rejected Goods.]—When goods sold by sample are, when delivered, found to be not equal to sample, the purchaser has a right to reject them, and it is sufficient if he gives the seller notice that he rejects them, and that the goods are at the seller's risk, and he is not bound to return them to the seller or to offer to do so, or to place them in neutral custody. *Grimoldby* v. *Wells*, 44 L. J., C. P. 203; L. R. 10 C. P. 391; 32 L. T. 490; 23 W. R. 524.

Where Goods kept.]—Semble, that the purchaser of a specific chattel, under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement, authorising the return or consent of the vendor. But where the contract is executory only, when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose, the vendee may rescind the contract, if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of owner over them, as by selling them. *Street* v. *Blay*, 2 B. & Ad. 456.

—— **Trial.**]—If a party buys a specific cargo of goods, expected by a particular ship, and which are warranted to be of a particular quality, he has a right, on the arrival of the ship, to inspect such cargo before it is delivered to him, in order to ascertain whether the warranty has been complied with; and, if it has not, he may reject the cargo altogether. But if the cargo is once delivered to him, he has no right to return it, on the ground that it does not correspond with the warranty. *Toulmin* v. *Hedley*, 2 Car. & K. 157.

A., as agent of B., sold a mare to C., and having no express authority from B. to warrant her, refused to do so, but, at the time of the sale, told C. that "if the mare was not all right, she was not his." C. thereupon paid the price, which was received by B. The mare proved unsound. C. returned her to A., and sued B. in the county court for a return of the money. The judge left the following questions to the jury: first, was the mare sound or unsound at the time of the sale? secondly, was there a warranty given by A. to C.? thirdly, was the warranty given by the authority of B.? and fourthly, when the mare was sent back to A., was she received by him for B. or for C.? The jury answered the first and third questions in the negative, and the second in the affirmative, and to the last, that the mare was not received back by A. on B.'s account. The judge thereupon entered a verdict for B. The court directed a new trial, on the ground that the proper question to leave to the jury was,

whether it was part of the contract that the mare should be returned if she proved unsound. *Foster* v. *Smith*, 18 C. B. 156.

Goods used.]—A vendee of goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract and recover back the price. *Harnor* v. *Groves*, 15 C. B. 667; 3 C. L. R. 406; 24 L. J., C. P. 53; 3 W. R. 168.

The plaintiff bought saffron of an inferior quality, and having kept it six months, and sold part, he then objected that the article was not saffron:—Held, in an action for a breach of warranty, that, from the length of time and inferior price given, it was such an article as the plaintiff intended to purchase. *Prosser* v. *Hooper*, 1 Moore, 106; 19 R. R. 530.

A party bought a ship under a representation that she was copper-fastened. He ascertained in the course of a few days that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned:—Held, that this delay would not prevent his recovering in an action for the misrepresentation, provided the action was in other respects maintainable. *Freeman* v. *Baker*, 2 N. & M. 446; 5 Car. & P. 475; 5 B. & Ad. 797; 3 L. J., K. B. 17.

Where A. agreed to sell to B. a quantity of prime bacon which B. weighed and examined, and paid for by a bill at two months, but before the bill became due gave notice to A. that the bacon did not answer the contract:—Held, that B. could not give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods. *Yeats* v. *Pim*, 2 Marsh. 141; 6 Taunt. 446; Holt, N. P. 95; 16 R. R. 653.

A soap-boiler using barilla warranted of a particular quality, in eight successive boilings, without complaint, must pay the full price. *Hopkins* v. *Appleby*, 1 Stark. 477.

Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury whether the vendee, who complains that they are unfit for the purpose for which they were intended, had used them further than was necessary, in order to give them a fair trial. And if not, the things being bulky, and after a reasonable trial, found unfit for such purpose, the vendor, upon notice, is bound to take them away; but if the vendee retains them, without giving such notice, he is liable to pay for the value of the materials. *Okell* v. *Smith*, 1 Stark. 107; 18 R. R. 752.

If one orders a certain machine, e.g. a threshing-machine, which when sent to him turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for if he keeps it a long time without doing either, he will be taken to have waived all objections to its goodness. *Cash* v. *Giles*, 3 Car. & P. 407.

As soon as goods are discovered not to answer the order given, they should be sent back, or notice given to the vendor to take them back, or an action cannot be maintained on the ground of unfitness of the article. *Fisher* v. *Samuda*, 1 Camp. 190.

A person who has purchased a horse warranted sound, selling it again, and then repurchasing it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he, by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence in reduction of damages. *Street* v. *Blay*, 2 B. & Ad. 456.

In an action for the recovery of the price of a horse, it is no defence that the warranty was not true, if the buyer did not return him after being apprised of the defect, but rendered the horse less valuable by the application of medicines. The vendee's remedy is an action against the seller for a defect in the warranty. *Curtis* v. *Hannay*, 3 Esp. 82.

Recovery of Price by Seller on Breach.]—It will be a good defence to an action for the price of goods sold under a warranty that such goods were not of the same description as those warranted. *Poulton* v. *Lattimore*, 4 M. & Ry. 208; 9 B. & C. 259; 7 L. J. (o.s.) K. B. 225.

In an action on a bill given for the price of goods sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand if the defendant has tendered back the goods, although the plaintiff did not accept them. *Lewis* v. *Cosgrave*, 2 Taunt. 2.

In an action for the value of goods ordered by the defendant from the plaintiff, but returned, it is incumbent on the plaintiff to prove that they were made agreeably to the order. *Hayden* v. *Hayward*, 1 Camp. 180.

Sale by Order of Court.]—In an action for the breach of warranty of a horse, an order may be made for the sale of a horse, as "goods which for some just and sufficient reason, it may be desirable to have sold at once." *Bartholomew* v. *Freeman*, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

Where Deceit.]—Where the facts, as between buyer and seller, amount to a warranty, the buyer may maintain assumpsit on the contract, although the facts amount to deceit on the part of the seller; and might support an action of deceit. *Wood* v. *Smith*, 5 M. & Ry. 124; 4 C. & P. 45; 1 M. & M. 539; 8 L. J. (o.s.) K. B. 50.

d. Pleadings in Actions.

i. *Parties.*

Different Owners.]—If two persons severally employ a dealer to sell their horses, and he sells both to one purchaser at an entire price, and warrants them sound, the purchaser cannot divide the contract, and bring an action on the warranty against one of the sellers in respect of the unsoundness of his horse. *Symonds* v. *Carr*, 1 Camp. 361.

ii. *Claims.*

Scienter.]—In an action for the breach of an express warranty of goods, the scienter need not be charged or proved. *Williamson* v. *Allison*, 2 East, 446.

In an action for a breach of an express warranty that a horse was quiet, if the declaration alleges that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved. *Gresham* v. *Postan*, 2 Car. & P. 540.

But in an action for the deceit when there is no warranty, it is necessary both to allege and prove a scienter. *Dowding* v. *Mortimer*, 2 East 450, n.

A declaration on a warranty alleging that seed was good, which the defendant could warrant, is sufficient after verdict. *Button* v. *Corder*, 7 Taunt. 405; 1 Moore, 109.

The plaintiff bought of the defendant the household furniture, fixtures, utensils in trade, &c., of a public-house, as per inventory taken by W. W., for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. The declaration alleged the agreement to be for the purchase of the goodwill, furniture, fixtures, &c.:—Held, that it substantially stated the true nature of the agreement. *Cater* v. *Wood*, 19 C. B. (N.S.) 286.

Promise Stated in Part only.]—Where the whole consideration of a promise is truly stated, and also all such part of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken; as where the plaintiff declared that, in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, which should be worth 80*l.*, and be a young horse, and then alleged a breach in both those respects:—Held, sufficient, though the proof was not only of a promise that the second horse should be worth 80*l.* (which it was not), and be a young horse, but also of a warranty that it was sound, and had never been in harness. *Miles* v. *Sheward*, 8 East, 7.

Statement of Consideration for Promise.]—A declaration stated that heretofore, to wit, on the 29th of September, 1840, in consideration that the plaintiff at the request of the defendant had bought of the defendant a horse for 30*l.*, he promised the plaintiff that the horse was sound and free from vice:—Held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of sale the only implied promise was to deliver the horse on request, and that after the sale, therefore, there was no consideration for the subsequent express promise of warranty. *Roscorla* v. *Thomas*, 2 G. & D. 508; 3 Q. B. 234; 11 L. J., Q. B. 214; 6 Jur. 929.

A declaration alleged, that, in consideration that the plaintiff would buy of the defendant a horse, at a "certain price or sum, to wit, the sum of 56*l.* 16*s.*," he promised that the horse was sound. Breach, that he was unsound. At the trial, it was proved that the plaintiff, who was a tailor, agreed to give for the horse 55*l.* and a new pair of breeches, value 1*l.* 16*s.*:—Held, no variance. *Saxby* v. *Wilkin*, 11 M. & W. 622; 1 D. & L. 281; 12 L. J., Ex. 381; 7 Jur. 704.

Proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 4*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that, in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the 31*l.* 10*s.* *Hands* v. *Burton*, 9 East, 349.

In an action for breach of a warranty of the soundness of the defendant's mare, the plaintiff in his declaration alleged, that, in consideration that he would deliver a horse of his to the defendant, and also pay him a certain sum in exchange for a mare of the defendant, the latter undertook that she was sound. In order to prove the warranty of the defendant's mare, the plaintiff produced a receipt written by the defendant, and given on the payment of the money, in which it was stated that both the horse and mare were warranted sound:—Held, that the declaration could not be supported, as it did not set out the whole of the consideration, the plaintiff not having alleged that he had warranted his horse to be sound. *Cross* v. *Bartlett*, 3 M. & P. 537; 8 L. J. (O.S.) C. P. 22.

Variance by Conditional Promise.]—In an action on a warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*; but the consideration, as proved, was, that the plaintiff would give that sum, and, if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse:—Held, no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting in point of law to a promise. *Guthing* v. *Lynn*, 2 B. & Ad. 232.

A plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring the plaintiff 4*l.* or 5*l.* The averment in the declaration was, that, in consideration that the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound:—Held, a variance. *Blyth* v. *Bampton*, 3 Bing. 472; 11 Moore, 387; 4 L. J. (O.S.) C. P. 157.

See further, ante, col. 397.

Liability for Diseased Animals.]—A declaration alleged that the defendant was possessed of a horse, and knowing it to be afflicted with glanders, caused it to be sold by auction at a horse repository, and the plaintiff, believing it to be in a healthy state, became the purchaser, and paid a large sum for it, and by reason of its diseased state the horse was utterly worthless to the plaintiff, and he paid a veterinary surgeon for examining it; and in consequence of the horse being put into the plaintiff's stable, wherein another horse of his was, that horse became infected and died of the disease, and the plaintiff was obliged to pay money in endeavouring to cure it:—Held, that the declaration disclosed no cause of action. *Hill* v. *Balls*, 2 H. & N. 299; 27 L. J., Ex. 45; 3 Jur. (N.S.) 592; 5 W. R. 740.

The mere fact of selling a glandered horse is not an illegal act, either at common law or under 16 & 17 Vict. c. 62. *Ib.*

A horse repository is not necessarily a "public and open place" within s. 1 of the statute. *Ib.*

To bring a horse infected with glanders into a public place to the danger of infecting the people is a misdemeanour at common law. *Reg.* v. *Henson*, Dears. C. C. 24.

An indictment that the defendant knew that a mare which he brought into a fair was glandered:

—Held, good, without an averment that he knew that the glanders was a disease communicable to mankind. *Ib.*

iii. *Defences.*

No Promise—Evidence.]—A declaration stated, that the defendant undertook and promised that the horse was sound and quiet in harness. He pleaded that he did not promise as alleged. The evidence was, that he had said that the horse was quiet and sound in all respects:—Held, first, that the proof satisfied the allegation; and, secondly, that he could not under the plea give any evidence tending to show that the horse was not unsound. *Smith* v. *Parsons*, 8 Car. & P. 199.

Infancy.]—Infancy is a good defence to an action on the warranty of a horse. *Howlett* v. *Haswell*, 4 Camp. 118.

Where a plaintiff declared that, having agreed to exchange mares with the defendant, the defendant by falsely warranting his mare to be sound well knowing her to be unsound, falsely and fraudulently deceived the plaintiff:—Held, that infancy was a good plea in bar. *Green* v. *Greenbank*, 2 Marsh, 485; 17 R. R. 529.

e. Evidence.

Parol.] — The defendant gave a verbal warranty of a horse, which the plaintiff thereupon bought and paid for, and the defendant then gave him the following memorandum:—"Bought of G. P. a horse for the sum of 7*l.* 2*s.* 6*d.* G. P.":—Held, that parol evidence might, notwithstanding, be given of the warranty. *Allen* v. *Pink*, 4 M. & W. 140; 1 H. & H. 207; 7 L. J., Ex. 206.

In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to show that the seller's agent, at the time of the sale, represented the goods to be of a particular quality. *Harnor* v. *Groves*, 15 C. B. 667; 3 C. L. R. 306; 24 L. J., C. P. 53; 3 W. R. 168.

In an action for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would have been had she been built of the materials described:—Held, that, although the sale took place under a written contract, setting forth the build and dimensions of the vessel (but omitting all mention of the materials), the plaintiff was at liberty to give in evidence verbal statements and declarations made by the defendant touching the ship, pending the negotiations for the purchase, and before the written contract was entered into, amounting to a warranty that her frame was of a particular description of timber. *Wright* v. *Crookes*, 2 Scott (N.R.) 685.

A horse was sold under a written warranty, contained in a receipt for the purchase money, which was given to the buyer's servant; the son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself), got the receipt back from the servant by a fraudulent representation:—Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness; the son, being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—Held, that this fact did not vary the case, so as to let in the parol testimony. *Best* v. *Osborne*, 2 Car. & P. 74; R. & M. 290.

Where representations, which may amount to a warranty, are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of showing that no warranty was contemplated by the parties. *Stucley* v. *Baily*, 1 H. & C. 405; 31 L. J., Ex. 483; 10 W. R. 720.

On a sale of goods, a sale-note having been given, with a certain description relied on as a warranty, evidence is not admissible to show that they were to be bought as they were. *Schweir* v. *Thorne*, 3 F. & F. 243.

Sufficiency.]—In an action by a farmer against a chemist for vending a sheep-wash, which killed his sheep, the evidence being that it was used according to the chemist's directions, and that the sheep died from the absorption of arsenic contained in it, although it was also shown that the same mixture had been sold by the chemist for many years, and used with impunity, the jury was directed that they might find for the plaintiff upon this evidence. *Black* v. *Elliot*, 1 F. & F. 595.

Letters.]—In an action on a warranty of a horse, letters passing between the plaintiff and the defendant, in which the plaintiff writes:—"You will remember that you represented the horse to me as a five year old," &c., to which the defendant answers:—"The horse is as I represented it," are sufficient evidence from which the jury may infer that a warranty was given at the time of sale; and it is not necessary to give other proof of what actually passed when the contract was made. *Salmon* v. *Ward*, 2 Car. & P. 211.

Invoice.]—The description in the invoice of goods is sufficient proof of a warranty that they should be of that particular description. *Bridge* v. *Wain*, 1 Stark. 504; 18 R. R. 815.

Receipt—Stamp.]—A receipt for the price of a horse containing a warranty of soundness may be read in evidence to prove the warranty, without an agreement stamp. *Skrine* v. *Elmore*, 2 Camp. 407; 11 R. R. 754.

Custom.]—A contract was made for the sale of a quantity of "Scott & Co.'s mess-pork," and it appeared by the evidence of mercantile men that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—Held, that the evidence of the mercantile men was properly received. *Powell* v. *Horton*, 2 Hodges, 12; 2 Bing. (N.C.) 668; 3 Scott, 110; 5 L. J., C. P. 204.

Where timber was sold, warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view of showing that in the timber trade the word "sound" had a technical and conventional meaning. *Woodhouse* v. *Swift*, 7 Car. & P. 310.

Rules—Of Auction Mart.]—The court will take into consideration the rules of an auction mart in an action for breach of warranty; but where the sale was by private contract those rules cannot prevail. *Tummons* v. *Gammell*, 15 L. T. 191. See *Smart* v. *Hyde*, 8 M. & W. 723; 1 D. (N.S.) 60; 10 L. J., Ex. 479.

What constitutes a public sale at a horse repository determined. *Ib.*

—— **Of Horse Repository—Notice of.**]—Certain rules were posted up at a repository for horses, regulating sales by private contract there:—Held, that parties contracting at the repository having notice of the rules, impliedly adopted the terms of the rules. *Bywater* v. *Richardson*, 3 N. & M. 748; 1 A. & E. 508; 3 L. J., K. B. 164.

A plaintiff bought a horse, warranted sound, by private contract, at a repository. At the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was, that a warranty of soundness there given should remain in force till noon of the day following, when the sale should become complete, and the seller's responsibility terminate, unless a notice and a surgeon's certificate of unsoundness were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made till after twelve on the following day. The unsoundness was of a nature likely not to be immediately discovered: some evidence was given to show that the defendant knew of it; and the horse was shown at the sale under circumstances favourable for concealing it. After a verdict for the plaintiff:—Held, that there was sufficient proof of the plaintiff having had notice of the rules at the time of the sale to render them binding on him. *Ib.*

Held, also, that the rule in question was such as a seller might reasonably impose, and that the facts did not show such fraud or artifice in him as would render the condition inoperative. *Ib.*

Proof of Unsoundness of which Seller had no Notice—New Trial.]—In an action on a warranty of a horse, it is no ground for a new trial that the defendant was taken by surprise by the proof of a particular kind of unsoundness, of which he had no previous notice. *Atterbury* v. *Fairmanor*, 1 L. J. (O.S.) C. P. 63.

f. Damages.

Diseased Cattle.]—The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot-and-mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question:—Held, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer and that he would or probably might place the infected cow with others. *Smith* v. *Green*, 45 L. J., C. P. 28; 1 C. P. D. 92; 33 L. T. 572; 24 W. R. 142.

The defendant, who was a cattle dealer and a butcher, knowing that a cow which he had recently bought was a foreign cow, and that she was suffering from an infectious disease, but not knowing that the disease was the cattle plague, from which she died shortly afterwards, sold her to the plaintiff, a farmer, warranting her to be found, and falsely representing that she was an English cow which had come from his father's farm, and that she was free from disease. The plaintiff having placed her in a cowhouse with five of his other cows, they became infected by the cattle plague, from which the cow, which he had bought, was in fact suffering, and died:—Held, in an action, containing counts on the warranty and for the false representation, first, that under the latter count, as well the value of the five cows, as that of the cow which the plaintiff had bought, was recoverable, his loss in respect of both those grounds of damage being the direct and natural result of the defendant's representation. *Mullett* v. *Mason*, 1 H. & R. 779; 35 L. J., C. P. 299; L. R. 1 C. P. 559; 12 Jur. (N.S.) 547; 14 L. T. 558; 14 W. R. 898. But see *Ward* v. *Hobbs*, ante, col. 493.

Sale of Picture.—Sub-sale.]—A. sold a picture to B., warranting it a Claude; B. sold it to J., and warranted it a Claude to him. The picture was not a Claude, and J. brought an action against B. on the warranty. B. defended the action, and J. recovered damages and costs against him. B. then brought an action against A. upon the first warranty:—Held, that B. was in that action entitled to recover against A. the amount of the damages and costs that B. had paid to J., and also the costs incurred by B. in defending the first action; but that, if the jury should be of opinion that the sale from B. to J. was not a real sale of the picture in the ordinary course of business, but merely a colourable sale, on the usurious discount of a bill, they ought to disallow these sums. *Pennell* v. *Woodburn*, 7 Car. & P. 117.

Sale of Seed.]—On a sale of seed potatoes, the potatoes were of an inferior quality to that warranted:—Held, that the purchaser was entitled to the difference in value between the crop actually produced and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination. *Wagstaff* v. *Shorthorn Dairy Co.*, 1 Cab. & E. 324.

Evidence of Claims by Sub-purchasers—Admissibility.]—In an action brought by a purchaser on a breach of warranty on a sale of goods, evidence given by sub-purchasers who had bought portions of the goods with a similar warranty, that they had made claims against the purchaser for breach of warranty is admissible as the natural and probable result of the breach of the original contract, and notwithstanding that none of the claims have been satisfied. *Randall* v. *Raper*, El. Bl. & El. 84; 27 L. J., Q. B. 266; 4 Jur. (N.S.) 662; 6 W. R. 445.

Keep of Horse.]—In an action for the breach of a warranty of soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep for such time only as would be required to resell the horse to the best advantage. *M'Kenzie* v. *Hancock*, R. & M. 436.

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time till he can fairly sell it, and may recover against the seller for keeping the horse during that time. *Ellis* v. *Chinnock*, 7 Car. & P. 1690. And see *Clare* v. *Maynard*, and *Chesterman* v. *Lamb*, infra, col. 528.

How Calculated.]—The damages for breach of warranty may be the whole value the plaintiff would have received had the defendant performed his contract. *Bridge* v. *Wain*, 1 Stark. 504; 18 R. R. 815.

In an action for breach of a contract, by delivering goods of a quality inferior to those contracted for, the proper measure of damages is the difference between the value of goods of the quality contracted for, at the time of the delivery, and the value of the goods then actually delivered, or their value as ascertained by a resale within a reasonable time; and the fact of the goods having been previously paid for, cannot be taken into consideration in estimating the damages. *Loder* v. *Kekulé*, 3 C. B. (N.S.) 128; 27 L. J., C. P. 27; 4 Jur. (N.S.) 93; 5 W. R. 884.

A., at Liverpool, entered into a contract with B. for the purchase of a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to A. and paid for; on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp; but it was not merchantable. B. did not know of the state in which the hemp had been shipped at Singapore. A. sold the hemp by auction as "Manilla hemp with all faults," and it realised 75 per cent. of the price which similar hemp would have fetched if undamaged:—Held, that there was an implied warranty, on the part of B., to supply Manilla hemp of the particular quality of which the bales consisted in a merchantable condition; and that A. was entitled, as damages, to the difference between what the hemp was worth when it arrived and what the same hemp would have realised had it been shipped in a state in which it ought to have been shipped. *Jones* v. *Just*, 37 L. J., Q. B. 89; L. R. 3 Q. B. 197; 18 L. T. 208; 16 W. R. 643.

Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him: if the horse is not returned, the measure of damages is the difference between his real value and the price given: if the horse is not tendered to the seller, the purchaser can recover no damages for the expense of his keep. *Caswell* v. *Coare*, 1 Taunt. 566; 2 Camp. 82; 10 R. R. 606; 11 R. R. 668.

—— **On Sub-sale.**]—If one merchant sells goods to another, who he knows buys them in order to sell again, the first is liable for all the ordinary natural consequences of selling an inferior article, if, upon the second merchant disposing of the article to his customers, it turns out to be of bad quality. Therefore, where A. sells manure to B., who sells it again to various customers, by one of whom it is discovered to be bad, but not complained of by the others up to the time of the trial, the proper measure of damage, in an action by B. against A. for the breach of A.'s contract, is the difference between the real value of the bad manure and the price at which it was sold to B. *Dingle* v. *Hare*, 7 C. B. (N.S.) 145; 29 L. J., C. P. 143; 6 Jur. (N.S.) 679; 1 L. T. 38.

Although a vendor of a commodity has purchased and resold with a warranty, he may recover in respect of liabilities to his vendees, yet the question of such liability will depend upon the opinion of the jury, on the whole case, as to the breach of the original warranty. *Henley* v. *Woodcock*, 1 F. & F. 532.

A declaration on the breach of a warranty of a horse, alleged, by way of special damage, that the plaintiff had resold the horse at an advanced price; that the horse had been returned to him, and that he had lost all the profit which he would have derived from the resale:—Held, that the plaintiff could not recover the difference between the two prices, it not being averred that the increased value of the horse was owing to any outlay by him since it had been in his possession. *Clare* v. *Maynard*, 1 N. & P. 701; 6 A. & E. 519; 1 W. W. & H. 274; 7 Car. & P. 741; 6 L. J., K. B. 138.

Held, at nisi prius, that A. could not recover the expenses of obtaining a certificate of unsoundness from the Veterinary College, or of counsel's opinion, but that he was entitled to be paid the expenses of bringing the horse to London (where he had brought it before the resale), and of its keep. *Ib.*

Where a horse warranted sound, turns out to be unsound, and is, after notice to the seller, resold by the purchaser, the latter may recover not only the difference of price between the first and second sales, but also for the keep of the horse for a reasonable time. *Chesterman* v. *Lamb*, 4 N. & M. 195; 2 A. & E. 129.

But the question, whether the horse has been kept an unreasonable time before the resale, is a question for the jury; and if the seller rests his defence on the soundness of the horse, and does not request the judge to put the question of time to the jury, the court will not, upon a motion for a new trial, look into the evidence upon this point. *Ib.*

A. sold and warranted a horse to B., which B. a few days afterwards, sold to C. The horse proved unsound, and C. recovered the price from B., in an action of which A. had notice:—Held, that B. was entitled to recover from A., not only the price of the horse, but the costs of the action by C. *Lewis* v. *Peat*, 2 Marsh. 431. *S. C.*, nom. *Lewis* v. *Peake*, 7 Taunt. 153; 17 R. R. 475. See also *Green* v. *Greenbank*, 2 Marsh. 485; 17 R. R. 529.

A plaintiff purchased a horse of the defendant, with a warranty of soundness, and sold it with a like warranty to S.; some months afterwards S. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, S. brought an action on the warranty; the plaintiff gave the defendant notice that the horse was returned to him as unsound, and an action brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by S., and failed. In an action against the defendant on his warranty, the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to S.:—Held, that the plaintiff was not entitled to recover as special damage the costs incurred by him in the defence of the former action, such defence being, under the circumstances, rash and improvident. *Wrightup* v. *Chamberlain*, 7 Scott, 598; 2 Arn. 28; 2 Jur. 328.

Breach of Warranty of Authority.] — The plaintiff being in the occupation of a house and shop, as assignee of a term which would expire

on the 25th of March, 1867, at a rent of 65*l.* a year, the defendant (who had for several years acted as agent for the freeholder, in the receipt of the rents of the property), on the 16th of November, 1863, agreed in writing, "on behalf of his brother" (the freeholder), to grant the plaintiff, at the expiration of the existing term, a renewed lease for twenty-one years at a rent of 70*l.* a year, and upon terms slightly varying from those of the former lease, the plaintiff contracting in the meantime to modernise the house by putting in a new shop-front at her own expense. The plaintiff put in a new shop-front at an expense of 50*l.*, and expended 10*l.* more in permanently improving the premises; and on the 28th of June, 1865, she contracted with B. to sell him all her interest in the existing and future leases for a premium of 150*l.*, B. taking the shop-fixtures and stock at a valuation. B. was let into possession under this agreement, and paid the premium. Neither the defendant nor his brother had notice of this agreement. The defendant had no authority from his brother to make the agreement of November, 1863; and the latter refused to ratify it. The plaintiff, who had no notice of the defendant's want of authority to make the agreement, thereupon (in conjunction with B.) filed in equity a bill against the defendant's brother for a specific performance. The brother in his answer denied all knowledge of the agreement; and the defendant, when before the examiner, swore that he was not authorised by him to enter into it: the plaintiff's bill was consequently dismissed with costs, which were paid by her. B., who had been turned out of possession, brought an action against the plaintiff upon her contract with him, and on a reference recovered damages to the amount of 280*l.*, which was made up as follows: —205*l.* assessed by the arbitrator as the value of the lease; 22*l.* 10*s.* for the loss incurred by B. on the resale of fixtures which he had brought upon the premises; 35*l.* for loss of business by removal; 17*l.* 10*s.* for solicitor's charges. These damages, together with the costs of the action and reference, were paid by the plaintiff:—Held, that the plaintiff was entitled to recover against the defendant all the costs paid and incurred by her in the chancery suit, and also the value of the lease which she had lost through the non-performance of the agreement of November, 1863 (assumed to be 205*l.*); but not the damages and costs which arose out of her agreement for the resale of the lease to B., these not necessarily or naturally resulting from the wrongful act of the defendant, and consequently being too remote. *Spedding* v. *Nevell*, 38 L. J., C. P. 133; L. R. 4 C. P. 212.

See DAMAGES FOR BREACH OF CONTRACT, post, cols. 578 et seq.

E. PERFORMANCE OF CONTRACT.

1. TIME OF DELIVERY.

Hour.]—A tender of goods to the purchaser himself at his warehouse, at an hour which leaves time enough for completing the delivery before twelve o'clock at night, is sufficient. *Startup* v. *Macdonald*, 6 Man. & G. 593; 7 Scott (N.R.) 269; 12 L. J., Ex. 477—Ex. Ch.

Secus, if, by reason of the lateness of the hour, the purchaser has left his warehouse before the arrival of the goods. *Ib.*

A party who undertakes to deliver goods within a given time performs his part of the contract if he delivers the goods within that time: the only effect of his delaying the delivery to a late hour at night is, to expose him to the risk of not being able to deliver at all. *Ib.*

Goods to be Delivered by Instalments—Failure as to one Instalment.]—The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig-iron at 42*s.* a ton, to be delivered to the plaintiff free on board at the maker's wharf, at Middlesborough, "in November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—Held, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett, L.J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards. The decision in *Hoare* v. *Rennie* (5 H. & N. 19) held to be right by Bramwell and Baggallay, L.JJ., and wrong by Brett, L.J. *Honck* v. *Muller*, 50 L. J., Q. B. 529; 7 Q. B. D. 92; 45 L. T. 202; 29 W. R. 830—C. A.

A. bought of B. 667 tons of Swedish iron, the iron to be shipped from Sweden in the months of June and July, August and September, in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in London. The seller shipped only 21 tons of iron in June, which arrived in London after the expiration of the month:—Held, that the buyer was not bound to accept the smaller quantity, or any subsequent quantity tendered, and that therefore a plea showing the non-payment of any larger quantity within the specified time, was an answer to an action for not accepting the iron, or any part of it. *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J., Ex. 73; 8 W. R. 80.

The defendant agreed to supply, during twelve months, the plaintiff with coals, to be accepted at the rate of not less than 500 tons a month. The plaintiff during the first month accepted only 158 tons. The defendant refused to supply the plaintiff with coal after the first month:—Held, that the plaintiff might maintain an action for the refusal of the defendant to supply coals after the first month. *Simpson* v. *Crippin*, 42 L. J., Q. B. 28; L. R. 8 Q. B. 14; 27 L. T. 546; 21 W. R. 141.

—— **Continuous Contract—Laches.**]—An agreement is made between A., an iron company, and B., the owner of an adjoining colliery, for the supply of coals, to be raised and delivered at the rate of 500 tons per week, A. also agreeing to loose and drain the unworked coal in B.'s colliery:—Held, that no interval in the performance of this agreement (which was continuous in its nature) should have been allowed; and that A., after the lapse of eleven months between filing his bill and breach of the agreement, was precluded from relief upon it:—Semble, that the court will not decree specific performance of a contract for delivery of a chattel by instalments where mutual duties of a complicated nature are

imposed upon the parties. Mere vicinity and convenience of situation will not induce the court to decree specific performance of a contract for supply of goods. Observations upon *Buxton* v. *Lister* (3 Atk. 383). *Pollard* v. *Clayton*, 1 Kay & J. 462; 1 Jur. (N.S.) 342; 3 W. R. 349.

—— **Non-Payment excusing further Delivery.**]—Under a contract for the sale of merchandise, a certain quantity of the goods was to be delivered in each of eleven months, payment to be by cash fourteen days after delivery:—Held, that the true meaning of the contract was that the vendor might cease delivering in any month if the purchaser neglected to pay for the previous month's delivery. *Chalmers, Ex parte, Edwards, In re*, 42 L. J., Bk. 2. Affirmed on appeal, 42 L. J., Bk. 37; L. R. 8 Ch. 289; 28 L. T. 325; 21 W. R. 349.

Delivery went on under the contract for ten months, and all the lots but the tenth were paid for. On the 22nd of December, the last month of the contract, a meeting was held of the purchaser's creditors, and he was then insolvent. On the 23rd, the vendors wrote that they refused to deliver any more goods, giving no reasons. The goods had greatly risen in value, and in January the purchaser claimed the difference in price on the December lot. In February he was adjudicated bankrupt on a declaration of insolvency. On a claim by the trustee for the difference on the December lot on account of the refusal:—Held, that the refusal was justified by the non-payment, and that the case was strengthened by the fact that the purchaser could not, at the time, make a valid payment. *Ib.*

The respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalments, and in the beginning of February made a further delivery. On the 2nd February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, bonâ fide, under the erroneous advice of their solicitor that they could not, without leave of the court, safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—Held, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance. *Mersey Steel and Iron Co.* v. *Naylor*, 53 L. J., Q. B. 497; 9 App. Cas. 434; 51 L. T. 637; 32 W. R. 989—H. L. (E.)

The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron "delivery in monthly quantities [of 166⅔ tons] over 1871, or sooner if required"; payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery:—Held, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2,000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action. *Tyers* v. *Rosedale and Ferryhill Iron Co.*, 44 L. J., Ex. 130; L. R. 10 Ex. 195; 33 L. T. 56; 23 W. R. 871—Ex. Ch.

—— **Bankruptcy of Vendor.**]—A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be 20 tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:—Held, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made. *Llansamlet Tin Plate Co., Ex parte, Voss, In re*, L. R. 16 Eq. 145.

Contract to deliver for Shipment during Two Months.]—Under a contract to deliver maize "for shipment in June and [or] July, 1869, sellers' option":—Held, that the maize must be on board so that the shipment might be complete in June and July, and that the whole cargo need not actually be put on board in those months. *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530; 20 W. R. 871—Ex. Ch.

Two contracts, each for the sale of 300 tons of rice, were made in London. The first contract (which the second exactly followed) was for 300 tons "of Madras rice, to be shipped at Madras,

or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per 'Rajah of Cochin.'" The 600 tons filled 8,200 bags. The vessel arrived at Madras in February, and on the 23rd of that month 1,780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3,560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1,080 bags was given on the 3rd of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March $\frac{\text{and}}{\text{or}}$ April:—Held, that the contract had not been complied with: that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the vendors could not recover on the contract. *Bowes* v. *Shand*, 46 L. J., Q. B. 561; 2 App. Cas. 455; 36 L. T. 857; 25 W. R. 730—H. L.

The defendant agreed to buy from the plaintiff a quantity of cotton, "to be delivered at seller's option in August or September, 1864; payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendant that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated from that day:—Held, that the plaintiff having exercised his option, was bound to deliver the cotton in August, and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton. *Gath* v. *Lees*, 3 H. & C. 558.

—— **Express Stipulation.**]—Where, by the terms of a contract for making steam-boilers, and delivery, on approval by C., at the defendant's works, when the plaintiff's liability was to cease, it was expressly stipulated that the engines should be completed within two months:—Held, that time was of the essence of the contract, and that an action might be maintained for the non-delivery within that time. *Wimshurst* v. *Deeley*, 2 C. B. 253.

—— **Sub-Contract for Supply as soon as Possible—Notice.**]—The plaintiff contracted with J. to manufacture a pile-driving machine within two months. Shortly afterwards the defendant contracted with the plaintiff to make a portion of that machine "as soon as possible." The terms of the plaintiff's contract with J. were known to the defendant. The defendant did not fulfil his contract with the plaintiff until after the expiration of the time specified in the contract between the plaintiff and J., and J. refused to accept the machine:—Held, that the contract between the plaintiff and the defendant was to be performed within a reasonable time, to be measured, not by the particular existing staff and appliances of the defendant's business, but by the time in which a reasonably diligent manufacturer of the same class as the defendant would take in carrying out the contract. *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670; 27 W. R. 221—C. A.

—— **"During next Two Months"—Custom.**]—A contract was entered into between the plaintiffs and the defendants, on the 17th June, 1872, whereby the latter agreed to supply the former with a certain quantity of puddled iron, "for immediate delivery, or say during the next two months." The defendants did not deliver any iron in June or July, but on the 15th August they sent a small portion of iron to the plaintiffs, and on the 21st of the latter month the plaintiffs, acting on the notion that under the contract the time for the delivery had expired on the 17th of that month, wrote to the defendants that as the time for delivery had expired, they would receive no more iron, and they afterwards commenced the present action for breach of contract in not delivering the iron on or before the 17th August. At the trial the judge received evidence that in the iron trade a usage or custom prevails whereby the entire months of July and August would be included in the terms "during the next two months":—Held, that the evidence was properly admissible. *Bissell* v. *Beard*, 28 L. T. 740.

—— **During Four specified Months.**]—A company contracted to buy from the plaintiff from 5,000 to 6,000 tons of iron ore, to be delivered at Cardiff "during the months of June, July, August, and September." From the correspondence between the parties which led to the contract the plaintiff had arranged with correspondents at Carthagena for the supply and shipment of the ore. By the 28th of July, 4,623 tons of ore were delivered to and accepted by the company, and on the 29th of July the "Nero" arrived with 767 tons more, notice at the same time being given to the company of her readiness to discharge. There was considerable delay in discharging the "Nero," she having made an exceptionally short voyage, and for her detention beyond the lay days, the plaintiff had to pay demurrage to the extent of 150*l.*, which he sought to recover from the company. The jury found that the tender was a reasonable one, but the company contended that the quantity ought to have been distributed ratably over the four months, and that, not being bound to accept the "Nero's" cargo till September, they were not liable to pay the demurrage sued for:—Held, that the contract gave the option to either party to deliver or to demand the amount contracted for; and as no provision was made for exercising the option at any given time, whether in the first month or the last, the plaintiff could not tell, until the option was exercised, how many tons should be delivered in any month; also, that the circumstances showed that the parties could not have contemplated equal monthly quantities. *Calaminus* v. *Dowlais Iron Co.*, 47 L. J., Q. B. 575.

—— **Day of Month.**]—The plaintiffs contracted to supply the defendants with goods, "delivering on April 17th, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance:—Held, that if on the true construction of the contract the plaintiffs were bound to commence the delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day. *Coddington* v. *Palaeologo*, 36 L. J., Ex. 73; L. R. 2 Ex. 193; 15 L. T. 581; 15 W. R. 961.

Delivery at Intervals—Payment—Course of

Dealing.]—The defendant agreed to sell to the plaintiff 200 tons of potatoes, to be delivered at T. station, and consigned to the plaintiff at N., in such quantities and at such intervals as the plaintiff should direct. The defendant delivered 16 tons 15 cwt. in five different quantities, and received the plaintiff's cheques in payment after the arrival of the potatoes, but he refused to deliver any more unless he was paid upon delivery at T. station. He also refused to deliver more than 50 tons under any circumstances. There was no agreement in writing, and it was admitted that there was no stipulation as to the time of payment:—Held, that in an action to recover damages for non-delivery, it was no misdirection on the part of the judge to tell the jury that they might accept, as evidence of what the intention of the parties was as to the time of payment, the course pursued in that respect, upon the five deliveries under the contract. *King* v. *Reedman*, 49 L. T. 473.

Fine for Delay in Delivery, how Calculated.]—The defendant entered into the following contract:—Sold to the plaintiff 5,000 tons of iron rails at 11*l.* 5*s.* per ton, delivered f. o. b., Newport, the delivery to commence by the 15th of January, and to be completed by the 15th of May. In the event of the defendant exceeding the time of delivery he shall pay by way of fine 7*s.* 6*d.* per ton per week. In the event of ships not being ready within fourteen days, notice being given, then payment to be made against wharf warrants for each 500 tons stacked and being to buyer's order. The defendants made default in the delivery of the iron, which was delivered during the months of May, June, July, August, and completed in September:—Held, that the fine to be paid for delay in delivery ought to be calculated from the time at which the contract was to be completed, viz. the 15th of May. *Bergheim* v. *Blaenavon Iron and Steel Co.*, 44 L. J., Q. B. 92; L. R. 10 Q. B. 319; 32 L. T. 451; 23 W. R. 618.

Necessity of Notice.]—A contract, under seal, recited that a railway company was desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber. This contract was based upon a specification prepared by the company, in which it was stated that the number of sleepers required under this specification was 350,000; that one-half would have to be delivered in 1847, and the other half by Midsummer, 1848; that the deliveries were to be made either by stacking the sleepers upon a wharf or properly loading them into a boat, or barge or other vessel, as might be directed by the resident engineer; and that the payments were to be made upon the engineer certifying the due delivery of each cargo. The plaintiff covenanted to supply the company with 350,000 sleepers, of the quality and description mentioned, and to deliver them within the times mentioned in the specification, as and when, and in such quantities and in such manner as the engineer of the company should, by order or requisition in writing, from time to time within the period limited by the specification direct or require. The engineer was to be at liberty, at any time before the complete execution of the contract by the delivery of the whole number of the sleepers, to alter their size, form or construction, or alter the times of delivery of any of the sleepers which should not have been delivered; and the company covenanted to pay to the plaintiff, for or in respect of the sleepers contracted to be supplied, a certain price, upon their engineer certifying the due delivery of each cargo; and it was further agreed, that 2,000*l.* of the price should be retained by the company until two months after their engineer should have certified that the whole of the sleepers agreed to be supplied by the contractor should have been supplied:—Held, that this was a positive contract of the plaintiff to supply, and by the company to take and to pay for, the whole number of the sleepers, and that the plaintiff was entitled to notice of the times when the sleepers would be required. *G. N. Ry.* v. *Harrison*, 12 C. B. 576; 22 L. J., C. P. 49—Ex. Ch.

To an action for not delivering iron sold by the defendant to the plaintiff under a contract to be delivered as required, the defendant pleaded that the plaintiff did not within a reasonable time request him to deliver the iron:—Held, that the plea was bad, since the defendant was bound to inquire of the plaintiff whether he would have the iron before he could rescind the contract on the ground that he was not within a reasonable time required to deliver it. *Jones* v. *Gibbons*, 8 Ex. 920; 22 L. J., Ex. 347; 1 W. R. 438.

In an action for not accepting oil, the declaration stated a contract to purchase forty tons of oil, the last ten tons whereof "to be delivered in all December, to be paid for on delivery," with an averment of readiness to deliver "in the month of December," and a traverse of that averment. The contract was not for any specific oil, no particular oil had been appropriated, and the brokers on each side had arranged for the previous deliveries. On the 11th of December the defendant's brokers wrote to him to know when he would receive the last ten tons. He directed a delivery to certain parties; but this was not communicated to the plaintiff, and on the 22nd of December the defendant stopped payment (towards the end of the month), upon which the defendant's brokers wrote to the plaintiff to the effect that the oil would not be received; and he then, before the end of the month, resold at a loss, and wrote to the defendant, demanding the difference:—Held, that he was entitled to recover, the jury finding that he would have been ready to deliver the oil contracted for if the defendant or his brokers had required it and offered the money. *Baker* v. *Firminger*, 28 L. J., Ex. 130.

In a contract of sale of goods to be delivered "ex quay or warehouse," there is an implied condition that notice shall be given to the buyer of the time when the goods are ready, and of the place in which they are. *Davies* v. *McLean*, 28 L. T. 113; 21 W. R. 264.

Tender of Goods in accordance with Contract after abortive Tender.]—The defendants agreed to buy of the plaintiffs a cargo of maize. The plaintiffs tendered the cargo of the "C.," which the defendants refused to accept, upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid. This dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs thereupon, and within the time limited by the contract, tendered the cargo of the "M.," which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the

"C.," the tender of which the arbitrator had decided to be invalid:—Held, that the defendants were bound to accept the cargo of the "M.," and might be sued by the plaintiffs to recover any loss which the latter might have sustained by the refusal to accept it. *Borrowman* v. *Free*, 48 L. J., Q. B. 65; 4 Q. B. D. 500—C. A.

Vendors, before the expiration of the time for the delivery of cotton, tendered marks of cotton that was not in accordance with the terms of the contract, and, on the vendee rejecting the same, they, before the expiration of the time fixed for delivery, tendered marks of cotton that was in accordance with the contract:—Held, that they had not, by the first delivery, broken the contract so as to justify S. in refusing to accept the cotton subsequently tendered. *Tetley* v. *Shand*, 25 L. T. 658; 20 W. R. 206.

A buyer entered into two contracts, each of which was for the purchase from the seller of 4,500 quarters of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation." The seller shipped on board one steamer 4,511 quarters to answer the first contract, and 1,139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—Held, that the buyer was bound to accept the 1,139 quarters in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late. *Brandt* v. *Lawrence*, 46 L. J., Q. B. 237; 1 Q. B. D. 344; 24 W. R. 749—C. A.

Goods sent to Depôt.]—In an action on a contract to deliver pheasants on the 12th October, it is sufficient to support such action if they are sent on that day to a coach-office, though they do not arrive till afterwards. *Honeywood* v. *Stone*, 1 Chit. 142; 23 R. R. 745.

Reasonable Time.]—On a contract to deliver goods generally, the vendor must prove a readiness to deliver within a reasonable time. *Macdonald* v. *Longbottom*, 1 F. & F. 538.

Readiness and Willingness.]—The plaintiff declared on a contract by the defendant to purchase iron of the plaintiff, alleging a promise by the defendant, that if the delivery of the iron should not be required by the defendant on or before the 30th April, 1845, the iron was to be paid for by the defendant on the day and year aforesaid; and averring that the plaintiff had always been ready and willing to deliver the iron in terms of the contract; that the 30th April was past before action, but the defendant had not paid for the iron:—Held, that, under the averment of readiness and willingness to deliver the iron, the plaintiff was not bound to show that any specific iron had been appropriated by him for that purpose. *Dunlop* v. *Grote*, 2 Car. & K. 158.

Postponement of Delivery.]—By a written contract the plaintiff agreed to deliver, and the defendants to accept, a certain quantity of iron, of greater value than 10*l.*, in the month of June. On the 2nd of June, and again in the middle of June, one of the defendants saw the plaintiff, and verbally requested him to allow the delivery of the iron to stand over, and the plaintiff verbally consented to his request. On the 1st of August the plaintiff pressed the defendants to take delivery, and they, after some correspondence, wrote on the 9th of August asking for further time. The plaintiff again waited, but without result. On the 20th of October the plaintiff brought an action for non-acceptance of the goods in accordance with the terms of the written contract. It was contended by the defendants that by reason of the arrangement to postpone delivery and acceptance made before any breach of the contract, the plaintiff could not recover upon the original contract, there never having been readiness or willingness to deliver or any tender of delivery on the plaintiff's part under such contract; and that the plaintiff could not rely on any new or substituted contract to accept at a later date, such contract being verbal only:—Held, that the true effect of what took place between the parties being that the plaintiff voluntarily withheld delivery at the request of the defendants, no new contract being substituted for the original written contract, the plaintiff was entitled to maintain his action; and that the damages must be estimated according to the market price of iron at a reasonable time after the last request of the defendants to withhold delivery. *Hickman* v. *Haynes*, 44 L. J., C. P. 358; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 872.

On the 15th of June, 1874, the defendant bought of the plaintiffs 100 tons of pig iron, to be delivered "25 tons at once, and 75 tons in July next." By the end of July 75 tons in all had been delivered. There was no evidence of any request by him to the plaintiffs before the end of July to delay the delivery of the last 25 tons; but it was proved that in October he verbally requested the plaintiff's manager to deliver them, in consequence of which they were forwarded in the course of the same month to the defendant, but he declined to receive them. In an action against the defendant for refusing to accept the 25 tons, he pleaded that the plaintiffs were not ready and willing to deliver the iron according to the contract:—Held, that inasmuch as the vendors were not shown to have withheld the delivery of the 25 tons in consequence of a request by the vendee before the expiration of the agreed time, viz. in July, the action was not maintainable upon the original contract; and that the subsequent conversation with the vendors' manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery. *Plevins* v. *Downing*, 45 L. J., C. P. 695; 1 C. P. D. 220; 35 L. T. 263.

On the 27th of April, A., who sold flour on commission for the defendant, a miller, verbally contracted to sell to the plaintiff 150 sacks, at 29*s.* per sack, no time being named for delivery. The defendant repudiated A.'s authority on the ground that his instructions to him limited him to 30*s.* per sack. Disputes arose between the parties, and eventually on the 8th of June, the defendant agreed to deliver the flour, which he accordingly did, and sued for and recovered the price. The plaintiff afterwards commenced an action against the defendant in a county court to recover the difference between the contract price and the price at which he had been obliged

to purchase other flour on the defendant's default. The judge found that the flour had not been delivered within a reasonable time, but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order, and that the defendant was entitled to judgment:—Held, that the decision of the county court judge was correct. *Williams* v. *Wheeler*, 8 C. B. (N.S.) 299.

Clauses entitling Vendor to suspend, or excusing him from Deliveries.]—By agreement between the plaintiffs and the defendants, the plaintiffs, who were merchants at Bilbao, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25*s.* 6*d.* per ton, cost, freight and insurance, payment to be made by cash on delivery of each shipment, "Deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we (plaintiffs) are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, railway shoots, rivers, seas, and navigation of whatever nature or kind, or through any circumstances beyond our own control:—Held, first, that the plaintiffs were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limits, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up arrears, &c.; secondly, that they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, &c., such quantities being as much struck out of the contract as if they had been actually delivered. *De Oleaga* v. *West Cumberland Iron and Steel Co.*, 48 L. J., Q. B. 753; 4 Q. B. D. 472; 41 L. T. 342; 27 W. R. 870.

2. Quantity and Quality of Goods.

"Say About."]—M., on behalf of the firm of M. & Co., merchants in Quebec, of which he was a member, entered into the following contract with R. M.—"R. M. sells, and Messrs. M. & Co. buy, all of the spars manufactured by R. M., say about 600 red pine spars, averaging by culler's measurement in Quebec sixteen inches, at the sum of, &c., delivered free of charge in Quebec. The above spars will be out of the lot manufactured by B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by B. was found to consist of 603 spars, of which only 496 averaged sixteen inches:—Held, that M. & Co. were bound to accept the 496 spars at the rate agreed on, the words "say about 600 red pine spars," being words of expectation and estimate only, and not amounting to a warranty. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609.

"More or Less."]—A club established for the supply of coals to its members, by their rules, duly certified, appointed a secretary and treasurer. The duty of the secretary was, amongst other things, to receive the members' subscriptions and pay them to the treasurer, and when necessary, to write to such merchant as the members might select for tenders for coals to be delivered at members' houses, and when the tender was accepted by the club, to draw up an agreement for the merchant to sign. The duty of the treasurer was, amongst other things, to pay the coal merchant as soon after every delivery as he should receive an order, signed by the secretary and chairman, and such order was to be given on the next Thursday night after each delivery. The plaintiff, having made a tender, which was accepted, to supply coals to the club, entered into a written agreement, signed by himself and the secretary, to supply 100 tons, "more or less," to be delivered at the members' residences, and he delivered 127 tons according to directions given by the secretary. When the time for payment arrived there was only sufficient money in the hands of the treasurer, owing to the default of the secretary, to satisfy a part of plaintiff's claim; that amount was paid to him, and he sued the defendant, a member of the club, for the residue:—Held, that defendant was liable. *Cockerell* v. *Aucompte*, 2 C. B. (N.S.) 440; 26 L. J., C. P. 194; 3 Jur. (N.S.) 844; 5 W. R. 633.

—— **"About."**]—The plaintiffs agreed to purchase of the defendants "about 300 quarters, more or less," of foreign rye, shipped on board the "A. E." at Hamburg, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburg. The ship brought 350 quarters, and the defendants refused to deliver any part unless the plaintiffs would accept the whole. The plaintiffs abandoned the contract and brought an action to recover back a sum of money which they had paid for 300 quarters:—Held, by Lord Tenterden, C.J., and Littledale, J., that, by the words "about" and "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters; by Parke, J., and Patteson, J., that at all events it lay on the defendants to show that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed. *Cross* v. *Eglin*, 2 B. & Ad. 106; 9 L. J. (O.S.) K. B. 145.

—— **Custom of Trade—Evidence—Admissibility.**]—The respondents agreed to supply to the appellants "the whole of the steel required by you," for certain works then in course of construction. The contract was made subject to certain general terms and conditions, which contained the clause, "The estimated quantity of steel we understand to be 30,000 tons more or less":—Held, that the respondents were entitled to supply all the steel required in excess of the estimated quantity of 30,000 tons, and that the contract was not qualified or affected by the clause stating that the estimated quantity was "30,000 tons more or less"; and further, that evidence of an alleged custom in the Glasgow steel trade, as to the interpretation of contracts containing such a clause, was not admissible. *Tancred* v. *Steel Co. of Scotland*, 15 App. Cas. 125; 62 L. T. 738—H. L. (Sc.)

"3,000 tons, 10 per cent. more or less"—Option to ship more or less—Tender of Bill of Lading for 3,800 tons.]—By a contract in

writing K. brought from B. "about 3,000 tons of wheat (10 per cent. more or less) to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause: "Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account." B. informed K. that 3,800 tons had been shipped on the "Bombay," and that he appropriated 3,000 tons of that shipment to the contract with K., and he subsequently sent K. an invoice for 3,000 tons ex "Bombay." The bills of lading for the 3,800 tons were two for 1,750 tons each and two for 250 tons each. K. offered to deliver to B. either all the bills of lading or two for 1,750 tons each, but B. refused to accept the tender or to pay any part of the price:—Held, that the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought, and were entitled to refuse a tender made by the sellers. *Keighley, Maxted, and Co.* and *Bryan, Durant, and Co., In re*, 70 L. T. 155; 7 Asp. M. C. 418—C. A.

"Say not Less."]—A declaration on the following contract—"J. S. sold to L. & Co. what he may pull, up to 6th January, say not less than 100 packs, of combing skin, at 7½*d.* per lb., delivered in M., allowing three months' interest for cash, in clean and dry condition. B. Dec. 12/48." Averments, that J. S. was a puller or preparer for sale of combing skin, which is a kind of wool. Breach, that he did not deliver 100 packs:—Held, that the words "say not less than 100 packs" were not mere words of expectation, showing what the parties supposed the quantity would prove to be, but amounted to a contract to deliver at least that quantity, and that the breach was well assigned. *Leeming* v. *Snaith*, 16 Q. B. 275; 20 L. J., Q. B. 164; 15 Jur. 988.

"Any less Number that may Arrive."]—B. contracted to buy of P. "115 bales containing 18,440 (or any less number that may arrive) East India hides, shipped per 'Ontario,' Calcutta to Hamburg, and to be delivered in London, at 11½*d.* per lb. round, but the wrappers to be charged 8*d.* per lb." The ship having been compelled by stress of weather to put back to Calcutta, eighteen of the bales were found to be damaged, and were sold. The remaining ninety-seven bales arrived, but the buyer refused to accept them:—Held, that the words "or any less number that may arrive," applied to the number of bales, and not merely to the number of hides, and consequently that the buyer was liable for not accepting the ninety-seven bales. *Beckh* v. *Page*, 5 C. B. (N.S.) 708; 28 L. J., C. P. 164; 5 Jur. (N.S.) 735. Affirmed, 7 C. B. (N.S.) 861; 28 L. J., C. P. 341; 5 Jur. (N.S.) 1405; 7 W. R. 588—Ex. Ch.

Several Contracts—Amount arriving deliverable.]—The plaintiffs, who expected to receive 576 bales of cotton from Madras, contracted to sell 202 bales thereof to C.; then 123 to the defendants; then, again, 154 to the defendants; and then ninety-seven to G. By these contracts the buyers were to take what arrived deliverable. Only 275 bales arrived deliverable. The plaintiffs delivered sixty to C., thirty to G., and thirty-three to the defendants under their first contract; they then tendered the remaining 152 to the defendants, in fulfilment of their second contract, which the defendants refused to accept:—Held, that this second contract with the defendants meant, that the plaintiffs were to deliver and the defendants to accept the residue (up to 154) beyond 123; and that though the plaintiffs had broken their first contract with the defendants, they had fulfilled their second, and were entitled to succeed. *Arbuthnot* v. *Streckeisen*, 35 L. J., C. P. 305.

"Cargo."]—A. ordered of B. "a small cargo (of lathwood) of about the following lengths, &c., in all about sixty cubic fathoms," and B. accepted the order. B., not being able to procure a vessel of the exact size, chartered a vessel loaded with eighty-three fathoms. On the arrival of the vessel B.'s agent unloaded, measured and set apart timber to answer the order, and tendered A. a bill of lading for that quantity, and a draft for acceptance; but he declined to accept on the ground that the cargo was in excess of the order:—Held (per Kelly, C.B., and Cleasby, B., Martin, B., dissentiente), that "cargo" meant a whole cargo, and not a parcel of a cargo, and that B. had not complied with the order so as to entitle him to maintain an action for non-acceptance of the cargo. *Kreuger* v. *Blanck*, 39 L. J., Ex. 160; L. R. 5 Ex. 179; 23 L. T. 128; 18 W. R. 813.

The plaintiff sold to the defendant "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum . . . to be shipped from New York . . . and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive (buyer's option)." The plaintiff chartered a vessel, on which were placed 3,000 barrels of petroleum, and a bill of lading was signed making them deliverable to the plaintiff; but as this quantity did not constitute a full cargo, 300 additional barrels were placed on board, which were marked with a different mark, and for which a separate bill of lading was signed. The plaintiff gave notice to the defendant of the shipment of the 3,000 barrels, and as ready to order the vessel from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3,000 barrels and to take the 300 barrels himself, or to deliver to the defendant at any such port 2,750 barrels as the mean between 2,500 and 3,000, but the defendant refused to accept either the 3,000 barrels or any other quantity. The plaintiff having brought an action for non-acceptance:—Held, that, on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it; that the defendant was therefore not bound to accept part of a cargo, and that the action was not maintainable. *Borrowman* v. *Drayton*, 46 L. J., Ex. 273; 2 Ex. D. 15; 35 L. T. 727; 25 W. R. 194—C. A.

—— Absolute Contract.]—B. contracted to sell to S. "about 500 tons nitrate of soda, in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price and upon certain terms and conditions. The contract then proceeded: "It is understood that the nitrate of soda is to form the full and complete cargo of the 'John Phillips,' 345 tons register,

now on her passage to Sydney, to proceed thence, without undue delay, to the west coast of South America, there to unload the above. In the unexpected event of the 'John Phillips' getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the seller agrees to deliver, and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to the arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the vessel on her homeward voyage: in which case this contract is to be considered void, but in no other event whatever" :—Held, that this was an absolute contract for the sale of 500 tons, and not of a quantity limited by the capacity of the vessel named. *Bourne* v. *Seymour*, 16 C. B. 337 ; 24 L. J., C. P. 202 ; 1 Jur. (N.S.) 1001 ; 3 W. R. 511.

Held, also, that the contract did not amount to a warranty that the "John Phillips" should be of capacity to carry the whole 500 tons. *Ib.*

—— **Contract within Certain Limits.**]—The defendants, employed by the plaintiffs as their brokers, made a contract for the sale by the plaintiffs to D., the principal of the defendants, of a cargo of wheat, to be shipped in any ship the sellers might select of a specified class, "of about 2,000 quarters—say 1,800 to 2,200 quarters —at the price of 52*s.* per delivered quarter of 492 lbs., to any safe port in the United Kingdom, calling for orders as usual. The measure, for the sake of invoice, to be calculated at the rate of 100 chetwerts, equal to 72 quarters. Sellers guarantee delivery of invoice weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be the result of damage or heating. Payment, cash in London in exchange for usual shipping documents." While the cargo was on board ship at sea the shipping documents were tendered to D., and in them the cargo was stated to consist of 3,077 chetwerts, making, at the rate of 72 quarters to 100 chetwerts, 2,215 quarters. The invoice stated that the cargo consisted of 2,200 quarters, and the cargo was more than 1,800, and less than 2,200. In an action against the defendants, D. having refused to accept the shipping documents. and to pay for the cargo : —Held, that D. was justified in such refusal, inasmuch as the agreement was, that the cargo should not exceed 2,200 quarters, and by accepting the shipping documents he would have been liable to pay for the excess, if there had been any. *Tamvaco* v. *Lucas*, 1 El. & El. 581 ; 28 L. J., Q. B. 150 ; 5 Jur. (N.S.) 731 ; 1 L. T. 161.

A contract was entered into between the defendants and the plaintiffs for the sale to the former of a cargo of wheat not shipped. In the contract the cargo was described as consisting "of about 2,000 quarters, say from 1,800 to 2,200 quarters, at the price of 50*l.* say 50*s.* per delivered quarter of 492 lbs. The measure, for the sake of invoice, to be calculated at the rate of 100 chetwerts, equal to 72 quarters. Sellers guarantee delivery of invoice weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be result of sea damage or heating. Payment, cash, in London, in exchange for usual shipping documents, as soon as the ship has got out of the sea of Azoff." The cargo was at the time it was shipped, and at all times subsequent, less than 1,800 quarters both according to the measure of 100 chetwerts, equal to 72 quarters, and according to the measure that each quarter was to weigh 492 lbs. In an action for the price :— Held, that inasmuch as, according to the contract, the cargo was to be between the limits of 1,800 and 2,200 quarters, and the cargo of which the shipping documents were tendered was less than 1,800 quarters, the defendants were not liable. *Tamvaco* v. *Lucas*, 1 El. & El. 581 ; 28 L. J., Q. B. 301 ; 5 Jur. (N.S.) 1258 ; 7 W. R. 568.

On Board Ships.]—A. agreed to sell to B. 50 tons St. Petersburg sound clean hemp, at 59*l.* per ton, to be shipped from St. Petersburg in June or July following, and the ship's name declared as soon as known. If the ship should not arrive by the 31st of December the contract to be void. On the 5th of September A. gave B. notice that the 50 tons were shipped in the "Lively," but on the 20th claimed the right (which B. denied) of supplying the deficiency, if any, from another ship. The "Lively" arrived on the 20th of September with 44 tons, 20 only of which were delivered to B., the rest being shipped at St. Petersburg to other persons. The remaining 30 tons arrived in another ship on the 4th of October : —Held, first, that A. was not confined by the contract to one ship ; secondly, that the notice of the 5th September having proceeded on mistake, he was not precluded from supplying the deficiency by another vessel ; and, thirdly, that he was only bound to deliver to B. from the "Lively" so much as was ascribed to B. *Thornton* v. *Simpson*, 2 Marsh. 267 ; 6 Taunt. 556 ; Holt, N. P. 164.

A. contracted to sell to B. 100 hogsheads of Gingelly oil "expected to arrive by the ship 'Resolute' from Madras." The "Resolute" arrived with 100 hogsheads of Gingelly oil on board, but it turned out that 34 hogsheads only were consigned to or under the power or control of A. Semble, that this did not excuse A. for the non-performance of his contract, and that it would not be performed by a delivery or tender of the 34 hogsheads over which he had control. *Fischel* v. *Scott*, 15 C. B. 69 ; 2 C. L. R. 1774.

A. sold to B. all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by C., the agent of the concern. C. shipped on board these vessels only 71 tons of hemp on account of A., but upwards of 300 tons on account of other persons :—Held, that the contract must be confined to such hemp as C. should ship as agent to A., and that A. was not answerable to B. for more than 71 tons. *Hayward* v. *Scougall*, 2 Camp. 56 ; 11 R. R. 662.

An agreement to sell a certain quantity of goods on arrival by a particular vessel, is a conditional contract dependent on the arrival of the goods. *Hawes* v. *Humble*, 2 Camp. 327, n. 11 R. R. 722, n. And see *Boyd* v. *Siffkin*, 2 Camp. 326 ; 11 R. R. 721. *Compare cases* ante, cols. 387, 388.

Right to Return whole Quantity when Part not in compliance with Order.]—The defendant gave to the plaintiff a joint order for a quantity of ready-made clothing, consisting of coats, vests, trousers, and knickerbockers, to be according to prescribed measurements and directions ; some of the goods were already made, and others had to be manufactured ; no particular time was mentioned for delivery ; one bale, value for 25*l.* 7*s.* 6*d.*, was sent according to order, and was

accepted and taken into stock by the defendant; another bale, value 21*l.* 8*s.*, was sent about a fortnight afterwards; it contained vests, trousers, and knickerbockers, value for 11*l.* 12*s.*, which were according to order, but the coats in the bale were much smaller than those ordered; the defendant, on discovering this, returned the whole of the second bale to the plaintiff:—Held, that the defendant was not bound to select and accept, and was not liable for the value of such part of the second bale as corresponded with the order, and that he was entitled to return the entire bulk, notwithstanding that he had accepted the bale first sent. *Turling* v. *O'Riorden*, 2 L. R. Ir. 82—C. A.

Sale of Goods not Divisible.] — The plaintiffs contracted to sell to the defendants 25 tons (more or less) Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared 25 tons by a vessel called the B., only 20 tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:—Held, that the contract was entire, and that the defendants were not bound to accept the 20 tons, but were entitled to insist upon the delivery of 25 tons according to the contract. *Reuter* v. *Sala*, 48 L. J., C. P. 492; 4 C. P. D. 239; 40 L. T. 476; 27 W. R. 631—C. A.

When Bound to accept Part.]—A buyer entered into two contracts, each of which was for the purchase from the seller of 4,500 quarters of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation." The seller shipped on board one steamer 4,511 quarters to answer the first contract, and 1,139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—Held, that the buyer was bound to accept the 1,139 quarters in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late. *Brandt* v. *Lawrence*, 46 L. J., Q. B. 237; 1 Q. B. D. 344; 24 W. R. 749—C. A. *And see cases*, ante, col. 532.

Tender of Larger Quantity than Ordered.]—The plaintiffs, at New York, contracted to sell and deliver 1,000 quarters of wheat to the defendants at Bristol, upon the terms, "cost, freight, and insurance." Through a mistake the plaintiffs shipped, by a sailing vessel, a cargo of 2,000 quarters of wheat to K. at Bristol. They also forwarded to K. by steamer a bill of lading and a policy of insurance of the whole cargo of wheat shipped. This policy was "free from particular average." K., at the request of the plaintiffs, accepted a bill of exchange drawn upon him by them for the price of the 2,000 quarters. The defendants afterwards refused to accept the 1,000 quarters from K.:—Held, that in an action against the defendants for breach of a contract to accept the 1,000 quarters, the plaintiffs were not ready and willing to deliver the 1,000 quarters to the defendants within the terms of their contract. *Hickox* v. *Adams*, 34 L. T. 404—C. A.

A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for. *Rylands* v. *Kreitman*, 19 C. B. (N.S.) 351.

A person having ordered of a wine merchant two dozen of port, and the same quantity of sherry, to be returned if not approved of, the merchant sent four dozen of each; the buyer returned all but thirteen bottles, objecting to the quality:—Held, that more wine having been sent than was ordered, he was entitled to return the whole, and was not bound to pay for more than he retained. *Hart* v. *Mills*, 15 M. & W. 85; 15 L. J., Ex. 200.

The defendant ordered of the plaintiffs specified quantities of particular kinds of crockery, to be sent to him by railway. They sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others; and they sent one invoice debiting the defendant with the contents of the whole crate. He refused to receive them, assigning as his reason that they were out of time. At the trial of an action for their price, an objection was taken that the defendant was not bound to take any part of the goods because of the manner in which they were sent, accompanied by goods not ordered:—Held, that the vendors had not furnished the goods so that the vendee was bound to accept them. *Levy* v. *Green*, 1 El. & El. 969; 28 L. J., Q. B. 319; 5 Jur. (N.S.) 1245; 7 W. R. 486—Ex. Ch.

Held, also, that the vendee might have taken his own goods, and rejected the excess. *Ib.*

Tender of Higher Price than Ordered.]—The defendant, a Liverpool cotton merchant, on 2nd April, 1872, authorised the plaintiffs, merchants at Liverpool and Bombay, to purchase 100 bales Salem's cotton at 8*d.* per lb., to be shipped by sailing vessel, and to draw for invoice amount at six months' sight; which drafts the defendant engaged to accept, with shipping documents attached, and to pay same. On the 22nd April, the plaintiffs wrote from Bombay that the Salem's cotton would be shipped as soon as it arrived there. On the 14th June they wrote again from Bombay, enclosing invoice of 100 bales Salem's cotton, at 8¼d. per lb., and informing the defendant that they had drawn upon him at six months' sight for the amount. On the 2nd July, before receiving the letter and invoice of 14th June, the defendant wrote to the plaintiffs' Liverpool house that he had waited more than a reasonable time, and that he declined to have anything more to do with the cotton. On the 10th July the defendant received the letter and invoice of the 14th June, and wrote again to the plaintiffs' Liverpool house, calling attention to the price charged in the invoice, and refusing acceptance of their draft. The following day the plaintiffs apologised for what they called the clerical error in the price, said they were prepared to rectify the mistake, and also tendered other cotton shipped at the time the defendant wished. The defendant refused to have anything more to do with the matter:—Held, that the plaintiffs could not

recover for the price of the cotton. *Jefferson* v. *Querner*, 30 L. T. 867.

Custom—Gross or Net Weight.]—The plaintiffs, merchants in London, ordered of the defendant, a merchant at Singapore, two parcels, of 25 tons and 150 tons respectively, of terra japonica, "provided it can be laid down here, all charges included, at 18*s.* per cwt." The defendant sent to the plaintiffs invoices and bills of lading, representing that two parcels, respectively of those weights, had been shipped to their order, and at the same time drew bills upon them for the price, which the plaintiffs, upon the faith of the representation contained in the invoices and bills of lading, accepted and duly paid. Upon the arrival of the goods in London, the net weight, exclusive of packages, which consisted of baskets and leaves, proved to be 24 tons and 132¾ tons only. The plaintiffs took the goods, and sold them; and brought an action to recover back the sum overpaid, as upon a partial failure of consideration. Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, and in London to sell it net:—Held, that the plaintiffs were entitled to recover. *Devaux* v. *Conolly*, 8 C. B. 640; 19 L. J., C. P. 71.

Contract to take all Goods required.]—By a contract between a railway company and the defendant, it was provided that he should supply, and the company should purchase, subject to the terms and to the extent thereinafter mentioned, all the coke that should be required by the company for working their railways between London and Cambridge and London and Colchester. By the fourth clause, the company engaged to take from the defendants 550 tons and 100 tons of coke weekly, during seventeen years; and they further agreed, that, if they should require more than those quantities for working their railways, they should take the same from the defendant, with a proviso, that if they should require less than the stipulated quantities, the supply should be reduced accordingly, upon giving the defendant three months' notice. And the company engaged that "so long as the defendant should punctually and duly supply the coke, and so long as the same should be of the best quality, they should abstain from making purchases of coke from any other persons:"—Held, that the readiness and willingness of the company to take from the defendant all the coke they required for the purpose of their railways was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for; and, consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by the company against the defendant for a failure to deliver the quantities contracted for. *Eastern Counties Ry.* v. *Philipson*, 16 C. B. 2; 24 L. J., C. P. 140.

W. undertook to supply a gas company, for a period of three years, with all such pipes as should from time to time during the period be required by the company, at rates specified in the agreement. The company ordered large quantities of pipes, and, when the contract expired, had in stock many thousand yards of pipes which W. had supplied, and for which he sought to recover the difference in price between the current value and the price paid according to the contract:—Held, that the contract could not be limited to orders for pipes required for use at the time of the orders, but that he was bound to supply all pipes ordered by the company for works which they were carrying on and authorised to undertake by their act of parliament. *Whitehouse* v. *Liverpool Gas Co.*, 5 C. B. 798; 17 L. J., C. P. 237.

Quality—Special Denomination.]—In a contract for delivery in this country of a raw material, the produce of a foreign country, and described by certain epithets in themselves indefinite, as long or white, the buyer is primâ facie entitled to delivery of the article which passes in the market under that designation; and if the epithet has acquired in the trade a definite meaning, as the usual or average length or quality, then the buyer is entitled to an article of such usual or average length or quality; and it is no sufficient excuse for not delivering it that it is a fair average of the growth of the year. *Frith* v. *Mitchell*, 4 F. & F. 464.

Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without warranty. *Josling* v. *Kingsford*, 13 C. B. (N.S.) 447; 32 L. J., C. P. 94; 9 Jur. (N.S.) 947; 7 L. T. 790; 11 W. R. 377.

A contract for the sale of oxalic acid is not complied with by the delivery of an article which the jury finds not to come in commercial language properly within the description of oxalic acid, even where the seller is not the manufacturer of the article, and at the time of contracting expressly declines all responsibility as to the quality, and the buyer has had an opportunity of inspecting it, and no fraud is suggested. *Ib.*

In an action for the price of coal sold as "Haswell Wallsend," without any warranty of quality or size:—Held, that the only question was, whether it was that kind of coal. *Taylor* v. *Dalton*, 3 F. & F. 263.

—— **Right to Reject when Inferior—Custom.**]—A vendor cannot compel a purchaser to accept goods inferior in quality to that contracted for, where no property in the goods has passed or the sale is not of a specific cargo. No custom exists in the Liverpool corn trade compelling the buyer to accept under such circumstances, and quære as to the reasonableness of such a custom. *Sinidino* v. *Kitchen*, 1 Cab. & E. 217.

—— **Special Mark—Falsa Demonstratio.**]—A. received an order from a correspondent at Bremen to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, and had been succeeded by a firm of Hopkins & Co. (the plaintiff); and he accordingly, through a broker, bought of the plaintiff sixty-seven tons of iron, which was described in the bought and sold notes as "S. & H. (crown) common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co." with a crown, and was rejected by A. In an action for refusing to accept the iron, the jury found that the mark "S. & H." was not a

material part of the bargain, and that the article tendered was substantially what A. bargained for:—Held, that, construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as falsa demonstratio, and that the contract was complied with by the tender of iron marked "H. & Co." *Hopkins* v. *Hitchcock*, 14 C. B. (N.S.) 65; 32 L. J., C. P. 154; 9 Jur. (N.S.) 896; 8 L. T. 204; 11 W. R. 597.

—— **Sale of Rice "in Double Bags."**]—The defendant contracted to deliver to the plaintiff rice "in double bags," to be shipped for New York. There was evidence that rice in single bags would not readily sell in the American market, and that in New York double bags were considered essential for transit to the west:—Held, that, as the packing in double bags affected the quality and description of the rice sold, the plaintiff was entitled to reject it if sent in single bags. *Makin* v. *London Rice Mill Co.*, 20 L. T. 705; 17 W. R. 768.

—— **"To Meet Convenience and Taste."**]—A. having applied to R., a coachmaker, to build for him a carriage of a particular description, the latter, at his request, sent him a drawing, which A. returned, with objections. B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approval, adding, "If you order, every attention shall be paid to any particulars you may think proper." A., in reply, wrote, "I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now, of course, give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built, and forwarded to A., who found many faults in it, and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet with the approval of A., "on the score of convenience and taste," the latter was entitled (acting bonâ fide, and not from mere caprice) to reject it. *Andrews* v. *Belfield*, 2 C. B. (N.S.) 779.

Allowance — Difference of Kind.]—Parties, through a broker, bought "the following cotton, viz., $\frac{\text{p.c.}}{\text{c.}}$ 128 bales, at 25*d.* per lb., expected to arrive in London per 'Cheviot' from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of Long-staple Salem cotton. The 128 bales marked $\frac{\text{p.c.}}{\text{c.}}$ which arrived by the "Cheviot" contained Western Madras cotton. The cotton was not in accordance with the sample; Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market price of Western Madras was at the date of the contract only 23*d.* per lb.:—Held, that the cotton tendered was not that which the buyers bargained for, and that they were not bound to accept it; for that the allowance clause had reference only to inferiority of quality, and not to difference of kind. *Azémar* v. *Casella*, 36 L. J., C. P. 124; L. R. 2 C. P. 431. Affirmed, 36 L. J., C. P. 263; L. R. 2 C. P. 677; 16 L. T. 571; 15 W. R. 998—Ex. Ch.

A person bought at a price named "413 bales of wool, to arrive ex 'Stige,' or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling brokers' possession; and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, and the brokers, after protest from the buyer, awarded that he should take it at a certain abatement in the price of different bales:—Held, that as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, and the buyer could not reject the wool on account of its inferiority; that the brokers had power to award as they had, and the buyer was bound to take the wool accordingly. *Heyworth* v. *Hutchinson*, 36 L. J., Q. B. 270; L. R. 2 Q. B. 447.

Under a contract to purchase 300 tons of Campeachy logwood, at 35*l.* per ton, &c., to be of real merchantable quality; and such as might be determined to be otherwise by impartial judges to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price, though it appeared at the time that a part, which was afterwards ascertained to be sixteen out of the 300 tons, was of a different and inferior description. *Graham* v. *Jackson*, 14 East, 498.

3. Other Points as to Delivery.

Mode of Tender—In Closed Casks.]—An allegation of a tender of goods is not supported by proof of a delivery or an offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance. *Isherwood* v. *Whitmore*, 11 M. & W. 347; 2 D. (N.S.) 548; 12 L. J., Ex. 318; 7 Jur. 535.

Insufficient Casks.]—A declaration set out a contract for the purchase of oil, with a breach, that the defendant refused to accept the oil. He pleaded, that the casks in which the oil was contained were not well seasoned:—Held, a bad plea. It admitted the good quality of the oil, and did not state that the oil was rendered of no use or value in consequence of the insufficiency of the casks. *Gower* v. *Von Dadelzen*, 3 Bing. (N.C.) 717; 4 Scott, 453; 3 Hodges, 94; 6 L. J., C. P. 198; 1 Jur. 285.

Natural Deterioration.]—The plaintiff agreed to sell to the defendant hoop iron to be manufactured in Staffordshire, and delivered in January and February at Liverpool. The iron was to be forwarded by canal boats, vessels, and carts. Iron so forwarded, at the period of the year in question, necessarily suffers some deterioration by being rusted. The iron, which was clean and bright when put on board, arrived at Liverpool in a rusty state, and acceptance of it was refused by the defendant:—Held, that the defendant was bound to accept

the iron if it was only so far deteriorated as it would necessarily be in its transit from Staffordshire to Liverpool, and that the judge misdirected the jury in saying that the defendant was entitled to have it delivered to him at Liverpool in a merchantable condition. *Bull* v. *Robison*, 10 Ex. 342; 2 C. L. R. 1276; 24 L. J., Ex. 165; 2 W. R. 623.

In two Deliveries.]—The plaintiff contracted to sell to the defendant 200 tons of brimstone, "to be delivered ex the first parcel of brimstone we have in the Tyne on our account." A ship arrived in the Tyne with a cargo of brimstone. The plaintiff, having obtained leave from the owner to dispose of fifty tons on his own account, tendered the fifty tons to the defendant, who wished to cancel the contract, and refused to receive them. Another vessel having subsequently arrived in the Tyne with brimstone, the plaintiff, having in like manner obtained permission of the owner to dispose of it on his own account, tendered 150 tons to the defendant in fulfilment of the contract. This portion also the defendant declined to accept. The defendant never objected to the brimstone being offered to him in two deliveries:—Held, that the plaintiff had sufficiently tendered the brimstone pursuant to his contract to entitle him to recover against the defendant for refusing to accept. *Leidemann* v. *Gray*, 26 L. J., Ex. 162; 3 Jur. (N.S.) 219; 5 W. R. 294—Ex. Ch.

Constructive Delivery.]—Goods shipped at Liverpool for Quebec were taken on their arrival to the examining warehouse, and were entered as consigned to M. & S. and were marked "M. & S." By the regulations of the warehouse, consignees were entitled to possession on payment of freight and duty. M. & S. having obtained an advance on the goods from Y. & Co., signed a request note directed to the officer of the warehouse, directing him to "hold their goods subject to their order, they paying duty and storage charged before removal." The officer wrote across the note "accepted," and signed it:—Held, that by the express agreement of the parties, followed by the acceptance of the officer of the warehouse, there was a valid constructive delivery of the property in the goods to Y. & Co., sufficient for the purposes of the pledge. *Young* v. *Lambert*, 6 Moore, P. C. (N.S.) 406; 39 L. J., P. C. 21; L. R. 3 P. C. 142; 22 L. T. 499; 18 W. R. 497.

Sending Vessels to Receive.]—By two contracts, entered into at different times, the defendants engaged to ship at Cronstadt for the plaintiffs 250 tons and 350 tons of rye meal, each contract stipulating that the shipment should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel and getting the goods down to Cronstadt; that payment should be made one-third at three months, from the date of bill of lading, but that should the vessel not arrive in time for the goods to be shipped before the 30th June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above. In an action by the buyers against the sellers for the breach of these two contracts, the defendants pleaded, that the plaintiffs were not, at and after the arrival of the vessels at Cronstadt, and thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the meal in manner and form as alleged, and that the plaintiffs had not performed the contracts in all things on their part to be performed in manner and form as alleged:—Held, that the circumstance of the buyers having sent out three vessels, neither of which was of capacity sufficient to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times, did not entitle the defendants to a verdict upon these issues; but that the buyers were entitled to maintain an action against the sellers, although they had not sent out one vessel to receive the quantity mentioned in each contract. *Reade* v. *Meniaeff*, 7 C. B. 152; 18 L. J., C. P. 145.

Place of Delivery.]—Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. *L. & N. W. Ry.* v. *Bartlett*, 7 H. & N. 400; 31 L. J., Ex. 92; 8 Jur. (N.S.) 58; 5 L. T. 399; 10 W. R. 109.

A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at Liverpool, per ship or ships, from Calcutta. The contract contained provisions as to quality, and for a reference in case of dispute; and then followed these words: "The cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale":—Held, that the stipulation as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted, in effect, to a contract to deliver the cotton at a reasonable time, and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay. *Neill* v. *Whitworth*, 18 C. B. (N.S.) 435; 34 L. J., C. P. 155; 11 Jur. (N.S.) 158; 11 L. T. 677; 13 W. R. 461. Affirmed, 1 H. & R. 832; 35 L. J., C. P. 304; L. R. 1 C. P. 684; 12 Jur. (N.S.) 761; 14 L. T. 670; 14 W. R. 844—Ex. Ch.

Selecting Port for.]—In an action by vendors against purchasers for not accepting one of several cargoes of Indian corn, sold "with privilege of having shipment to a direct port in the United Kingdom" (subject to certain exceptions), "port to be named on signing bills of lading," the defendants pleaded that the plaintiffs were bound, under the contract of sale, to consult the defendants, and to give them the privilege of selecting any direct port in the United Kingdom, save as excepted, for the destination of each cargo before the signing the bills of lading, and that the cargo which they refused to accept had been shipped, and the bills of lading signed, without affording them the option of exercising such privilege. The plaintiffs having taken issue in fact, the jury found that the defendants had not been given the option of selecting a direct port for the destination of the cargo:—Held, first, that the contract was subject to the term pleaded. *Knox* v. *Mayne*, Ir. R. 7 C. L. 557.

Held, secondly, that on the record the defendants were entitled to judgment, irrespectively of the question whether the observance of the term was a condition precedent to the plaintiff's right of action. *Ib.*

Consolidating several Contracts.]—In an action by the sellers against the buyers, for the breach of two contracts for the shipment at a

foreign port of two several quantities of rye meal, the declaration stated, that "after the making of the contracts, and before the performance of them or any part thereof, it was agreed between the plaintiffs and the defendants, that the two contracts should be deemed and taken to be and to operate as one contract, and should be performed as if the same had been one contract for the amount of the two quantities of meal":—Held, that this allegation was not sustained by proof that the buyers had sent out three vessels to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill drawn on them for the stipulated proportion of that particular cargo. *Meniaeff* v. *Reade*, 7 C. B. 139.

Tender of Two out of a Set of Three Bills of Lading.]—Where by the terms of the contract of sale of goods to be shipped, payment is to be made in exchange for bills of lading of each shipment, the purchaser is bound to pay when a duly-indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, and all the three are not then tendered or accounted for; and, if he refuses to accept and pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered. *Sanders* v. *Maclean*, 52 L. J., Q. B. 481; 11 Q. B. D. 327; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160—C. A.

Per Brett, M.R.: The seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery either before the arrival of the vessel with the goods, or before charges are incurred there in respect of them. *Ib.*

F. DISCHARGE AND BREACH OF CONTRACT.

1. Impossibility of Performance.

Destruction of Specific Crop.]—When, from the nature of a contract, the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment arrived some particular specified subject-matter continued to exist, no warranty that the subject-matter should so continue to exist is to be implied from the fact that the subject-matter was not in existence at the time of the making of the contract. The contract in such a case is therefore subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible by the perishing of the subject-matter without default of the contractor. *Howell* v. *Coupland*, 46 L. J., Q. B. 147; 1 Q. B. D. 258; 33 L. T. 832; 24 W. R. 470—C. A.

In March, 1872, the defendant agreed to sell to the plaintiff 200 tons of potatoes, grown on land belonging to the defendant at W., to be delivered in the following September and October. The defendant sowed a sufficient quantity of potatoes on lands belonging to him at W. to meet the contract in the ordinary course of husbandry. Before the time for the performance of the contract a large portion of the crop was destroyed by disease without any default on the part of the defendant, and the remainder was insufficient to meet the contract. In an action for non-delivery:—Held, that the contract was for the sale of a specific crop, without any warranty that the crop should continue to exist at the time of performance. *Ib.*

Where Delivery Impossible.]—The agents of M. at Chili having purchased a quantity of nitrate of soda, and chartered the vessel "Precursor" to convey it to England, M. contracted to sell to S. "600 tons, more or less, being an entire parcel of nitrate of soda, expected to arrive at port of call per 'Precursor.'. . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, the contract to be void." At the date of the sale the greater part of the nitrate of soda intended for shipment had been destroyed by an earthquake. The charterparty was subsequently cancelled, and notice of this fact was in due course forwarded to S. M.'s agent afterwards purchased a like quantity of nitrate of soda on his account, and obtained a transfer of a second charterparty made between the vendors and the owners of the "Precursor" for the conveyance of the second parcel of nitrate of soda to England. Upon the arrival of the cargo in this country S. laid claim to it under his contract:—Held, that the contract related only to the nitrate of soda which was then expected to be carried by the particular voyage, and that upon this voyage being rendered impossible, the liability of M. was terminated, and S. had no claim to the cargo subsequently purchased. *Smith* v. *Myers*, 41 L. J., Q. B. 91; L. R. 7 Q. B. 139; 26 L. T. 103; 20 W. R. 186—Ex. Ch.

Delivery prevented through Strikes.]—The plaintiffs, on the 13th September, 1873, contracted in writing with the defendant to sell 4,000 parcels of Kibbles coal at 15*s.* 6*d.* per parcel of 2,240 lbs., loaded into the defendant's trucks at the average rate of two trucks per day, a truck consisting of eight tons, in the event of a colliers' strike or accident the vendors not binding themselves to keep up the daily supply. Coal was delivered under this contract up to the 28th March, 1874, but on that day, in consequence of the plaintiffs' men refusing to accept a lower rate of wages proposed by the plaintiffs, in pursuance of a combination entered into by the plaintiffs with other masters in the district, the pits were closed by the plaintiffs, and remained closed until the 28th July, other pits in the neighbourhood being also closed by their owners for a like reason. During that time no coal was in consequence delivered; but at the end of the strike the plaintiffs called upon the defendant to take the amount of coal which still remained undelivered under the contract. In an action for not accepting this coal:—Held, that the strike was equally a strike within the meaning of the contract, though brought about by the plaintiffs lowering the wages of their men; that the effect of the strike was merely to postpone the daily deliveries, and that the defendant was

bound to accept the coal remaining undelivered. *King* v. *Parker*, 34 L. T. 887.

Held, also, that under the circumstances the delay was not of such a nature to entitle the defendant to consider the contract at an end in a commercial sense, and so repudiate the performance of it. *Ib.*

Conditional Contract.—Where there is an agreement to deliver goods on a condition which, without any default in the vendor, never happens, he will not be liable for a non-delivery; but where the agreement is absolute or conditional on an event which happens, the vendor will be liable for a breach, though without default on his part; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility when he might have provided against it by his contract. *Hale* v. *Rawson*, 4 C. B. (N.S.) 85; 27 L. J., C. P. 189; 4 Jur. (N.S.) 363; 6 W. R. 339.

Contract in London for the sale of tallow from a particular ship, to be taken from the king's landing scale, if it should not arrive on or before a given day the bargain to be void; the ship was wrecked off the coast of Scotland, but the cargo was saved, and might have been forwarded to the port of London by the given day. The vendors resold the tallow in Scotland. The purchaser did not offer them any indemnity if they would bring the tallow to London:—Held, that the vendors were not answerable for the non-delivery of the tallow. *Idle* v. *Thornton*, 3 Camp. 274; 13 R. R. 799.

Restraint of Princes.]—It is no answer to an action against the vendor of goods to be shipped at St. Petersburg on a particular day, in certain ships, that such goods were seized by the Russian government on board lighters for the purpose of loading the ships, and that the ships cut their cables and put to sea to avoid an embargo. *Splidt* v. *Heath*, 2 Camp. 57, n.; 11 R. R. 663.

Sale of Horse—Death of Horse before Sale Absolute.]—A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick* v. *Barnes*, 49 L. J., C. P. 698; 5 C. P. D. 321; 29 W. R. 139; 44 J. P. 651.

2. Insolvency.

Of Vendee.]—In the beginning of February, 1872, the plaintiffs agreed to buy and the defendants agreed to sell 200 tons of iron, to be forwarded in quantities of 25 tons per month, the first delivery to be in April. At the time of making the contract the plaintiffs were insolvent, and upon the 12th of March they determined to suspend payment. They forthwith informed the defendants of their insolvency. Upon the 5th of April there was a meeting of the plaintiffs' creditors; the contract with the defendants was not mentioned in their written statement of affairs. The iron was not forwarded by the defendants in April or the early part of May, nor did the plaintiffs require it to be delivered, nor did they offer payment for it. The plaintiffs' creditors ultimately accepted a composition of five shillings in the pound. The plaintiffs took new partners; and on the 13th of May they called upon the defendants to supply iron according to the contract of the preceding February; the defendants forthwith repudiated liability to fulfil the contract. The plaintiffs having sued for breach of the contract:—Held, that there was evidence upon which a jury might find that the contract had been rescinded, and could not be enforced upon the 13th of May. *Morgan* v. *Bain*, 44 L. J., C. P. 47; L. R., 10 C. P. 15; 31 L. T. 616; 23 W. R. 239.

By a contract dated the 27th of October, 1874, the C. company contracted to sell to the P. company 2,500 tons of pig-iron, to be delivered over the next ten months in about equal monthly quantities. Payment by four months' bill net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery. In performance of this contract the C. company, in November and December, 1874, and in January and February, 1875, made deliveries amounting to 852 tons. On the 24th of February the P. company, requiring further capital to carry on their business, called a meeting of the principal creditors, with a view to an arrangement being made for an extension of credit, and laid a statement of affairs before them, showing that out of a nominal capital of 100,000*l.*, of which 80,000*l.* was paid up, the company had sustained losses to the extent of 40,000*l.* The creditors did not accept the propositions submitted to them, and the C. company, considering the statement to be a declaration of insolvency, declined to make any further deliveries except for cash, and thereupon the P. company cancelled the contract. Three months afterwards the P. company was ordered to be wound up. Upon a claim by the C. company for damages in respect of breach of the contract:—Held, that the statement of affairs laid before the creditors on the 24th of February did not amount to a declaration of insolvency which justified the C. company in refusing to deliver without cash payments, and the claim was disallowed. *Phœnix Bessemer Steel Co., In re, Carnforth Hæmatite Iron Co., Ex parte*, 46 L. J., Ch. 115; 4 Ch. D. 108; 35 L. T. 776; 25 W. R. 187—C. A.

The rule laid down in *Chalmers, Ex parte, Edwards, In re* (42 L. J., Bk. 2, 37; L. R. 8 Ch. 289; 28 L. T. 325; 21 W. R. 349), only applies where there is something amounting to a declaration on the part of the purchasers that they will be unable to meet their engagements. *Ib.*

Bankruptcy of Purchaser before Delivery of Goods Sold on Credit.]—When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee. And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the resale. *Stapleton, Ex parte, Nathan, In re*, 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327—C. A.

3. FRAUD.

Election to Rescind.]—To support a plea of rescission of a contract on the ground of fraud, it is not necessary to prove that the circumstances of the fraud were known to the defendant, and the contract rescinded before action brought. The election to rescind may be made at any time, unless there has been a previous election to affirm the contract. *Clough* v. *L. & N. W. Ry.*, 41 L. J., Ex. 17; L. R., 7 Ex. 26; 25 L. T. 708; 20 W. R. 189—Ex. Ch.

A. purchased goods of a company, not intending to pay for them. The company delivered them to a carrier to deliver them according to his instructions to C. The carrier afterwards held the goods for C., at his request, as a warehouseman. A. becoming bankrupt, the company demanded the goods, and the carrier re-delivered them, under the mistaken supposition that the transitus was not determined. In an action of trover against him:—Held, that an equitable plea of rescission of the contract, on the ground of A.'s fraud, to which C. was privy, would raise a good defence to the action, although the fraud was not discovered till the cross-examination of C. at the trial of the action. *Ib.*

Examination.]—It is no defence to an action for rescission of a contract on the ground of fraud that the plaintiff inquired to a certain extent whether the representation made to him was true, but did it so carelessly and ineffectually as not to observe the fraud. *Redgrave* v. *Hurd*, 51 L. J., Ch. 113; 20 Ch. D. 1; 45 L. T. 485; 30 W. R. 251—C. A.

If a maker of a chattel makes it with a patent defect so serious as to render it worthless, and the person for whom it is made has an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he does not point out the defect. *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322; 8 Jur. (N.S.) 721; 6 L. T. 462; 10 W. R. 650; at nisi prius, 2 F. & F. 785.

What Amounts to Fraud.]—A. sold goods to B. to be paid for by a bill at two months, and not being able to obtain it from B., and doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became a bankrupt, without knowing that the goods had been repurchased by the broker on the account of A. In an action of trover by the assignees of B. against A. for the goods:—Held, that they were not entitled to recover, as the transaction was not fraudulent on the part of A. *Harris* v. *Lunell*, 4 Moore, 10; 21 R. R. 662.

If A., under the pretence of a purchase, obtains possession of B.'s goods, and absconds to avoid a suit for their value, and the sheriff seizes such goods in execution immediately after the delivery to A., it seems that B. may lawfully rescue them out of the hands of the sheriff, even by stratagem; but the validity of the purchase by A. is a question for the jury, viz., as to whether the purchaser had obtained possession of the goods with a preconceived design not to pay for them. *Bristol (Earl)* v. *Wilsmore*, 2 D. & R. 755; 1 B. & C. 514; 1 L. J. (O.S.) K. B. 178; 25 R. R. 488.

Intention.]—In order to set aside a sale of goods quoad a purchaser, on the ground that it was made with the intention of defrauding the creditors of the seller, it must be shown that the purchaser was aware of that intention, and that he conspired with the seller to carry it into effect. *Bentliff* v. *Garnett*, 1 Car. & K. 326.

A. bought goods from B. with the fraudulent intention of never paying for them, and kept them until his bankruptcy:—Held, that they did not pass to his assignees under his bankruptcy, as having been in his possession, order and disposition, as the reputed owner thereof, with the consent of the true owner. *Load* v. *Green*, 15 M. & W. 216; 15 L. J., Ex. 113; 10 Jur. 163.

Knowledge.]—Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller:—Held, that an action for a false and fraudulent representation was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. *Ormrod* v. *Huth*, 14 M. & W. 651; 14 L. J., Ex. 366.

Effect of Fraud.]—A contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor; and it is too late to declare such election after the goods have passed into the hands of a bonâ fide purchaser. *White* v. *Garden*, 10 C. B. 919; 20 L. J., C. P. 166; 15 Jur. 630.

A man cannot recover for the price of goods sold under a fraud. *Lewis* v. *Cosgrave*, 2 Taunt. 2.

—— **On Property.**]—The established principle is, that fraud only gives a right to avoid a purchase, that the property vests until avoided, and that all mesne dispositions to persons not parties to, or at least not cognisant of the fraud, are valid. *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J., C. P. 110; 17 Jur. 600—Ex. Ch.

A sale of goods effected by fraud does not change the property in them. *Abbotts* v. *Barry*, 5 Moore, 98; 2 Br. & B. 369.

Where a vendee, who has made a false and fraudulent misrepresentation, obtains, by means of it, possession of a chattel from a vendor who intended to transfer both the property and the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and therefore if, before the disaffirmance, the fraudulent vendee has assigned or transferred the chattel to an innocent transferee, the title of such transferee is good against the vendor. *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L. J., Ex. 83; 3 Jur. (N.S.) 68; 5 W. R. 151—Ex. Ch. *S. C.*, 11 Ex. 577; 25 L. J., Ex. 166. *See also* ante, cols. 444, et seq.

Waiver.]—If a party is induced to purchase an article by the fraudulent misrepresentations of the seller of it, and, after discovering the fraud, continues to deal with the article as his own, he cannot recover back the money from the seller. *Campbell* v. *Fleming*, 3 N. & M. 834; 1 A. & E. 40; 3 L. J., K. B. 136.

The right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud. *Ib.*

Estoppel—Party Liable.]—An action lies for

the value of goods which the defendant has by his fraud induced the plaintiff to sell to a third person who is unable to pay for them. *Hill* v. *Perrott*, 3 Taunt. 274; *Biddle* v. *Levy*, 1 Stark. 20.

As against Third Parties.]—Where an owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him obtained by means of fraudulent representations, and avoidable at the option of the owner, a sale or a pledge by such party before the owner has exercised his option, and without notice to the subsequent purchaser, is binding; but this is not so when a party has merely obtained the goods by means of false pretences, without any contract of sale to himself, as when he falsely and fraudulently represents that another person has authorised him to purchase the goods, and in such case the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud or any disaffirmance of the transaction, by the real owner. *Higgons* v. *Burton*, 26 L. J., Ex. 342; 5 W. R. 683.

A coachbuilder let a brougham for a year, and, according to the custom of the trade, the hirer's arms were painted on the panels. The hirer put the brougham up for sale by auction at Aldridge's and it was purchased by a commission agent and horse dealer:—Held, in an action of trover by the owner against the purchaser of the brougham, that, by allowing the arms to be painted on the panels, the owner did not render himself responsible for the fraudulent sale by the hirer, and therefore the purchaser must be the loser in the transaction. *Marner* v. *Banks*, 17 L. T. 147; 16 W. R. 62.

If bonâ fide for valuable consideration, a sale of goods is not invalidated by knowledge, on the part of the purchaser, that an execution against the vendor is intended. *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492; 28 L. J., Ch. 777; 7 W. R. 316.

Fraudulent Sale of Horse — Keep.] — The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray* v. *Mann*, 2 Ex. 539; 17 L. J., Ex. 256; 12 Jur. 634.

4. Refusal to Perform.

Right to Cancel Contract where Goods to be Delivered by Instalments.]—The defendant, in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig iron, at 42*s.* a ton, to be delivered to the plaintiff, f. o. b., at the maker's wharf, in November, December, and January next, at 6*d.* per ton extra. The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December, and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—Held, in an action by the plaintiff for damages in respect of the defendant's refusal, by the majority of the court of appeal, that by the plaintiff's failure to take one-third in November, the defendant was justified in refusing to deliver the other two-thirds afterwards. *Honck* v. *Muller*, 50 L. J., Q. B. 529; 7 Q. B. D. 92; 45 L. T. 202; 29 W. R. 830—C. A.

Tender of Two of a Set of Three Bills of Lading.]—If by the terms of a contract of sale payment is to be made in exchange for bills of lading, the purchaser is bound to pay when a duly indorsed bill of lading effectual to pass the property is tendered, although the bill be drawn in triplicate and all three are not accounted for, and if he refuses to accept and pay, he does so at his own risk as to whether the bill of lading tendered was an effectual one. *Sanders* v. *Maclean*, 52 L. J., Q. B. 481; 11 Q. B. D. 327; 49 L. T. 462; 31 W. R. 608; 5 Asp. M. C. 160.

For Accepting too Little.]—The defendants agreed to supply the plaintiffs with from 6,000 or 8,000 tons of coal, to be delivered into the plaintiffs' waggons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5*s.* 6*d.* per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal:—Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. *Simpson* v. *Crippin*, 42 L. J., Q. B. 28; L. R. 8 Q. B. 14; 27 L. T. 546; 21 W. R. 141. See also *Hoare* v. *Rennie*, ante, col. 530.

Non-Payment of Instalment.]—When there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. *Bloomer* v. *Bernstein*, 43 L. J., C. P. 375; L. R. 9 C. P. 588; 31 L. T. 306; 23 W. R. 238.

The defendant contracted to sell to the plaintiffs 260 tons pig-iron at 56*s.* per ton, half to be delivered in two, remainder in four, weeks; payment, net cash fourteen days after delivery of each parcel. The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. They refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was

ultimately paid :—Held, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. *Freeth* v. *Burr*, 43 L. J., C. P. 91 ; L. R. 9 C. P. 208 ; 29 L. T. 773 ; 22 W. R. 370.

When a contract was entered into to deliver a quantity of barley by delivery in certain portions, each portion to be paid for on its arrival at the port of destination, some of the portions delivered were delivered short in weight ; the purchaser refused to pay for any more, unless a reduction was allowed for the price of the deficiency, and also for re-weighing the barley :—Held, that such a refusal did not amount to a rescission of the contract by the purchaser. *Corcoran* v. *Proser*, 22 W. R. 222—Ir. Ex. Ch.

The respondents bought from the appellant company, 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On 2nd February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents bonâ fide, under the erroneous advice of their solicitor that they could not, without leave of the court, safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court which they asked the company to obtain. On 10th February, the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On 15th February an order was made to wind up the company by the court. The respondents sought damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due, and said that they always had been and still were ready to accept such deliveries and make such payments as should be accepted and made, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery :—Held, that on the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery ; that the respondents had not by postponing payment under erroneous advice acted so as to show an intention to repudiate the contract, so as to release the company from further performance. *Mersey Steel and Iron Co.* v. *Naylor*, 53 L. J., Q. B. 497 ; 9 App. Cas. 434 ; 51 L. T. 637 ; 32 W. R. 989—H. L. (E.)

Time for Payment on Sale of Specific Chattel.]—On a contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract ; and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day. *Martindale* v. *Smith*, 1 G. & D. 1 ; 1 Q. B. 389 ; 10 L. J., Q. B. 155 ; 5 Jur. 932.

Re-sale—Non-Payment.]—If after the sale of a chattel, but before actual delivery, the vendor resells the property while the purchaser is in default, the resale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. *Page* v. *Eduljee*, L. R. 1 P. C. 127 ; 12 Jur. (N.S.) 361 ; 14 L. T. 176.

A fortiori, where there has been a delivery, and the vendor takes it out of the possession of the purchaser, and resells it. *Ib.*

Where the resale is wrongful, the purchaser's remedy is by an action of trover. *Ib.*

Time of Shipment.]—A. contracted to sell to B. a specific cargo of wheat, described in a bought and sold note as "shipped per 'Diletta Mimbella,' as per bill of lading dated September or October," and which was all on board at the date of the contract :—Held, that this did not amount to a condition so as to entitle the buyer to rescind the contract, on its turning out that the wheat was not shipped at the time mentioned. *Gattorno* v. *Adams*, 12 C. B. (N.S.) 560. *See cases* ante, cols. 532, 533.

Ship to be Ready to Sail on Given Date.]—In a contract for the sale of flour free on board the first-class steamer T. from S. to C., it was stipulated that the vessel was "to sail from L. to S., on or before 1st December, 1855, accidents excepted ; if such should happen, and the vessel not be ready to sail on 4th December, buyers to have the option of cancelling the contract. The vessel was prevented from sailing from L. on the 1st of December by an accident, and she was not ready to sail until six o'clock in the evening of the 4th, when she was prevented by stress of weather and did not sail till the following day :—Held, that the meaning of the contract was, that if she were prevented sailing by an accident on the 1st, the buyers would not have the power to cancel the contract if she were "ready to sail" on the 4th, although she did not actually sail until after that day. *Smyth* v. *Schilizzi*, 4 W. R. 460.

Declaration of Inability to Perform.]—The defendant by his agent contracted to deliver 300 casks of oil during the season to the plaintiff's customers on receipt of orders from the plaintiff ; on complaint by the plaintiff of irregularity in the delivery of the oil, the defendant's agent stated that the defendant had no oil to give him :—Held, that this statement by the agent of his inability to perform was a breach of contract upon which the plaintiff might sue. *Lesson* v. *North British Oil and Candle Co.*, Ir. R. 8 C. L. 309.

Breach of Warranty.]—The purchaser of a mare at an auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price, and was casually told that the description was untrue. Nevertheless, he removed the mare to his own stables, and while being so removed, she ran away and injured herself severely, without any negligence on the purchaser's part. The description was, in fact, untrue, and on that ground the purchaser

returned her to the seller within the specified time :—Held, that since the purchaser had in removing her done no more than he was entitled to do under the contract, and since the injuries were not owing to any negligence on his part, he had not lost his right to rescind the contract, and could recover the price from the seller as money had and received. *Head* v. *Tattersall*, 41 L. J., Ex. 4 ; L. R. 7 Ex. 7 ; 25 L. T. 631 ; 20 W. R. 115.

Sale upon Condition—Seller prevented from fulfilling Condition by Buyer.]—If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. By a written contract A. agreed to buy of B. a digging-machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up one," and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine :—Held, that B. was entitled to a decree against A. for payment of the price of the machine. *Mackay* v. *Dick*, 6 App Cas. 251 ; 29 W. R. 541—H. L. (Sc.).

Seller Hindering Buyer—Fraud.]—To a declaration on a contract for the sale of growing trees, alleging for breach, that although the defendant had permitted the plaintiff to fell and carry away certain of the trees, he refused to permit him to fell and carry away the residue, the defendant pleaded, that after the promise, and before breach, the plaintiff fraudulently felled and carried away trees which were not sold to him, exceeding in number and value the residue ; which trees, so fraudulently felled and carried away, were taken by the plaintiff in fraudulent substitution of the trees purchased by him ; and that the defendant kept the trees so fraudulently felled and carried away by him, and that therefore the defendant refused to permit him to fell and carry away the residue of the trees contracted for :—Held, that the plea was bad, inasmuch as it showed not a rescission or an abandonment of the contract by the plaintiff, but a mere act of trespass or wrongful act, for which the defendant might have a remedy ; and that there was no estoppel. *Lewis* v. *Clifton*, 14 C. B. 245 ; 2 C. L. R. 1350 ; 23 L. J., C. P. 68 ; 18 Jur. 291 ; 2 W. R. 230.

And see CONTRACT.

Sale of Cargoes—Neglect to Fetch—Delay.]—Declaration on an agreement by the plaintiff to sell and deliver to the defendant, and by the defendant to purchase, as many of the plaintiff's gas coals, equal in quality to a cargo before shipped on trial, as one steam vessel to be sent by the defendant could fetch in nine months from to S. to L. Breach, that the defendant refused to send a steam vessel to fetch divers cargoes of coals. A plea, that, before any breach by the defendant, the plaintiff broke the contract by delivering coal which was not gas coal equal in quality to the cargo shipped on trial, but was inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiff well knew. Another plea, that, before any breach by the defendant, the plaintiff broke the contract by detaining an unreasonable time, and beyond the time permitted by the contract, the vessel sent by the defendant to receive the coal :—Held, that neither of the pleas was an answer to the declaration. *Jonassohn* v. *Young*, 4 B. & S. 296 ; 32 L. J., Q. B. 385 ; 11 W. R. 962.

Bought and Sold Notes—Time for.]—Where a broker sold on a Saturday goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality upon the Monday following, and sent the sold-note to the plaintiff on the Saturday, marked with the words "quality to be approved on Monday," but did not send the bought-note to the defendant then, because he had met and informed him of the contract on the same day ; but the plaintiff not having signified his disapproval of the contract on the Monday, the broker sent the sold-note to the defendant on the Friday, with the words "quality to be approved on Monday" struck out, which note the defendant returned within twenty-four hours, which, by the custom of the trade, signified his disaffirmance of the contract, so far as in him lay ; yet, held, that at any rate the defendant could no longer disaffirm it after the Monday, when the plaintiff, not having signified his disapproval, was also bound by it. *Humphries* v. *Carvalho*, 16 East, 45 ; 14 R. R. 280.

—— **Mistake as to Parties.**]—Where the broker makes a mistake in the contract, describing on the bought and sold notes goods to be sold by A., B. and C., which he believed to be the real names of the firm which employed him, which firm, in fact, from a recent alteration that the broker was not privy to, consisted of A., D. and E. only : —Held, that the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting upon a subsequent communication from the plaintiffs, unless he could show that he had been prejudiced, or had lost the benefit of a set-off. *Mitchell* v. *Lapage*, Holt, N. P. 253 ; 17 R. R. 633.

5. AGREEMENT TO RESCIND.

Verbal.]—The plaintiff agreed with the defendants, in writing, signed by them, to sell and deliver, at a future day, goods above 10*l.* in value. Afterwards, and before breach, the time for performing the contract was verbally extended for a fortnight :—Held (there being neither acceptance nor payment under the verbal arrangement), that the verbal arrangement was void, and could not rescind the written contract, which the plaintiff might therefore enforce. *Noble* v. *Ward*, 4 H. & C. 149 ; 35 L. J., Ex. 81 ; L. R. 1 Ex. 117 ; 12 Jur. (N.S.) 167 ; 13 L. T. 639 ; 14 W. R. 397. Affirmed 36 L. J., Ex. 91 ; L. R. 2 Ex. 35 ; 15 L. T. 672 ; 15 W. R. 520—Ex. Ch.

In an action for goods sold and delivered, it is no plea that the sale and delivery were in pursuance of a contract, which it was agreed should be wholly rescinded. *Edwards* v. *Chapman*, 4 D. P. C. 732 ; 1 M. & W. 231 ; 1 Gale, 376 ; 1 Tyr. & G. 481 ; 5 L. J., Ex. 139.

Waiver.]—Where a seller of goods, upon the buyer's refusal to accept them, requested the

buyer to sell them for him, which the buyer agreed to do if he could, but did not:—Held, that, in an action by the seller for the price, the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, and impression that his remedy was gone. *Gomery* v. *Bond*, 3 M. & S. 378.

As to Third Persons.]—A contract of sale may be rescinded by the consent of the vendor and vendee, before the rights of other persons are concerned. *Smith* v. *Field*, 5 Term Rep. 402; 2 R. R. 630.

But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt:—Held, that the vendor could not recover the goods from the packer in trover. *Ib.*

Evidence.]—The plaintiff agreed to buy thirteen tons of oil from the defendant, and paid a deposit for the price. Five tons were delivered, when the plaintiff said they were of inferior quality, and required the defendant to take them back or return the deposit-money. The defendant sold the other eight tons, but it did not appear whether he had thus rendered himself incapable of completing the contract, before or after the plaintiff refused to receive any more of the oil:—Held, in the absence of such evidence, that, on an action to recover back the money, the jury was properly directed, first, whether there was fraud on the part of the defendant in the inception of the contract, and, if not, whether, secondly, there was sufficient evidence that the defendant had agreed to rescind the contract. *Pitt* v. *Cassanet*, 4 Man. & G. 898; 5 Scott (N.R.) 902; 12 L. J., C. P. 70; 6 Jur. 1125.

Effect.]—Where the vendor of a horse rescinds the contract for the sale, he is liable to the purchaser for the keep during the time he kept the horse, from the day of the contract. *King* v. *Price*, 2 Chit. 416.

—— Hire and Purchase Agreement—Seizure of Goods—Action for Arrears—Election.]—If an agreement, though in form a hire-and-purchase agreement, is in fact an executory contract of sale, and contains a stipulation that it may be determined in case of instalments being in arrear by seizure of the goods, then, if such seizure is made, the vendor cannot also sue for the arrears due at the time of the seizure. He is put to the election of one of his two remedies, and cannot avail himself of both. *Hewison* v. *Ricketts*, 63 L. J., Q. B. 711; 10 R. 558; 71 L. T. 191.

If the payment of the future instalments has been guaranteed by a surety for the purchaser, he is not liable after the seizure, as the principal obligation has ceased. *Ib.*

6. Breach.

a. Action for.

i. *Generally.*

Credit Unexpired at Time of Action.]—The plaintiffs contracted to deliver iron of a certain quality to the defendants, and agreed to receive payment for each delivery, either in cash for discount within a month, or by bills at four months, according to the defendants' option. Upon application by the plaintiffs in July for payment for iron delivered in June the defendants elected to pay by bill. Before, however, the bill was given, the defendants discovered that the iron which had been worked up into plates was of inferior quality to the sample, and useless to them. They therefore refused to accept any more bills, and the plaintiffs immediately, in August, brought an action to recover the contract price of the June delivery:—Held, that the contract having been broken by the plaintiffs delivering iron of inferior quality, and it being consequently their fault that the bill for the invoiced price was not given, and yet both parties having at the time, and up to the discovery of the quality of the iron, treated the delivery as made under the contract, and to be paid for under it, the period of credit had not expired, and the plaintiffs were not entitled to sue either for the contract price or on a quantum valebant for the reduced value of the goods. *Wayne's Merthyr Steam Coal and Iron Co.* v. *Morewood*, 46 L. J., Q. B. 746.

On a sale of goods the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and the jury found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—Held, that the question was properly left to the jury, and the verdict right. *Ashworth* v. *Redford*, 43 L. J., C. P. 57; L. R. 9 C. P. 20.

If the agreed terms of payment for goods sold are by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the buyer is not bound to accept a bill for a larger amount than his debt, and even if he refuses to accept a bill correctly drawn the seller cannot sue for good sold and delivered before the end of three months from the date of the bill drawn by him. *Anderson* v. *Carlisle Horse Clothing Co.*, 21 L. T. 760.

If, however, the agreed terms are cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept. *Ib.*

Credit unexpired is no defence to an action for not accepting goods, if they have not been accepted according to the contract. *Foster* v. *Eades*, 2 F. & F. 103.

Tender—Estoppel by.]—When a declaration shows substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609.

Goods Paid for but not Delivered.]—Where several articles are bought at a certain price per article and the money paid, but the articles are not earmarked or set apart for the purchaser, and some of them are not delivered, the right claim of the purchaser is for the price of the articles not delivered, as money had and received upon a consideration which has totally failed,

which is a claim for liquidated damages. *Biggerstaff* v. *Rowatt's Wharf*, 65 L. J., Ch. 536; [1896] 2 Ch. 93; 74 L. T. 473; 44 W. R. 536—C. A.

Where goods stored in a warehouse are sold, and a warrant for them delivered to the vendee upon payment of the purchase-money, and the warehouseman refuses to deliver the goods to the purchaser upon presentation of the warrant, an action lies against the vendor for the non-delivery of the goods. *Thöl* v. *Hinton*, 4 W. R. 26.

Parties to Sue—Consignee.]—A consignee of goods has such a right of property in the goods consigned to him as to maintain an action against the shipowner for non-delivery of the goods. *Tronson* v. *Dent*, 8 Moore, P. C. 420.

A. agreed, verbally, to buy of B. all the whalebone he could procure, at a certain price, to be sent by a particular railway, A. agreeing to pay the carriage. Some whalebone, to an amount exceeding 10*l*., having been delivered at the railway station by B., consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote, requesting A. to make a claim against the company:—Held, that there having been no acceptance and receipt of the goods within the statute of frauds, A., the consignee, was not entitled to sue the railway company for the loss. *Coombs* v. *Bristol and Exeter Ry.*, 3 H. & N. 510; 27 L. J., Ex. 401; 6 W. R. 725. *See also Cases* ante, col. 459.

—— **Principal or Agent.**]—Where a factor, having a del credere commission, sold goods for the plaintiffs to the defendant without disclosing their names, the defendant knowing that he was factor, and the plaintiffs, according to the settled course of dealing between them, drew on the factor for the amount, who, before the bills became due, stopped payment, and afterwards became bankrupt:—Held, that notwithstanding the del credere commission, the plaintiffs might sue the defendant for the price of the goods, the balance of the account current between the factor and the defendant being, at the time he stopped payment, in favour of the factor, but at the time of action brought in favour of the defendant. *Hornby* v. *Lacy*, 6 M. & S. 166; 18 R. R. 345.

F., a broker in London, having some rum for sale, made a contract with L., and gave him a sale-note in these terms:—"Mr. L., London, January 15, 1861,—I have this day bought, in my own name, for your account, of T., 259 puncheons of Cuba rum, sold at 1*s*. 9*d*. per gallon. Landing charges 5*s*. per puncheon, to be paid by the buyer; landing gauge; prompt 23rd March; brokerage half per cent. Money on delivery, or 5*l*. per cent." (Signed by him.) A portion of the price of the rum was afterwards paid to T. and received by him:—Held, that the broker could not maintain an action for goods sold and delivered against L. for the residue of the price of the rum, but that the action should be brought by the principal. *Fawkes* v. *Lamb*, 31 L. J., Q. B. 98; 8 Jur. (N.S.) 385; 10 W. R. 348.

Parties Liable—Representatives.]—A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage-coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offered to return them:—Held, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W. *Weatherby* v. *Banham*, 5 Car. & P. 228.

A. agreed with B. that B. should have his (A.'s) farm for his life, for 20*l*. a year rent, and the whole of A.'s keep and maintenance, B. to take off the stock at 75*l*. 10*s*. B. having taken the stock, and had possession of the land for his life:—Held, that his executor might be used for the 75*l*. 10*s*. in an action for goods sold and delivered. *Stone* v. *Rogers*, 2 M. & W. 443; 6 L. J., Ex. 145.

—— **Chapel-wardens.**]—Where goods were ordered by one of two chapel-wardens for the use of the chapel:—Held, that the warden giving the order might be sued separately, without joining his brother-officer. *Shaw* v. *Hislop*, 4 D. & R. 241; 2 L. J. (O.S.) K. B. 168; 27 R. R. 515.

—— **Bankrupt's Assignees.**]—M. ordered certain goods; subsequently M. became insolvent and executed a deed for the benefit of his creditors, under which inspectors were appointed. Afterwards they wrote a letter confirming the order of M., but signed as his agents:—Held, that the fact did not make them personally liable to pay for the goods which M. had ordered. *Redpath* v. *Wigg*, 4 H. & C. 432; 35 L. J., Ex. 211; 12 Jur. (N.S.) 903; 14 L. T. 764; 14 W. R. 866—Ex. Ch.

—— **Volunteer Officer.**]—An officer and promoter of a volunteer rifle corps may be liable to a tailor for uniforms supplied to the corps on the orders of the committee, although in the tailor's books the corps is debited, the question of liability being for the jury, on the whole of the evidence, supposing there is any evidence of the defendant's concurrence in the orders given. *Cross* v. *Williams*, 7 H. & N. 675; 31 L. J., Ex. 145; 6 L. T., 675; 10 W. R. 302.

—— **Member of Officers' Mess.**]—An individual member of a mess, who has not in any way pledged the credit of the mess, is not personally liable for goods supplied to the mess by the orders of the wine caterer. *Hawke* v. *Cole*, 62 L. T. 658.

—— **Person Purchasing Vendor's Business.**]—The defendant, who had been in the habit of dealing with B., sent a written order for goods directed to B.; the plaintiff, who, on the same day had bought B.'s business, executed the order without giving the defendant any notice that the goods were not supplied by B.:—Held, that the plaintiff could not maintain an action for the price of the goods against the defendant. *Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J., Ex. 117; 3 Jur. (N.S.) 1156; 6 W. R. 107.

Estoppel—by Conduct.]—A person may, by his acts, in causing another to believe that he is the purchaser of goods, be precluded from disputing that he was not, in fact, the purchaser, although his acts were not intended to induce that belief. *Cornish* v. *Abington*, 4 H. & N. 549; 28 L. J., Ex. 262; 7 W. R. 504.

—— **Principal or Agent.**]—B., foreman of A., attended, on behalf of A., at a sale by auction

of the plaintiff's goods, at which the plaintiff, who knew B. to be A.'s foreman, was present, but took no part. A lot was knocked down to B., and the auctioneer, who did not know him, asked his name, and he gave his own name, which was entered as the name of the purchaser. The goods were taken away in A.'s carts, and consumed by him:—Held, per Channell and Wild, BB., that B. was liable for the purchase-money; but per Pollock, C. B., and Bramwell, B., that he was not. *Williamson* v. *Barton*, 7 H. & N. 899; 31 L. J., Ex. 170; 8 Jur. (N.S.) 341; 5 L. T. 800; 10 W. R. 321.

Where a trader arranged with his paid servant to set up in the name and style of a supposed firm as a merchant, and there was evidence to show that the latter had an interest in the concern:—Held, that, whether they were partners or not, they might be jointly liable as contractors for goods ordered by the servant in the name of the supposed firm in the way of its apparent business, the employer as the real principal, the servant as holding himself out as partner. *Kirkwood* v. *Cheetham*, 10 W. R. 670. *S. C.*, at nisi prius, 2 F. & F. 798.

When a man purchases goods through the medium of an agent, and ignorant that he is dealing with an agent, the seller is not precluded from afterwards suing the principal, unless he has by words or conduct induced him to alter his condition; as, for instance, induced him to pay the agent on the supposition that the agent has settled with the seller. *Heald* v. *Kenworthy*, 10 Ex. 739; 3 C. L. R. 612; 24 L. J., Ex. 76; 1 Jur. (N.S.) 70; 3 W. R. 176.

A merchant, A., purchases goods of B. for the use of C., who is present and selects the goods, and stipulates with B. the price and other terms of the purchase, and A. credits B. with the amount, and debits C. with the amount and a commission, and B. debits A. in his books and invoices; B. cannot recover the price of the goods against C. *Addison* v. *Gandassequi*, 4 Taunt. 374; 13 R. R. 689.

A., a foreign merchant, employed B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) made out the invoices to B., and took in payment his acceptances, payable at six months:—Held, first, that there was no contract of sale as between A. and B.; and, secondly, that if any such contract existed, B. could maintain no action against A. before the six months expired. *Seymour* v. *Pychlau*, 1 B. & Ald. 14.

See also PRINCIPAL AND AGENT.

ii. *Action for Goods Bargained and Sold.*

When Maintainable.]—To support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards assented to by the buyer. *Atkinson* v. *Bell*, 2 M. & Ry. 292; 8 B. & C. 277; 6 L. J. (O.S.) K. B. 258.

The plaintiffs in London entered into the following contract with the defendants: "October 11, 1833. Sold to G. and Son for account of Messrs. A. & Co., 200 firkins of M. & Co.'s Sligo butter, at 71*s.* 6*d.* per cwt. free on board. Payment, bill at two months from the date of landing. To be shipped this month." &c. The butters were not shipped until the following month, but the defendants had waived that condition, and they accepted the invoice and the bill of lading, which was indorsed to them. The butters were afterwards lost on the voyage:—Held, that an action for such goods bargained and sold was maintainable to recover the price of the butters. *Alexander* v. *Gardner*, 1 Scott, 281, 630; 1 Bing. (N.C.) 671; 3 D. P. C. 146; 1 Hodges, 147; 4 L. J., C. P. 223.

Although goods are stopped in transitu, the vendor, after the credit has expired, may recover for them in an action for goods bargained and sold, if he is ready to deliver them on the price being paid. *Kymer* v. *Suwercropp*, 1 Camp. 109; 10 R. R. 664.

An action for goods bargained and sold is a good action against a vendee for refusing to take them on a false allegation that they were damaged. *Hankey* v. *Smith*, Peake, 42, n.

—— **Resale.**]—After a resale an action for goods bargained and sold will not lie. *Hore* v. *Milner*, Peake, 42, n. S. P., *Lamond* v. *Devall*, 9 Q. B. 1030; 16 L. J., Q. B. 136.

In an action for not taking away goods sold at a public auction, and for a loss on the resale, the plaintiff may recover on the count for goods bargained and sold; and it is no objection to his right to recover, that he has not the goods then to deliver in case he had a verdict. *Mertens* v. *Adcock*, 4 Esp. 251.

—— **Possession.**]—It is not essential, in order to a plaintiff maintaining an action for goods bargained and sold, that he should have possession of the goods or chattels at the time of the contract of sale; for all that is necessary is, that there should be a contract for the sale of specific goods and chattels at a fixed price, so that the plaintiff could have maintained trover for them. *Scott* v. *England*, 2 D. & L. 520; 14 L. J., Q. B. 43; 9 Jur. 87.

—— **Delivery.**]—If goods have actually been delivered by a vendor to a purchaser, and it appears that the delivery was part of the consideration for payment, a count for goods bargained and sold will not lie, but that for goods sold and delivered should be used. *Forbes* v. *Smith*, 11 W. R. 574.

—— **Where Goods not Fit for Delivery.**]—By the English law, if there is a contract for sale by weight or measure, and acts are to be done in order to identify the thing to be delivered before it is in a fit state for delivery, no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. *Boswell* v. *Kilborn*, 15 Moore, P. C. 309; 8 Jur. (N.S.) 443; 6 L. T. 79; 10 W. R. 517.

K. & Co., by an agreement in writing, contracted to sell and deliver to B. five tons weight of hops for 1855, 1856, 1857, the hops to be good and merchantable, and of the growth of each respective year; to be paid for on delivery, at a rate specified; the hops to be delivered free in Quebec. In 1856, K. & Co. sent to B. a quantity of hops, consisting of eighty-two bales, of the growth of 1856, in weight far exceeding five tons. B. inspected the hops, and after a tender by K. & Co. of the bulk, but without any specific tender of the specific quantity of five tons, B. refused to accept any of the hops, when K. & Co. took them away, and deposited them in a storehouse at

Quebec. K. & Co. then brought an action against B. for breach of contract in not accepting the hops:—Held, that as the five tons of hops had never been separated from the bulk, and there was no complete delivery, K. & Co. could not sue for the price, but only recover damages for the non-acceptance of the hops. *Ib.*

Held, also, that the measure of such damages was the difference of the contract price and market price at the time when the contract was broken. *Ib.*

iii. *Action for Goods Sold and Delivered.*

Commission.]—The mere delivery of goods by A. to B. will not support an action at the suit of A. for goods sold and delivered, where it appears that A. was to pay C. a commission upon the sale of the goods to B. *Miller* v. *Newman*, 4 Man. & G. 646; 11 L. J., C. P. 265.

Place.]—An action for goods sold and delivered is not supported by proof of an order by the defendant to send the goods to a certain quay, to be left till called for, without a reception and an acceptance on the part of the vendee of the goods so sent. *Anderson* v. *Hodgson*, 5 Price, 630.

Fixing Engine.]—Where it was proved that a contract was "to build an engine of 100-horse power for 2,500*l.*, to be completed and fixed by the middle or end of December"; and that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine:—Held, that the price agreed upon was not recoverable as for goods sold and delivered. *Clark* v. *Bulmer*, 11 M. & W. 243; 1 D. & L. 367; 12 L. J., Ex. 463. S. P., *Parsons* v. *Sexton*, 2 Car. & K. 266.

Condition—Resale.]—Where goods are sold on a condition that if they are not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute. *Lamond* v. *Davall* or *Devalle*, 9 Q. B. 1030; 16 L. J., Q. B. 136; 11 Jur. 266.

Appropriation.]—A. sold to B., by sample, twenty-four sacks of flour, part of a lot of 217 sacks belonging to A. which were lying at the warehouse of M., and he also gave B. a delivery order on M., in pursuance of which M. transferred twenty-four sacks of flour to B.'s name in the books, and afterwards delivered twelve sacks of the flour to B., which B. paid for. No appropriation of any particular twenty-four sacks was ever made for B. The flour contained in the twelve sacks delivered was found on examination not to correspond with the sample, and B. consequently refused to accept or pay for the remaining twelve:—Held, that A. could not recover the price of these twelve sacks as for goods sold and delivered. *Elliott* v. *Heginbotham*, 2 Car. & K. 545.

Title.]—In an action for goods sold and delivered, the defendant cannot show, under the general issue, that, at the time of the sale, the goods did not belong to the vendor, and that they were afterwards reclaimed by the real owner. *Walker* v. *Mellor* or *Mellon*, 11 Q. B. 478; 2 Car. & K. 546; 17 L. J., Q. B. 103; 12 Jur. 268.

Retaking from Buyer.]—Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking is no answer to an action by the seller for the price. *Gillard* v. *Brittan*, 8 M. & W. 575; 1 D. (N.S.) 424; 11 L. J., Ex. 133.

Sale and Return.]—A contract with an advertising tailor for four suits a year, and a return of the old suits, is not provable under a count for goods sold; it is a special contract, and should be declared on as such. *Rees* v. *Manners*, 3 Smith, 119.

Death of Horse before Sale Absolute.]—A horse was sold by the plaintiff to the defendant, upon condition that it should be taken away by the defendant and tried by him for eight days and returned at the end of that time if it was not found suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price as for goods sold and delivered. *Elphick* v. *Barnes*, 49 L. J., C. P. 698; 5 C. P. D. 321; 29 W. R. 139; 44 J. P. 651.

Loss of Ship on Voyage.]—The defendant in London buys of the plaintiff a ship which the plaintiff builds beyond seas. The defendant writes to the plaintiff, ordering him to provide a captain and crew, to load the vessel and to insure her. The plaintiff carries out the order, and the captain and crew sail in the vessel, which is lost on the voyage. The plaintiff may recover the price of the vessel under a count for goods sold and delivered. *Hazard* v. *Hodges*, 7 W. R. 204.

Goods Damaged while Lent.]—The plaintiff agreed to let (or lend) the defendant a musical snuff-box, on the understanding that if it was damaged, the defendant was to have it and pay for it, and 3*l.* 10*s.* was to be taken as its value. The defendant received the box accordingly, and it was damaged while in his possession:—Held, that the plaintiff was entitled to maintain an action for goods sold and delivered, to recover the 3*l.* 10*s.* *Bianchi* v. *Nash*, 1 M. & W. 545; 1 Tyr. & G. 916; 5 L. J., Ex. 252.

Sale or Return.]—When goods have been sold upon a contract of sale or return within a reasonable time, and the goods are detained an unreasonable time, the plaintiff may bring an action for goods sold and delivered. *Beverley* v. *Lincoln Gas Light and Coke Co.*, 2 N. & P. 283; 6 A. & E. 829; 7 L. J., Q. B. 113. S. P., *Bailey* v. *Gouldsmith*, Peake, 78; *Harrison* v. *Allen*, 9 Moore, 28; 2 Bing. 4; 1 Car. & P. 235; 2 L. J. (O.S.) C. P. 97.

Where goods are sold under a contract of sale or return, they pass to the purchaser, subject to an option in him to return them within a reasonable time; and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered as upon an absolute sale. *Moss* v. *Sweet*, 16 Q. B. 493; 20 L. J., Q. B. 167; 15 Jur. 536. Contrà, *Iley* v. *Frankenstein*, 8 Scott (N.R.) 839. Overruled, 2 Bing. 484.

—— **Goods Sold in Casks.**]—On the sale of beer in casks, the seller gave notice to the purchaser, that, unless he returned the casks within a fortnight he would be considered as the pur-

chaser, and he did not return them within a fortnight :—Held, that the seller could not maintain an action for goods sold and delivered, the whole resting on a special agreement. *Lyons* v. *Barnes*, 2 Stark. 39.

In an agreement for the sale of oil was the following memorandum :—"The casks to be returned in three months, or to be paid for at the rate of 3*l.* per ton." The casks not having been returned within the time specified :—Held, that the value might be recovered as goods sold and delivered. *Johnson* v. *Kirkaldy*, 1 Arn. & H. 7 ; 4 Jur. 988.

Brewers in Dublin supplied porter in casks to a customer on the terms that the empty casks were to be returned to Dublin at the customer's expense, within six months from the date of invoice, or paid for at the invoice price, at the option of the shippers :—Held, that, as soon as the casks were empty, the customer was in the situation with respect to them of a mere bailee during pleasure, and that the brewers had such an immediate right of possession of the empty casks as would entitle them to maintain an action against any person who converted them to his own use. *Manders* v. *Williams*, 4 Ex. 339 ; 18 L. J., Ex. 437.

The defendant sold to the plaintiff cement in casks and bags for a certain sum, the defendant to allow the plaintiff 3*s.* 6*d.* for each cask, and 2*s.* 6*d.* for each bag which should be returned, terms cash. In an action upon the contract for the price of the casks and bags, the plaintiff averred, and the defendant traversed, a readiness and offer to return the casks and bags :—Held, that the averment was severable, and that the plaintiff was not bound to prove a readiness to return all the casks and bags. *Nelson* v. *Patrick*, 3 C. B. 774 ; 16 L. J., C. P. 98.

By way of Barter or Exchange.]—Where two parties agreed to barter goods for goods, and, the balance being in favour of the plaintiff, the defendant omitted for three years to send goods to meet it :—Held, that the lapse of time did not entitle the plaintiff to bring an action for goods sold, but that his remedy was by an action against the defendant for not delivering goods. *Harrison* v. *Luke*, 14 M. & W. 139 ; 14 L. J., Ex. 248.

The plaintiff sued for goods sold and delivered. It appeared at the trial that the plaintiff had sold the defendant goods, for which he was to be paid partly in money and partly by a second-hand saddle and bridle. No evidence was given to show whether the goods had or had not been delivered by the defendant to the plaintiff :—Held, that it was no objection that the plaintiff had not declared on the special contract. *Bull* v. *Parker*, 2 D. (N.S.) 345 ; 12 L. J., Q. B. 93 ; 7 Jur. 283.

If A. and B. agree to exchange horses, and B. gives a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of, or offer to deliver his own to B. ; for the payment of earnest-money vests the property of A.'s horse in B. *Bach* v. *Owen*, 5 Term Rep. 409.

A plaintiff agreed to exchange his horse, warranted sound, with the defendant, for another horse and a sum of money : the horses were exchanged, but the defendant refused to pay the money, alleging that the plaintiff's horse was unsound. In an action on the agreement, with counts for horses sold :—Held, that the plaintiff might recover the money on the common counts though he failed to prove the agreement as stated in the special count. *Seldon* v. *Cox*, 5 D. & R. 277 ; 3 B. & C. 420.

Upon an agreement between two traders to supply each other on the footing of goods for goods ; after a balance struck between them, such balance is to be paid in money, and may be sued for on the general counts. *Ingram* v. *Shirley*, 1 Stark. 185.

If trefoil is sold, to be paid for partly in goods and partly in money, the seller should declare specially on the contract, and not generally for goods sold and delivered. *Tulver* v. *West*, Holt, N. P. 178.

B. agreed to purchase of A. a gun, for forty-five guineas ; but it was stipulated that A. should take a gun of B.'s, valued at thirty guineas, in part payment : B. having refused to deliver his gun and complete the contract :—Held, that A. was entitled to recover the forty-five guineas as the stipulated price. *Forsyth* v. *Jervis*, 1 Stark. 437 ; 18 R. R. 804.

iv. *Pleadings and Evidence.*

Pleadings—Non-delivery.]—It is not necessary, in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach. *Squier* v. *Hunt*, 3 Price, 68.

A contract for the sale of tallow warranted to be ready for delivery from ship or warehouse before 1st November :—Held, that this was equivalent to a contract to be generally ready for delivery before that day, and need not be specially averred. *Thornton* v. *Jones*, 6 Taunt. 581 ; 2 Marsh. 287 ; Holt, N. P. 164.

Upon breach of a contract for the purchase of 100 bags of wheat, forty or fifty of which were to be delivered on one market-day, and the remainder on the next market-day, the plaintiff cannot declare as upon an absolute contract for the delivery of forty bags on the first day, &c., though forty bags were then in fact delivered, but the contract should be stated in the alternative, according to the original terms of it. *Penney* v. *Porter*, 2 East, 2.

Where, in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver it to, and suffer the plaintiff tiff to take it away as he wanted it, when requested, an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver the residue. *Bowdell* v. *Parsons*, 10 East, 359.

—— **Tender of the Price of Goods.**]—In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price. *Rawson* v. *Johnson*, 1 East, 203 ; 6 R. R. 252. S. P., *Waterhouse* v. *Skinner*, 2 Bos. & P. 447.

In an action for the non-delivery of corn at S. pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price, or

what is equivalent thereto: for the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time, and each must aver performance, or offer to perform his part, before he can maintain an action against the other. *Morton* v. *Lamb*, 7 Term Rep. 125; 4 R. R. 395.

—— **Non-acceptance.**]—In an action for not accepting a quantity of guano, the declaration alleged that the plaintiffs were ready and willing to deliver the guano to the defendant according to the terms of the contract:—Held, that it was not necessary for the plaintiffs to aver a tender or an offer to deliver, or that the defendant dispensed with a tender. *Boyd* v. *Lett*, 1 C. B. 222; 2 D. & L. 847; 14 L. J., C. P. 111.

A declaration stated that the defendants bought of the plaintiff linseed to be worked by them within a specified time, and to be paid for in ready money, and by the defendants' acceptance at two months; that the plaintiff tendered the linseed to the defendants, who, although requested, refused to pay in ready money or to give their acceptance, and discharged the plaintiff from tendering the bill for that purpose. The defendants pleaded, first, that they were not requested to pay for the linseed in ready money, or to give their acceptance; and, secondly, that they did not refuse to give their acceptance or discharge the plaintiff from drawing upon them:—Held, that the pleas were bad, the averments traversed being immaterial. *Spaeth* v. *Hare*, 1 D. (N.S.) 595; 9 M. & W. 326; 11 L. J., Ex. 104.

To a count for not accepting goods described in the contract as "to arrive ex Peerless from Bombay," a plea that the defendant meant another ship of the same name, which sailed from Bombay two months earlier, and that the plaintiff was not ready to deliver any goods which arrived by that ship, is a good answer. *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

The plaintiffs declared upon a contract for the sale of refined petroleum. The declaration stated that the plaintiffs were ready and willing to perform their part of the agreement, but that the defendants, though they accepted part of the petroleum, refused to accept the remainder. The defendants pleaded that the contract was contained in certain bought and sold notes, and that the plaintiffs were never ready and willing to sell to the defendants such refined petroleum as they agreed to sell, and that the petroleum received by the defendants was received by them in ignorance, and without the means of knowing that it was not such refined petroleum as the plaintiffs agreed to sell:—Held, that the plea, if not amounting to a traverse of the plaintiffs' readiness and willingness to perform their contract, was bad in substance, as setting up an understanding inconsistent with that stated in the declaration, and admitted by the plea. *Borrowman* v. *Rossel*, 16 C. B. (N.S.) 58; 33 L. J., C. P. 111, 112, n.; 10 Jur. (N.S.) 679; 10 L. T. 236; 12 W. R. 580.

It is a good defence to an action, on an agreement to deliver goods sold, that the plaintiff is in such a situation as to be unable to pay for them, and had compounded with his creditors. *Reader* v. *Knatchbull*, 5 Term Rep. 218, n.

—— **Bargain and Sale.**]—Where goods are sold for ready money, and payment is made accordingly, no debt arises, and such payment is therefore provable under the general issue. *Bussey* v. *Barnett*, 9 M. & W. 312; 1 D. (N.S.) 646; 11 L. J., Ex. 211. Contra, *Littlechild* v. *Banks*, 7 Q. B. 739; 14 L. J., Q. B. 356; 9 Jur. 1096.

Under a plea of nunquam indebitatus for goods bargained and sold, it is open to the defendant to take the objection, that the contract is void by s. 17 of the Statute of Frauds. *Fricker* v. *Thomlinson*, 1 Man. & G. 772. S. P., *Leaf* v. *Tuton*, 10 M. & W. 393; 12 L. J., Ex. 69.

—— **False Representation.**]—A declaration alleged that the plaintiff bargained with the defendant to buy his interest in a lease and fixtures and the goodwill of a business; and that the defendant, by falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the business, and the net profits of the trade, were of a certain amount, sold to the plaintiff the lease and fixtures and the goodwill of the business: and it then went on to allege, that the representation was false, and occasioned a consequent damage to the plaintiff:—Held, that, under not guilty, the plaintiff was bound to prove a sale, by production of the agreement between the parties, which appeared to be in writing, as well as a false and fraudulent representation; and that it was not enough to prove an assignment of the lease, fixtures, and goodwill. *Mummery* v. *Paul*, 1 C. B. 316; 2 D. & L. 582; 14 L. J., C. P. 9.

Where a declaration alleged that the defendant falsely represented himself as an agent of the master of a vessel, and so entered into a charterparty with the plaintiff:—Held, that, under the plea of not guilty, the contract must be proved by the plaintiff, and not the misrepresentation only. *Brink* v. *Wingvard*, 2 Car. & K. 656.

A defendant in an action for goods bargained and sold at a specific price will not be allowed to show, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless specially pleaded. *Woodhouse* v. *Swift*, 7 Car. & P. 310.

—— **Fraud.**]—In an action on an agreement, in which fraud is pleaded, the plea is not supported unless some wilful misrepresentation has been made. *Stevens* v. *Webb*, 7 Car. & P. 60.

Evidence—Readiness and Willingness.]—A demand of delivery of the goods sold is sufficient proof of an averment that the plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant when he was not himself present to have done so, if required, on the spot. *Squier* v. *Hunt*, 3 Price, 68.

In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods. *Wilks* v. *Atkinson*, 1 Marsh. 412; 6 Taunt. 11.

—— **Parties.**]—A. bought goods of B., which were delivered to C., a carrier, to be by him conveyed to A.'s shop. C., by mistake, delivered to A. goods of the like description, but of greater value, which had been entrusted to him to deliver to a third person. A., having, in ignorance of the mistake, appropriated the goods so de-

livered to him, afterwards agreed to pay C. (who had paid their value to the owner) for the goods, at the same rate that he was to have paid for those he had ordered:—Held, that this was some evidence in support of a count for goods sold and delivered. *Coles* v. *Bulman*, 6 C. B. 184; 17 L. J., C. P. 302; 12 Jur. 586.

—— **Time of Delivery.**]—If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them it is not competent for the defendant to give parol evidence that it was a condition of the sale that the goods should be taken away immediately, or that by the usage of trade, where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract. *Greaves* v. *Ashlin*, 3 Camp. 426; 14 R. R. 771.

—— **Method of Delivery.**]—A declaration alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery. *Samuel* v. *Darch*, 2 Stark. 60.

—— **Inference from Catalogue.**]—At the trial of an action for not accepting goods, described in a colonial broker's catalogue, the defendant's counsel put the catalogue into the hands of a witness, and, without laying foundation for the question by asking whether there was any usage, asked at once whether, from the catalogue, it would be inferred by custom that the goods were sound and in their original packages:—Held, that the question in that form was inadmissible. *Curtis* v. *Peek*, 13 W. R. 230—Ex. Ch.

Evidence of Sale.]—A receipt and also a delivery order given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shown to be in existence before the sale, is admissible as affording some evidence of the sale having taken place on the day of the date of the documents. *Morgan* v. *Whitmore*, 6 Ex. 716; 20 L. J., Ex. 289.

In an action for goods sold and delivered, to which the defence was, that the plaintiff had sold them to the defendant on certain terms, the defendant was not allowed to call witnesses to prove that the plaintiff had sold the same quality of goods to other persons on the same terms. *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; 27 L. J., C. P. 241; 4 Jur. (N.S.) 379; 6 W. R. 442.

In an action for goods sold, if a defendant says that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum; on evidence of this, the plaintiff is entitled to a verdict, with nominal damages. *Dixon* v. *Deveridge*, 2 Car. & P. 109.

Where the plaintiff sent goods to the defendant, resident abroad, on the order of merchants in London, and the defendant received and used the goods:—Held, that it was primâ facie evidence of goods sold and delivered to the defendant. *Bennett* v. *Henderson*, 2 Stark. 550.

In an action for the price of goods sold which have been sent by a carrier, there must be evidence either that they were ordered or received. *Harman* v. *Bennett*, 1 F. & F. 400.

Where the price of goods is above 10*l.*, and nothing is paid as earnest to bind the bargain, nor is there any memorandum in writing, signed by the defendant or his agent, two things must be proved to entitle the plaintiff to recover: first, that the defendant in fact ordered the goods; and, secondly, that he accepted them with an intent to take to them as owner. *Smith* v. *Rolt*, 9 Car. & P. 696.

Under the general issue evidence is admissible that the period of credit was not expired when the action was commenced. *Broomfield* v. *Smith*, 1 M. & W. 543; 1 Tyr. & G. 929; 5 L. J., Ex. 155.

Under the general issue the defendant may prove that the goods delivered were not such as were ordered, although there was a special contract to pay for the goods at a certain price; and the plaintiff can then recover only on the quantum meruit. *Cousins* v. *Paddon*, 2 C. M. & R. 547; 5 Tyr. 535; 5 L. J., Ex. 49.

A count for a tailor's bill: the defendant put in an agreement between himself and the plaintiff, by which it was agreed that the defendant should recommend customers to the plaintiff, and receive a percentage on their accounts; such percentage to be received by the defendant in clothes, to be ordered from the plaintiff by the defendant, from time to time, as he might want the same, and that a settlement of accounts should take place between the parties every six months, or at the furthest in twelve months:—Held, on this agreement, under nunquam indebitatus, that the onus lay on the plaintiff to prove that a settlement of accounts had been come to, on which the balance was in his favour, and that no action lay till the expiration of twelve months. *Garey* v. *Pyke*, 2 P. & D. 427; 10 A. & E. 512.

—— **Invoices.**]—If a party receiving an invoice does not object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it. *Pauli* v. *Simes*, 6 Car. & P. 506.

If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter with a letter, saying that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale. *Ib.*

An invoice being in the hands of a purchaser stating the weight of the goods sold, and no objection being made by him, is some evidence of their weight. *Baylis* v. *Lundy*, 4 L. T. 176; 9 W. R. 556.

The fact of a tradesman delivering an invoice or an account in which goods are described as bought from him, does not operate as an estoppel, so as to prevent his showing that he was not in truth the seller. *Holding* v. *Elliott*, 5 H. & N. 117; 29 L. J., Ex. 134; 1 L. T. 381; 8 W. R. 192.

b. Measure of Damages.

i. *For Non-Delivery.*

Delivery by Instalments.]—B. bought of M. 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, M. gave notice to B. that he did not intend to deliver any iron. In December, B. commenced an action for non-delivery, and claimed as damages the difference on the 30th of November, between the contract and market prices of the iron:—Held, that the proper measure of damages was the sum of the

differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October and the 30th of November, respectively. *Brown* v. *Muller*, 41 L. J., Ex. 214; L. R. 7 Ex. 319; 27 L. T. 272; 21 W. R. 18.

The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron, "delivery in monthly quantities (of 166⅔ tons) over 1871, or sooner if required"; payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons, and upon the defendants' refusal, brought an action for non-delivery:—Held (by Kelly, C.B., and Pigott, B.; Martin, B., dissentiente), that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons in December, and were therefore not entitled to recover. By Martin, B., first, that the original contract had not been put an end to by the plaintiff's application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2,000 tons under their contract; and, secondly, that the proper measure of damages was the difference between the contract and market prices in December, 1871, when the defendants refused to deliver the iron. *Tyers* v. *Rosedale and Ferryhill Iron Co.*, 42 L. J., Ex. 185; L. R. 8 Ex. 305; 29 L. T. 751; 21 W. R. 793. Reversed on appeal, ante, col. 532; the point as to damages not arising in Ex. Ch.

If a contract is made for the sale of a certain quantity of goods to be delivered by parcels on successive days, and prior to the time for fulfilment of the agreement the vendor finally repudiates and declines to perform it, whereupon the buyer, electing to treat such repudiation as a breach of the entire contract, brings an action for the same, before the period for completion has arrived—the measure of damages will be the difference between the contract and market price of the goods on the several days when the vendor ought to have performed his contract by delivery; subject, however, to the reduction of the amount so ascertained, by proof of any facts which may have afforded the buyer the means of mitigating and diminishing the loss incurred. *Roper* v. *Johnson*, 42 L. J., C. P. 65; L. R. 8 C. P. 167; 28 L. T. 296; 21 W. R. 384.

The defendant in April agreed to sell and the plaintiffs to buy 3,000 tons of coal, at 8*s.* 6*d.* per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitely refused to deliver any coal, and on the 3rd of July the plaintiffs brought an action for this breach. At the trial, which took place on the 13th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to show whether they could have gone into the market, and obtained a new contract for coals:—Held, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. *Ib.*

The defendants entered into a contract with the plaintiff, whereby they undertook to deliver, from the 1st January until the 31st December, 1872, 6,260 waggons of coal, at 7*s.* 3*d.* per ton of 20 cwt., at the fair average rate of twenty waggons per day; payment by three months' acceptance, drawn on the 10th of each month, for the previous month's supply. The deliveries were irregular in point of time, and insufficient in point of quantity, and they failed to comply with the condition of the contract, that they should be at the fair average rate of twenty waggons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendants at any time during 1872, but on the 13th February, 1873, he bought coal in the market to supply the whole of the deficiency of the coal undelivered, at a very much higher price, namely 19*s.* per ton. Coal had been gradually rising in price in the market throughout the successive months of 1872, and it rose more rapidly in the months of January and February, 1873. The plaintiff claimed to be entitled to, as damages, the difference between the contract price of 7*s.* 3*d.* and the market price of coal at the expiration of such a reasonable time after the 31st December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole of the deficiency left undelivered by the defendants under their contract throughout the year 1872. The defendants contended that the plaintiff was not entitled to wait until the expiration of the year before assessing his damages, as contended for by the plaintiff, for that a breach of the contract was committed as often as a month expired without the proper quantity applicable to such month having been delivered, and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price of coal, or that the breaches were committed at some shorter periods; but that the damages should be calculated at the end of each month:—Held, that as soon as the defendants failed to deliver a fair average of coal, according to the terms of the contract, a breach had taken place, for which, at that time, the plaintiff was entitled to damages as upon that breach, and so on from time to time as each subsequent breach took place, and that it was an erroneous way of estimating the damages by waiting until the full period of the contract had expired, and then claiming the difference at that time. *Barningham* v. *Smith*, 31 L. T. 540. *See cases*, ante, cols. 529, et seq.

Penalties.]—The defendant, in January, 1872, agreed to furnish the plaintiffs with a quantity of sets of wheels and axles according to tracings, to be delivered on certain specified days, free on

board at Hull. The plaintiffs were under a contract with a Russian railway company to deliver them 1,000 covered waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873, under a penalty of two roubles per waggon for each day's delay in delivery. In the course of the negotiations the defendant was told by the plaintiffs that they wanted the wheels and axles to complete waggons which they were bound to deliver under penalties, but neither the precise day for the delivery nor the amount of the penalties was mentioned. The defendant did not deliver the sets of wheels in time, and the plaintiffs in consequence had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to 100*l.*:—Held, that though the plaintiffs were not entitled to recover in an action for breach of contract, as a matter of right, the amount of the penalties, yet the jury might reasonably assess the damages at that amount. *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel* v. *Armstrong*, 43 L. J., Q. B. 211; L. R. 9 Q. B. 473; 30 L. T. 871; 23 W. R. 127.

The plaintiff, having contracted to supply iron rails to a foreign company, applied to the defendants, who wrote him: "We have this day sold you about 5,413 tons of iron rails . . . . delivered f. o. b. at Newport. Payment to be stated in the specification." By the specification "the delivery of the rails was to commence by the 15th of February, 1873," and to be completed by the 15th of April, 1873. The makers to have the option to begin delivery on the 15th of December, 1872. In the event of the makers exceeding the time of delivery above stipulated, they were to pay by way of fine 7*s.* 6*d.* per ton per week, this amount to be deducted out of the payment for the rails. The rails were to be stacked so that they might be tested, and payment to be made by bills. In the event of ships not being ready within fourteen days' notice being given, then the payment by the same bills to be made against wharf warrants and engineer's certificate for each 500 tons stacked, and being to buyer's orders. The sellers undertaking to put f. o. b. when the vessel was ready. The workmen in the employ of defendants struck work, and defendants did not deliver any rails until the month of May. They continued the delivery from time to time, but the whole quantity was not delivered until the month of September:—Held, that the sum of 7*s.* 6*d.* per ton per week was a liquidated sum which the defendants were bound to pay to the plaintiff, but that it was only to be calculated from the 15th of May. *Bergheim* v. *Blaenavon Iron and Steel Co.*, 44 L. J., Q. B. 92; L. R. 10 Q. B. 319; 32 L. T. 451; 23 W. R. 618.

See also PENALTY.

Increased Freight.]—A charterer who has, through the shipowner's default in not being ready to load at the time agreed upon, been compelled not only to pay increased freight, but also to pay a higher price for the article to be shipped, is, in the absence of evidence that he will be able to sell at a corresponding increased price at the port of delivery, or of other evidence that he will not be a loser, entitled to recover as damages the additional price paid as well as the difference in freight. *Featherston* v. *Wilkinson*, 42 L. J., Ex. 78; L. R. 8 Ex. 122; 28 L. T. 448; 21 W. R. 442.

Postponement of Delivery.]—When a vendor of goods, by contract in writing, at the request of the purchaser, who is at the time fixed for delivery unable to take and pay for the goods, withholds delivery till a later date on a parol promise to the purchaser to that effect:—Held, that, if at the expiration of the latter date so fixed the purchaser refuses to accept delivery, the vendor may sue for damages as for a breach at the time fixed for delivery by the original contract, and is entitled to damages according to the market price at the later date verbally fixed for the purchaser's convenience. *Hickman* v. *Haynes*, 44 L. J., C. P. 358; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 872.

By bought and sold notes signed by brokers acting both for the plaintiff and the defendant, the last of which was dated April 25th, the plaintiff bought of the defendant 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by the 25th July. A correspondence ensued between the brokers and the defendant's agent until February following, from which a jury might properly come to the conclusion that the plaintiff waited for the delivery of the iron at the request of the defendant; he then went into the market and bought, the price of iron being higher than at the end of July:—Held, that, as the plaintiff had not bound himself to wait, there was no alteration of the contract within the Statute of Frauds, and therefore he might recover from the defendant the difference between the contract price of the iron and the market price in February. *Ogle* v. *Vane (Earl)*, 9 B. & S. 182; 37 L. J., Q. B. 77; L. R. 3 Q. B. 272; 16 W. R. 463—Ex. Ch.

Of Goods Sold on Credit.]—A having bought some sheep on credit, left them in the custody of the vendor; without any default of A. the vendor resold the sheep:—Held, that the measure of damages was not the value of the sheep, but the loss sustained by A. not having the sheep delivered to him at the price agreed on. *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J., Ex. 180; 2 L. T. 466; 8 W. R. 629.

Goods Paid for but not Delivered.] — See *Biggerstaff* v. *Rowatt's Wharf*, ante, col. 567.

Late Delivery—Loss of Profit.]—The plaintiffs, in July, 1877, undertook to make for J. a machine, to be delivered at the end of August. The defendants contracted with the plaintiffs to make "as soon as possible" part of the machine called a "gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish the "gun" until the latter part of September. J. then refused to accept the machine from the plaintiffs. The delay on the part of the defendants was owing to the circumstance that at the time of undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns, without which it could not be made:—Held, that the defendants had committed a breach of their contract, and that the plaintiffs were entitled to recover damages for the loss of profit upon the contract with J., and for the expenditure uselessly incurred by them in making other parts of the machine. *Hydraulic Engineering Co.* v. *McH* 4 Q. B. D. 670; 27 W. R. 221—C. A.

—— **Of Thrashing Machine—Injury to Corn.**]—The plaintiff, a farmer, contracted with the defendant, an agent for the sale of thrashing machines, for the purchase of a thrashing machine, to be delivered on the 14th August; the defendant was aware of the particular purpose for which it was ordered. The machine was not delivered on that day, and the plaintiff being led by the promises of the defendant to expect that it would be delivered from day to day, abstained from hiring one elsewhere:—Held, that the plaintiff was entitled to recover for loss sustained by injury to his wheat by a fall of rain, and for expenses incurred in carting the wheat and thatching it, and for the cost of kiln-drying it, but not for loss by a fall in the market price of wheat. *Smeed* v. *Foord*, 1 El. & El. 602; 28 L. J., Q. B. 178; 5 Jur. (N.S.) 291; 7 W. R. 266.

Loss of Profit on Contract to Resell.]—In an action for breach of contract to deliver goods it was shown that the goods were not procurable in the market, that the plaintiff had entered into a contract of subsale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for resale:—Held, that the plaintiff was not entitled to recover damages for loss of profit on the resale. *Borries* v. *Hutchinson* (infra) distinguished. *Thol* v. *Henderson*, 8 Q. B. D. 457; 46 L. T. 483; 46 J. P. 422.

The defendant contracted to sell to the plaintiff 75 tons of caustic soda, a commodity not ordinarily procurable in the market, at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, and 25 tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered 26 tons in all. At the time of entering into the contract, the defendant was aware that the plaintiffs were buying the soda for a foreign correspondent, but did not know until the end of August that it was destined for St. Petersburgh. The plaintiffs had in fact contracted to sell the soda to A., a merchant at St. Petersburgh, at an advanced price, and A. had contracted to sell it to B., a soap manufacturer at that place, for a still further advance. In consequence of the late delivery of the 26 tons, the plaintiffs were compelled to pay a higher rate of freight and insurance; this amounted to 40*l.* 17*s.* For their failure to deliver the remainder to A., they were called upon to pay and actually paid 159*l.*, which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him. In an action by the plaintiffs to recover from the defendant damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the 49 tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to A.; in other words, the loss of profit on the resale. *Borries* v. *Hutchinson*, 18 C. B. (N.S.) 445; 34 L. J., C. P. 169; 11 Jur. (N.S.) 267; 11 L. T. 771; 13 W. R. 386.

Held, that they were also entitled to recover the 40*l.* 17*s.*, the excess of freight and insurance which was the necessary result of the defendant's breach of contract; but that the defendant was not chargeable with the 159*l.* which the plaintiffs had paid to A. to compensate B. for the loss of his bargain, this being too remote a damage. *Ib.*

—— **Custom.**]—The loss of profit on a resale cannot be taken into calculation in estimating the damages which the original vendor is liable to pay for non-delivery; although the original contract was a contract for "forward delivery," and in the place where it was made such purchases are commonly followed by a resale, and are made with that view, and although such a resale has been actually made before the breach of the original contract by non-delivery. *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L. J., Q. B. 221; 11 Jur. (N.S.) 973; 12 L. T. 728; 13 W. R. 940.

Sub-Contract—Written Agreement not mentioning.]—The plaintiff having received an order from P. to supply from 150 lbs. to 200 lbs. of wound cotton daily, verbally agreed with the defendant that the defendant should undertake the winding of it, informing the defendant, as was the fact, that the plaintiff had taken upon himself the consequences of late delivery, if any, to P., and obtaining from the defendant the assurance that he, the plaintiff, might rely on him. Afterwards, and on the day of the interview, the plaintiff sent the defendant a written order for the cotton, on the express condition that the same should be delivered daily, but containing no notice or stipulation as to the sub-contract of the plaintiff with P. The defendant failing to deliver regularly to the plaintiff, and the plaintiff to P., the result was that P. claimed, and the plaintiff paid to P. 300*l.* by way of reimbursing P. for his loss upon resale of the goods which P.'s customers had refused to accept, as having been delivered late:—Held, that the plaintiff might recover the 300*l.* from the defendant as damages for the breach of contract to deliver the cotton daily. *Sawdon* v. *Andrew*, 30 L. T. 23.

Market Price—Difference.]—The defendant on the 26th July, sold by sample to the plaintiff, 3,000 gallons of naphtha, at 2*s.* 2*d.* On the 27th the plaintiff resold the same to H. also by sample at 2*s.* 6*d.* The sample contained 73 per cent. of benzol, an article used in the manufacture of magenta dye, newly discovered, and for that purpose was worth 5*s.* 9*d.* a gallon. The defendant failed to deliver the naphtha. It was proved that H. had claimed the difference between 5*s.* 9*d.* and 2*s.* 6*d.* from the plaintiff. In assessing the damages for the non-delivery of the naphtha, the jury gave this amount to the plaintiff as damages:—Held, that there must be a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample at the time of the breach. *Josling* v. *Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78; 4 L. T. 251.

On a second inquiry, naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5*s.* 9*d.* at the time of the breach. The judge told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having given this amount:—Held, that the damages were rightly assessed, and that there was no misdirection. *Ib.*

In an action for a breach of contract in not delivering a quantity of bacon upon a given day, the damages must be estimated by the price of bacon of the same description at or about the time when the contract was broken, and not at the time when the damages are assessed. *Gainsford* v. *Carroll*, 4 D. & R. 161; 2 B. & C. 624; 2 L. J. (O.S.) K. B. 112; 26 R. R. 495.

The defendants, in the month of September, contracted to deliver tallow to the plaintiff "in all next December," at a certain price per cwt. In October they informed him that they had sold the tallow, and could not perform the contract:—Held (tallow having risen in price), that the plaintiff was entitled to recover damages according to the market price, on the last day on which the contract could have been performed, viz. 31st of December, as he had not acquiesced in its being rescinded when the defendants refused to perform it. *Leigh* v. *Paterson*, 2 Moore, 588; 20 R. R. 552.

The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. *Peterson* v. *Ayre*, 13 C. B. 353.

Loss of Market.]—Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:—Held, that the consignee could not recover damages for the loss of market. *The Parana*, 2 P. D. 118; 36 L. T. 388; 25 W. R. 596—C. A.

No Market.]—When goods which cannot be procured in the market are sold to be delivered on a day certain, the purchaser is entitled to recover, in an action for breach of contract to deliver, the amount which he has reasonably expended to avert the loss which he would otherwise have sustained from non-delivery. *Hinde* v. *Liddell*, 44 L. J., Q. B. 105; L. R. 10 Q. B. 265; 32 L. T. 449; 23 W. R. 650.

The defendant contracted to supply to the plaintiff 2,000 pieces of grey shirtings, to be delivered on the 20th of October certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October the defendant informed the plaintiff that he would be unable to complete his contract by the time specified, on which the plaintiff endeavoured to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to the plaintiff. The plaintiff sought to recover against the defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. The shirtings which the plaintiff bought were the nearest in price and quality that could be got by the 20th of October, and the jury returned a verdict for the amount claimed:—Held, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price. *Ib. And compare the following case.*

A purchaser bought champagne lying at a wharf at 14*s.* per dozen, and resold it at 24*s.* to the captain of a ship about to leave England. The wharfinger refused to deliver the wine, and the purchaser was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The wharfinger had no knowledge of the sale, or of the purpose for which the purchaser required delivery of the champagne. In an action for the conversion:—Held, that he was entitled, as damages, to the price at which he had sold the champagne. *France* v. *Gaudet*, 40 L. J., Q. B. 121; L. R. 6 Q. B. 199; 19 W. R. 622.

Payment by Bill—Dishonour—Parties.]—On 30th October, 1857, A. agreed with B. to buy of him 100 parcels of iron of a named quality, and 300 parcels of iron of another named quality, to be delivered immediately, and paid for by a bill of exchange at four months' date, down. No specific iron was appropriated for the purposes of the contract. A. gave the bill, which, on the 31st October, 1857, B. indorsed to his bankers, who continued the holders till the bill fell due. B. duly delivered the 100 parcels of iron, and gave A. a delivery order for the 300 parcels; which A., on 19th November, 1857, indorsed to his bankers, H. & Co., and a few days afterwards gave B. notice of the indorsement. H. & Co. presented the order at the works where the iron was lying, on 19th November, 1857, when delivery of it was refused. On 17th November, 1857, B. suspended payment; and, on 10th February, 1858, A. was adjudicated a bankrupt. On 4th March, 1858, the bill given by A. fell due, and was dishonoured. The banking company, though they claimed to be creditors of A. for the amount of the bill, did not prove against his estate, nor had A. paid any part of the amount. B., however, had paid them a composition of 8*s.* in the pound upon the amount of the bill:—Held, in an action for non-delivery of the 300 parcels of iron, that A. was entitled to recover only nominal damages, and that the fact that H. & Co. were the real parties, suing in A.'s name, could not be taken into consideration as affecting the damages, inasmuch as H. & Co. could have no greater right to recover than A. himself had. *Griffiths* v. *Perry*, 1 El. & El. 680; 28 L. J., Q. B. 204; 5 Jur. (N.S.) 1076.

ii. *For Non-Acceptance.*

No Market—Duty of Party Injured.]—The damages for the breach of a forward contract to accept goods for which there is no market, is the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do, as a reasonable man, and he, on the other hand, not being bound to do otherwise than is the ordinary course of his business. The plaintiffs contracted to sell to the defendant 15,000 tons of cannel coal in weekly quantities, the deliveries not to commence before June, at 26*s.* per ton, payable by monthly instalments, the defendant not to sell in certain specified places. The defendant repudiated the contract in July, but the plaintiffs

attempted to come to terms with him, and did not treat it as broken until September, when, there being no regular market for cannel coal, they tried without advertising to find another purchaser according to the ordinary course of their own business. After several failures, the coal was sold at 19*s.* per ton:—Held, that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained. *Lever* v. *Dunkirk Colliery Co.*, 43 L. T. 706—H. L. (E.)

Goods of Perishable Nature—Coal not raised.]—The plaintiff company, colliery owners, contracted to supply, and the defendant company, dealers in coal, in London, contracted to purchase, 3,250 tons of old Silkstone coal, at 19*s.* a ton, to be delivered to and taken by the defendants at the pit's mouth in equal monthly quantities, extending over a period of nine months. During several of the months the defendants failed to send waggons forward to accept the full quantity they were bound to accept, and which the plaintiffs were ready and willing to supply in such months, and the defendants therein made default. The coal of the plaintiffs' colliery was a perishable coal, deteriorating rapidly in quality if stacked or stored above ground, and it was not the ordinary course of business, nor a reasonable course for the colliery owner, to raise such coal, except to supply contracts previously entered into, and it was raised as far as possible from day to day to supply the waggons arriving to receive it, into which it was delivered direct from the pit's mouth. Such coal already raised could be, and frequently was, sold in small quantities in the London coal exchange by colliery owners, when a truck of coal had been refused by a customer, or had been sent astray, or when from any other reason coals ready raised were left on their hands, but not otherwise. An action was brought by the plaintiffs to recover damages from the defendants for breach of contract in failing to take the full monthly quantity of coals:—Held, that the amount of damages the plaintiffs were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine (whatever those two heads of calculation might amount to) and the contract price of 19*s.* a ton, and that such amount could be accurately calculated and ascertained by persons familiar with the subject, without actually raising and selling the coal, which, being of a perishable nature, was not readily or profitably to be so disposed of, and that the plaintiffs were not bound to have so raised and sold it. *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Coal Co.*, 35 L. T. 668.

Value of Goods when Tendered.]—Where A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof"; and, subsequently (the market having fallen), gave the seller notice that he would not accept it if delivered, the wheat being then on its transit to Birmingham:—Held, in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to him for acceptance at Birmingham and refused, and not on the day when the notice was received by the seller. *Phillpots* v. *Evans*, 5 M. & W. 475; 9 L. J., Ex. 33.

The measure of damages for non-acceptance of goods is the difference of the contract and market price at the time of breach. *Boswell* v. *Kilborn*, 15 Moore, P. C. 309; 8 Jur. (N.S.) 443; 6 L. T. 79; 10 W. R. 517.

Full Price.] — The plaintiff declared on a contract by the defendant to purchase iron of the plaintiff, and if the delivery of the iron should not be required by the defendant on or before the 30th April, the defendant agreed to pay for the iron on that day; and alleged that the plaintiff had always been ready and willing to deliver the iron, according to the terms of the contract, and that the 30th April had elapsed before the action, yet the defendant had not paid for the iron:—Held, that the plaintiff was entitled to recover, on this contract, the full price of the iron, and not merely the damages which he had sustained by the breach of the contract. *Dunlop* v. *Grote*, 2 Car. & K. 158.

Acceptance of Repudiation by bringing Action—Subsequent Resale by Seller.]—By a contract, made on the 24th May, 1895, the defendants purchased from the plaintiffs a cargo of maize, to be shipped from a port in the Argentine Republic about the 15th July. The market was then falling, and on the 28th May the buyers repudiated the contract, and on the 24th July the plaintiffs brought this action for damages for non-acceptance of the goods. The prices at that time were falling continuously, and there was no prospect of their recovery. If the plaintiffs had resold about the 24th July, when they brought this action, the loss on the contract price of the cargo, would have been 1,557*l.*, but they did not resell until the vessel and cargo arrived at her port of call on the 8th Sept., when the loss was 3,807*l.*:—Held, that the measure of damages was 1,557*l.*, being the difference between the contract price and the market price on the 24th July, when the plaintiffs accepted the defendants' repudiation by bringing this action, as, having regard to the falling prices, the plaintiffs ought not to have waited until the arrival of the cargo on the 8th September. *Roth* v. *Taysen*, 73 L. T. 628; 8 Asp. M. C. 120.

Dishonoured Bill.]—Where, in a contract of sale, there are specified days for the delivery of the goods, and payment is to be made by bill, if the bill is given, but dishonoured before the goods are delivered, the parties are placed in the same position as if no bill had been given, or as if the contract had been for ready money; and, therefore, if the vendor is sued by the vendee, after the dishonour of the bill, for non-delivery of the goods, the measure of damages is not the full contract price, but the difference between the contract and the market prices of the goods. *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380; 16 Jur. 38.

Sending Bill of Exchange with Bill of Lading—Conversion of Goods.]—A shipload of timber having been consigned to the defendants, the consignor sent the bill of lading and other shipping documents, and also a bill of exchange, to the plaintiffs, in pursuance of the usual course of business between him and them, to cover certain advances which they from time

to time made to him. The plaintiffs placed the shipping documents and bill of exchange relating to the cargo of timber in the hands of agents who acted between the plaintiffs and the defendants. The agents at the request of the plaintiffs forwarded the documents to the defendants, in order to have the bill of exchange accepted by them. Shortly afterwards the defendants informed the agents that the cargo was thoroughly out of condition, and that they could not take it in its then state. The agents replied that, unless the defendants returned the bill of exchange accepted, they ought to send back the shipping documents. This the defendants declined to do, as they had paid part of the freight, and intended to take possession of the cargo. Later on they stated that they had been compelled to remove the cargo under the rules of the dock company, but that, if the agents would repay them the freight and certain charges, and their profits on a portion of the cargo which they had sold, they would return the documents. The agents replied that the matter must be left in the hands of the plaintiffs, the owners of the cargo. The defendants then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against freight and charges. They offered to yield up the bill of lading on the freight and charges being refunded. Thereupon the plaintiffs commenced an action against the defendants, asking that they might be ordered to accept and deliver up the bill of exchange; and that it might be declared that, until such acceptance and delivery, the defendants were not entitled to retain the bill of lading. They also asked for an injunction, a receiver, and damages. Owing to delay, caused by the fault of both parties, the action did not come on for hearing until about four years after its commencement:—Held, that the defendants, having refused to accept the bill of exchange, were bound to have returned the shipping documents, which were only at their disposal on the condition that they should so accept the bill; and that they wrongfully took possession of the cargo, and dealt with it as its owners, although they had repudiated the contract, and refused to accept the bill of exchange, availing themselves of the bill of lading, which they had no right whatever to retain or make use of, to get that possession:—Held, therefore, that the plaintiffs were entitled to damages against the defendants; that the proper measure of damages was the value of the cargo after making a deduction for freight; but that none of the other charges claimed by the defendants could be allowed, except outgoings in connection with the sale of part of the cargo:—Held, also, that defendants must pay damages, in the nature of interest, for keeping the plaintiffs out of possession of their goods; that the ordinary measure of such damages would be 5 per cent. on the value of the cargo from the time the defendants wrongfully took possession thereof; but that, having regard to the delay which had occurred in bringing the action on for hearing, attributable no less to the plaintiffs than the defendants, half damages, computed at the rate of 2½ per cent only, would be awarded. *Rew* v. *Payne*, 53 L. T. 932; 5 Asp. M. C. 515.

Loss on Resale.]—If a purchaser refuses to accept goods bargained and sold, the vendor may resell them and recover against the purchaser the amount of the loss on the resale. *Maclean* v. *Dunn*, 4 Bing. 722; 1 M. & P. 761; 6 L. J. (o.s.) C. P. 184; 29 R. R. 714.

iii. *In other Cases.*

Fraudulent Sale—Price in Market at Time of Sale.]—L. ordered the defendant to buy for him rupee paper: the defendant sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what the defendant had sold to him, and ultimately resold it at a loss of 43,000*l.*:—Held, that the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper and the price which he would have received, if he had resold it in the market forthwith after purchasing it. *Waddell* v. *Blockley*, 48 L. J., Q. B. 517; 4 Q. B. D. 678; 41 L. T. 458; 27 W. R. 938—C. A.

Notice of Sub-Contract.] — The defendant agreed at Belfast with the plaintiffs, who were commission agents there, for the sale to the plaintiffs of a quantity of iron. The sold note was as follows:—"19th February, 1880. Sold Messrs. Hamilton, Megaw & Thomson, 500 to 700 tons, as lot may turn out, heavy No. 1 wrought scrap iron, as per Philadelphia inspection, copy of which I have received from you, for shipment to Philadelphia, not later than 19th April, 1880, at 6*l.* 5*s.* per ton, cost, freight and insurance, to Philadelphia. Payment to be made by you, net cash in exchange for bills of lading, as shipments are made.—James Magill." After such contract had been entered into, the plaintiffs contracted with W. for the sale to W. of a lot of scrap iron of the same description, up to 700 tons, upon certain terms which had been offered by W. prior to the contract, viz.:—"No. 1 wrought scrap iron, according to W.'s classification of October 17th, 1879, at 130/- c. f. i. to Philadelphia; shipment on or before April 19th, 1880." Immediately after the defendant began to ship the iron, the plaintiffs complained that the iron shipped did not answer the description in the contract, which was afterwards admitted to be the case, but it was agreed between the plaintiffs and the defendant that the former should be at liberty to accept the bills of lading of the shipments, without prejudice to the question between the plaintiffs and the defendant as to whether the iron shipped was in accordance with the contract. The vessel, on board which the iron was shipped, arrived at Philadelphia early in June, 1880, when W. refused to receive the cargo, which was admittedly not in accordance either with the contract between the plaintiffs and defendant, or with that between the plaintiffs and W. The plaintiffs, thereupon, sold the cargo at Philadelphia for 975*l.* 7*s.* 2*d.* If the cargo had been equal to the contract between the plaintiffs and the defendant, the plaintiffs would have been entitled to receive for it from W. the sum of 2,990*l.* 14*s.* 2*d.* In an action by the plaintiffs against the defendant for the breach of the contract, the jury found that the cargo equal to the contract would, at the time of delivery, have been 2,055*l.* 9*s.* 8*d.*, and the value of the cargo actually delivered was 975*l.* 7*s.* 2*d.*, viz. the amount got for it by the plaintiffs, after its refusal by W. The jury

also found, inter alia, that the defendant at the time of the contract, had notice that it was entered into by the plaintiffs to enable them to accept an offer already received by them for shipment to Philadelphia of iron answering the description of W.'s classification of October 17th, 1879, and that the profit on the resale was not an unusual one in such a transaction :—Held, that the plaintiffs were entitled to recover as damages the sum of 2,015*l.* 7*s.*, being the difference between the actual value and the amount which would have been receivable from W. had the cargo been in accordance with the contract, and not merely the difference between the actual value and the value of a cargo equal to the contract at the time of delivery. *Hamilton* v. *Magill*, 12 L. R., Ir. 186. See *Horn* v. *Midland Ry.*, 42 L. J., C. P. 59 ; L. R. 8 C. P. 131 ; 28 L. T. 312 ; 21 W. R. 481—Ex. Ch. ; and *Hydraulic Co.* v. *McHaffie*, supra, col. 582.

Action for not giving Bill.]—Where goods bargained and sold are to be paid for by a bill of exchange, and the vendor brings an action for not giving the bill before the bill would have been due, the measure of damages is the amount of the bill, less discount, at the time the action is brought. *Gordon* v. *Whitehouse*, 4 W. R. 231.

Sub-Sale—Retention of Waggons inferior to Sample—Trover.]—The plaintiffs being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorised by L. to pay them. Some waggons were delivered by the waggon company to a railway company, to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them ; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for the loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to deliver them up :—Held, that the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers, and that the plaintiffs were therefore entitled to recover the full value of the goods at the time of the conversion without deduction of the price. *Johnson* v. *Lancashire and Yorkshire Ry.*, 3 C. P. D. 499 ; 39 L. T. 448 ; 27 W. R. 459.

Mitigation of Damages.]—Where A., for a valuable consideration, contracted to sell and plant 70,000 trees, on certain lands of the defendant, and also well and sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, and that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him : —Held, that evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price, and for planting them. *Allen* v. *Cameron*, 3 Tyr. 907 ; 1 C. & M. 832; 2 L. J., Ex. 263.

Where a contract between A. and B. was, the one to deliver, and the other to accept, a steam-engine of fourteen horse-power, and the foreman of B. went over to the premises of A. and there saw a steam-engine in pieces, which he approved of and which steam-engine was afterwards delivered by A. :—Held, that the fact that the power of the engine was not a fourteen horse-power was no answer to an action for the price, though it might be given in evidence for the purpose of reducing the damages. *Parsons* v. *Seaton*, 4 C. B. 899 ; 16 L. J., C. P. 181 ; 11 Jur. 849.

Breach of Warranty—Death of Cattle fed on Barley sold.]—The plaintiff purchased from the defendants, who were a firm of distillers, a quantity of grains, warranted by the defendants as being good, sound and merchantable, and as reasonably answering the description "distillers' grains." These grains were ordinarily used in feeding cattle, as the defendant knew, though the sale to the plaintiff was not expressly made for that purpose. The substance delivered to the plaintiff, and which was used by him in feeding cattle, did not answer the description warranted, as it contained small particles of lead and deleterious matter, which had become accidentally intermixed with it during a fire which occurred at the defendants' premises, and the cattle fed with the grains were poisoned :—Held, that the defendants were liable in damages for the value of the cattle. *Wilson* v. *Dunville*, 6 L. R., Ir. 210.

For the purpose of rendering a defendant responsible for damages, which, in the ordinary course of things, flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties ; for anything which amounts to a breach of contract, whether foreseen or unforeseen, the party breaking the contract is responsible. *Ib.*

See also cases under WARRANTIES, supra, *and* DAMAGES.

G. RIGHTS OF UNPAID VENDOR.

1. LIEN.

Reviving, on Dishonour of Acceptances.]—The defendants agreed to manufacture for F. & Co. 4,000 tons of iron rails to be ready for delivery by a certain date, "payment to be made by buyers' acceptances of sellers' drafts at six months' date against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." The defendants manufactured the iron, and inspector's and wharfinger's certificates were duly given for it, and in accordance with the contract, F. & Co., as the certificates were delivered to them, accepted the drafts of the defendants, and they negotiated the acceptances. Before the contract was completed, F. & Co. filed a liquidation petition, under which a receiver was appointed. The plaintiff, to whom F. & Co. had pledged the wharfinger's certificates to secure an advance, filed a bill, alleging that by the custom of the iron trade

those certificates were warrants for the delivery of the iron rails, and praying for a declaration that he was entitled to a lien on the iron rails in priority to the defendants, in whose possession the rails still remained, and for an injunction to restrain the defendants from parting with the rails:—Held, that the payment by the acceptances given by F. & Co. to the defendants did not amount to an absolute payment, but was conditional on the acceptances being honoured at maturity, and that the debt and the vendors' lien revived on F. & Co. becoming openly insolvent. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.

A. sold to B. rum lying in the warehouse of C. at L., and delivered to B. an invoice with marks and numbers. B. accepted the draft of A. for the price, and sold to D., and obtained payment from D. The usage at L. was for the vendor to deliver to the vendee delivery orders, addressed to the warehouseman, who accepted such orders. No delivery order was given by A. to B., except for a small portion of the goods, which B. received. By the permission of B., but without the knowledge of A., D. gauged and coopered the casks in the warehouse, and marked them with his initials. Upon B.'s acceptance being dishonoured:—Held, that A. had a lien upon the rum for the price. *Dixon* v. *Yates*, 2 N. & M. 177; 5 B. & Ad. 313; 2 L. J., K. B. 198.

—— **Payment of Bill—Condition.**]—K. purchased corn at New Orleans, for the plaintiff, a London merchant, whose agent K. was. The purchase was made with K.'s money, and K. drew for the amount upon the plaintiff, the bill being in its body expressed to be on account of the corn. K. sold the bill to the defendant at New Orleans, and at the same time handed to the defendant a bill of lading of the corn, which had been drawn for delivery to K.'s order, and indorsed by K. K. at the same time empowered the defendant to sell the corn if the bill of exchange should not be paid. Afterwards K. advised the plaintiff of the transaction, forwarded to him the invoice, which stated the corn to be shipped at the risk and on account of the plaintiff, and requested the plaintiff to accept the bill of exchange:—Held, that the inference from these facts was that K. did not transfer the property in the corn to the plaintiff, subject to a lien, but only transferred the property to the plaintiff on the condition of his paying the bill of exchange, and that in the meantime the corn was the property of the defendant. *Jenkyns* v. *Brown*, 14 Q. B. 496; 19 L. J., Q. B. 286.

Goods were sold under an invoice, which expressed that they remained at rent. The vendee subsequently accepted a bill of exchange, drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he had paid. Subsequently the vendee became bankrupt, and the bill was dishonoured:—Held, that the assignees of the vendee could not, without paying the price, maintain trover against the vendor for the residue of the goods which had remained in his hands. *Miles* v. *Gorton*, 2 C. & M. 504; 4 Tyr. 295; 3 L. J., Ex. 155.

A purchaser of goods accepted a bill for the price, which the vendor indorsed over; and the indorsee recovered judgment on the bill against the purchaser, but did not issue execution; afterwards the vendor took up the bill and received a mortgage from the purchaser, from which, however, there were no proceeds:—Held, that the vendor was not, in point of law, paid for the goods. *Turleton* v. *Allhusen*, 2 A. & E. 32; 4 L. J., K. B. 17.

—— **Lien lost.**]—A vendor who takes in payment a promissory note, and negotiates it, loses his lien, which is not revived upon the dishonour of the note which is outstanding in the hands of an indorsee. *Bunney* v. *Poyntz*, 1 N. & M. 229; 4 B. & Ad. 568; 2 L. J., K. B. 55. But see *Gunn* v. *Bolckow*, supra.

Destroyed by Reason of Property having passed by Negotiable Instruments.]—Goods were consigned to the plaintiff's order to a railway station, and the usual advice note was sent them by the company. On the 12th April the plaintiffs sold these goods to J., payment half by cash, half by bill at three months, due the 13th July, and handed over the advice note to J., with an indorsement directing the company to deliver the goods to J.'s order. On the 24th April, J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D., with a second indorsement ordering the company to deliver the goods to D.'s order. But neither this delivery order nor that made by the plaintiffs was stamped in accordance with the Stamp Act, 1870, s. 89. J. becoming insolvent, D. on the 14th May wrote to the company inclosing the delivery order, and directing them to hold the goods to his order. To this he received the following reply from the goods manager, dated the 15th May: "I have yours of yesterday, inclosing transfer of rails, and beg to say I hold them to your order; but you will please produce this order when applying for the rails, and which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the act of parliament. You will be aware they remain here at owner's risk and subject to our usual rent-charges." On the 19th May, D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamp, as required by ss. 24 and 89, and the same were never, up to trial, so cancelled. On the 23rd May, the company wrote to the plaintiffs, asking if they consented to the goods being delivered to D., to which they replied on the 23rd and 30th June, giving the company formal notice to hold them to their (plaintiffs') order; but upon indemnity being given by D. the goods were handed over to D. The bill given to the plaintiffs by J. in part payment of these goods not being met at maturity, the plaintiffs claimed the goods as partial unpaid vendors, and brought an action against the company for wrongfully parting with the possession of them:—Held, that the condition in the company's letter of the 15th May, as to the transfer stamp, was no qualification of their admission that they held the goods to D.'s order; that the letter was an absolute attornment by the company to D., by which the plaintiffs' right of possession as unpaid vendors was destroyed, and that the plaintiffs were, therefore, not entitled to recover. *Pooley* v. *G. E. Ry.*, 34 L. T. 537.

—— **Indorsing Delivery Order.**]—On the 3rd

of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the docks company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the docks company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the dock house, with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the dock house before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the docks company, who refused to act upon it. In an action by the plaintiffs, claiming as against the docks company, C., and D., to be entitled to the goods:—Held, that D. was the surety, and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had passed to D.; that the title to the goods was in D. *Imperial Bank* v. *London and St. Katharine Docks Co.*, 46 L. J., Ch. 335; 5 Ch. D. 195; 36 L. T. 233.

—— **Custom of Iron Trade—Warrants.**]—By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418; 5 Ch. D. 205; 36 L. T. 395; 25 W. R. 457.

A company, being manufacturers of steel rails, contracted with S. & Co., iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight, and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & Co. with an invoice and drafts for the purchase money, and the goods referred to in the warrants were stacked at the works. In the meantime S. & Co. pledged the several warrants, and indorsed the same to the plaintiffs. Before the contract was completed, when only part of the goods was paid for, S. & Co. became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been despatched in waggons sent by order of S. & Co., and was stored in a railway company's warehouse, addressed to the agents of S. & Co., and part remained stacked at the works:—Held, that, by the usage of the iron trade, as well as by the intention of the parties as shown by their course of dealing, the plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien. *Ib.*

—— **Delivery, whether Actual or Constructive.**]—The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect:—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:—Held, that the giving of these delivery orders or undertakings did not estop the defendants from setting up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery. *Farmiloe* v. *Bain*, 45 L. J., C. P. 264; 1 C. P. D. 445; 34 L. T. 324.

Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency. *Grice* v. *Richardson*, 47 L. J., P. C. 48; 3 App. Cas. 319; 37 L. T. 677; 26 W. R. 358—H. L. (E.)

An indorsement on warehouse certificates by the vendor's clerk, making the goods deliverable to the purchaser's order, and entered in the transfer book, is not such a constructive delivery as would defeat the vendor's right. *Ib.*

When the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent:—Held, that, as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees. *Ib.*

Wharfinger's certificates are not warrants for delivery, and no custom of trade to raise money upon such certificates can alter the nature of the certificates or affect the vendor's lien. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.

Timber, which was deposited in the name of A., the importer, in the West India Docks, was sold by him to B.: B. afterwards contracted to sell the timber to C., who accepted a bill for the amount, B. giving him an invoice of the timber, and a delivery order. The dock company refused to deliver the timber, except upon an order from A. C. became bankrupt without having obtained such an order, and the bill was dishonoured:—Held, that there had been no constructive delivery to C., so as to put an end to B.'s lien on the timber for the price. *Lackington* v. *Atherton*, 7 Man. & G. 360; 8 Scott (N.R.) 38; 13 L. J., C. P. 140; 8 Jur. 406.

Held, also, that B. was not estopped, by having given a delivery order, from disputing the operation of such an order as a constructive delivery of the timber. *Ib.*

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has bonâ fide purchased them from the original vendee. *M'Ewan* v. *Smith*, 2 H. L. Cas. 309; 13 Jur. 265.

Bill of Lading to Shipper's Order.]—Upon a sale of goods, where the shipper takes and keeps in his own hands a bill of lading, making the goods deliverable to the shipper's order with the

intention to protect himself, the effect of his so doing is to preserve to him a hold over the goods until the vendee has fulfilled, or has been ready and willing to fulfil, the conditions of the sale; and the hold so preserved is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. *Ogg* v. *Shuter*, 45 L. J., C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100—C. A.

L., in France, contracted to sell to the plaintiffs in England a certain quantity of potatoes, to be shipped free on board at Dunkirk, cash against bill of lading, and took a bill of lading to his own order. On the arrival of the ship and tender of the bill of lading, the plaintiffs, erroneously believing that the full number of sacks had not been sent, made default in payment. The defendant, by order of L., resold the potatoes. After the resale, the plaintiffs were ready and willing to pay the price, and demanded the potatoes:—Held, that the defendant was not liable in trover to the plaintiffs. *Ib.*

After Part Delivery.]—It is not an entire waiver of a condition to be paid for goods on delivery, that the vendor allowed the purchaser to carry away part of the goods without being paid for them. *Payne* v. *Shadbolt*, 1 Camp. 427.

The plaintiff, having purchased timber growing on the land of B., felled it, and afterwards sold it to J. at a certain price per cubic foot, J. to be at liberty to convert the timber on the land. The trees were marked and measured by J., the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—Held, that the transfer of the whole was complete, and consequently, that the vendor had no right of lien for the unpaid price of the timber. *Tansley* v. *Turner*, 2 Scott, 238; 2 Bing. (N.C.) 151; 1 Hodges, 267; 4 L. J., C. P. 272.

A vendor has a general lien for the price of the goods sold while in his possession, even after a part delivery, if the right to stop in transitu is not gone. *Hanson* v. *Meyer*, 6 East, 614; 2 Smith, 670; 8 R. R. 572.

Delivery of Keys.]—Goods were sold to be paid for by instalments, the balance to be paid before removal. The vendor allowed the vendee to place the goods under lock and key upon the vendor's premises, and delivered the key to the vendee, but retained the key of the external inclosure. The balance remaining unpaid:—Held, that the vendee had not such a possession as entitled him to maintain trover against the vendor upon a wrongful removal and sale of the goods. *Milgate* v. *Kebble*, 3 Man. & G. 100; 3 Scott (N.R.) 358; 10 L. J., C. P. 277.

After Verdict.]—A. sells to B. a carriage, to be paid for partly by a bill upon delivery, and partly by a bill at a future day, and B. neglecting to take the carriage, A. obtains a verdict against him for goods bargained and sold. Until the amount is paid to him he has a lien upon the carriage. *Houlditch* v. *Desanges*, 2 Stark. 337; 20 R. R. 692.

Part Payment.]—The right of an unpaid vendor to a lien on goods in the hands of his agent is not taken away by the fact that the vendor has recovered a verdict for their price against the purchaser, and, under a county court order for payment of the debt by instalments, has been paid one instalment of it. *Scrivener* v. *G. N. Ry.*, 19 W. R. 388.

A quantity of tea was sold at a price, which was to be paid at a future day. After the day had elapsed, the purchaser paid a sum on account, and wrote to the vendors, who had retained the warrants in their possession, requesting them to wait the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards became bankrupt:—Held, that the vendors had a lien on the tea for the unpaid purchase money. *Twining*, *Ex parte*, 1 Mont. D. & D. 691; 5 Jur. 536.

Trover by Purchaser.]—A purchaser of goods, of which the vendor retains possession with a lien for unpaid purchase money, cannot maintain trover against a mere wrongdoer. *Lord* v. *Price*, 43 L. J., Ex. 49; L. R. 9 Ex. 54; 30 L. T. 271; 22 W. R. 318.

2. Stoppage in transitu.

a. Nature of Right.

Stoppage in transitu is an ordinary legal right, as to which a court of equity, unless by reason of some unusual circumstances, will not interfere. *Straker* v. *Ewing*, 34 Beav. 147; 11 Jur. (N.S.) 127; 11 L. T. 588; 13 W. R. 286.

Application to quash a writ of replevin, issued to try the right to stop goods in transitu, refused. *Farrell* v. *Beresford*, 1 Ball & B. 328.

Where Pledge.]—An equitable right of (quasi) stoppage in transitu remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendee to a person who advances money on the security of such indorsement. But such right of the vendor is subject to the right of the indorsee to be repaid his advances. *Westzinthus*, *In re*, 2 N. & M. 644; 5 B. & Ad. 817; 3 L. J., K. B. 56.

The vendor has an equity to require the indorsee of the bill of lading to repay himself out of other property of the vendee in his hands, as far as such other property will extend. *Ib.*

And if the indorsee applies the proceeds of the property so equitably stopped in transitu in payment of his debt, the vendor will have a lien upon the interest of the vendee in such other property. *Ib.*

Sub-Sale.]—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales, but before delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the sub-sales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase-money:—Held, that the principles established by *Westzinthus*, *In re* (5 B. & Ad. 817), and *Spalding* v. *Ruding* (6 Beav. 376; 12 L. J., Ch. 503) were applicable; that the right of stoppage in transitu was not at an end when the notice was given; and that the vendor was entitled to the balance

after satisfaction of the bank's claim. *Kemp* v. *Falk*, 52 L. J., Ch. 167; 7 App. Cas. 573; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1—H. L. (E.)

Retransfer — Fraudulent Preference.]—On the 21st July goods were shipped on board a general ship, and bills of lading to order or assigns of vendor were subsequently handed to the purchaser in exchange for his acceptances. On the 11th August judgment was obtained by a creditor against the purchaser, and on the 19th August the purchaser returned to the vendor the bills of lading, stating he was unable to meet the acceptances. On the 24th August the vendor gave notice to stop the goods in transitu. On the purchaser becoming bankrupt:—Held, that, even if the retransfer was a fraudulent preference, it was void as such for all purposes, and therefore neither the property in the goods nor the jus disponendi passed to the vendor, so as to defeat the right which he had previously exercised to stop the goods in transitu. *Baller, Ex parte, O'Sullivan, In re*, 67 L. T. 464—C. A. Reversing, 61 L. J., Q. B. 228.

Right Analogous to.]—H. agreed to deliver 330 tons of bleaching powder to E., at the rate of thirty tons per month, E. paying for each delivery of thirty tons within one fortnight from that delivery. When only thirty tons remained to be delivered, E. made a declaration of his insolvency; H. retained the thirty tons; C., the creditors' trustee of E., demanded delivery of the thirty tons, which H. refused to make; and H. also returned E.'s debit note of 150*l.*, the price of the thirty tons:—Held, that H. had a clear right to refuse delivery, whether on the ground of a rescission of the contract, or in exercise of a right analogous to that of stoppage in transitu. *Edwards, In re, Chalmers, Ex parte*, 42 L. J., Bk. 2; 21 W. R. 138. Affirmed, 42 L. J., Bk. 37; L. R. 8 Ch. 289; 28 L. T. 325; 21 W. R. 349. See *Phœnix Bessemer Co., In re*, ante, col. 556.

Price Compounded for.]—A. sold to B. a butt of wine, which was not delivered; B. compounded with his creditors, and the amount was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine from A., who refused to deliver it:—Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine of stoppage in transitu did not apply. *Nicholls* v. *Hart*, 5 Car. & P. 179.

Whether Contract Rescinded by.]—A vendor of cotton in America, by direction of the purchasers in England, shipped the cotton on board a vessel belonging to the latter, who became bankrupt before its arrival. A mortgagee of the ship, who happened to be an agent of the vendor, took possession of the ship under his mortgage, and sold the cotton under a supposed right on the part of his principal to stop it in transitu, and the principal sanctioned the transaction as between himself and his agent by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then brought an action against the mortgagee for the seizure, and he paid them, under a compromise, the amount for which the cotton sold:—Held, that the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase money. *Humberston, In re*, De Gex, 262; 8 Jur. 675.

In Respect of what Goods or Matters.]—The right of stoppage in transitu extends only over the goods themselves and the net proceeds of the sale, and not over the policy moneys paid in respect of insurances effected by the vendee. *Berndtson* v. *Strang*, 37 L. J., Ch. 635; L. R. 3 Ch. 588; 19 L. T. 40; 16 W. R. 1025.

Where a party remits money on a particular account for a particular purpose, and the consignee becomes insolvent, it may be stopped in transitu; aliter, where it is a general remittance from a debtor to his creditor on account of his debt. *Smith* v. *Bowles*, 2 Esp. 578.

Effect of.]—Stoppage no payment at law or in equity, unless under special circumstances, and in case of mutual demands, where the balance only is the debt. *Jeffs* v. *Wood*, 2 P. Wms. 128.

b. Who Entitled to Stop.

Where Mutual Dealings.]—A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former to credit in account; two of them arrived; against the third the consignor drew a bill for the amount whilst it was in transitu; in the interval the consignee dishonoured the bill and became insolvent:—Held, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until their mutual accounts were finally adjusted. *Wood* v. *Jones*, 7 D. & R. 126.

Correspondent Abroad—Payment by Bills.]—A trader here gave an order to his correspondent abroad to ship him goods, which the latter procured upon his own credit, without naming the trader here, and shipped to him at the original price, charging only his commission:—Held, that the correspondent abroad was so far a vendor as between him and the trader here, that, on the bankruptcy of the latter, he might stop the goods in transitu, by procuring the bill of lading from the bankrupt's brother; and this, though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances, provable under his commission, amounting at most to part payment for the goods, which did not take away the vendor's right to stop in transitu. *Feise* v. *Wray*, 3 East, 93; 6 R. R. 551.

Vendor likely to become Bankrupt.]—If goods are delivered to a carrier to be delivered to A., and are lost by the carrier, the consignee only can bring the action; but if before delivery, consignor hears A. is likely to become a bankrupt, or is actually one, and gets the goods back again, no action will lie for the assignees of A. *Snee* v. *Prescott*, 1 Atk. 248.

Agent of Bankrupt — Purchaser.]—Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adversely to his principal; but if he gives them a fresh destination, in furtherance of the usual course of business of the principal,

they pass to the assignees as in the order and disposition of the bankrupt. *Hawkes* v. *Dunn*, 1 Tyr. 413; 1 C. & J. 519; 9 L. J. (O.S.) Ex. 184.

Agents on behalf of Principals—Ratification.]—C. & T., merchants at Liverpool, sent orders to I., a merchant at New York, to purchase for them goods, which were accordingly shipped by him in five vessels bound to Liverpool, and consigned to C. & T., who, after the receipt of the goods by one of the vessels, stopped payment on the 7th April, 1846. I. had drawn bills for the goods partly on C. & T. and partly on B. & Co., with whom C. & T. had dealings. B. & Co., who were merchants at Liverpool, and also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and were dated, some on the 28th March, and the rest on the 30th. On the 8th May, a fiat in bankruptcy issued against C. & T. The four other vessels arrived at Liverpool on the 3rd, 5th, 6th, and 9th May respectively, and immediately on the arrival of each, and whilst the transitus of the goods on board continued, B. & Co., on behalf of I., gave notice to the master and consignees of each ship, claiming to stop the goods in transitu. B. & Co. were not the general agents of I., nor had they received from him any authority to make this stoppage. On the 11th May the assignees of C. & T. made a formal demand of the goods from the master and consignees of each of the four ships, at the same time tendering the freight, but they refused to deliver them, and on the same day delivered the whole to B. & Co. On the next day the assignees made a formal demand of the goods from B. & Co., but they refused to deliver them up, claiming title under the stoppage in transitu. On the 28th April, I. heard at New York that C. & T. had stopped payment, and on the next day he executed a power of attorney to H., at Liverpool, authorising him to stop the goods in transitu. This was received by H. on the 13th May, and he on that day adopted and confirmed the previous stoppage by B. & Co. I. afterwards adopted and ratified all that had been done both by H. and B. & Co.:—Held, first, that there could be no valid stoppage in transitu after the formal demand of the goods by the assignees on the 11th May, and the subsequent delivery of them to the defendant. *Bird* v. *Brown*, 4 Ex. 786; 19 L. J., Ex. 154; 14 Jur. 132.

Held, secondly, that the ratification of the stoppages by I., after the conversion by B. & Co., had not the effect of altering retrospectively the ownership of the goods, which had already vested in the assignees of C. & T. *Ib.*

—— **Authority.**]—M. & Co., merchants of Jamaica, ordered of P. & G., merchants of Baltimore, goods, to be shipped from Baltimore to Jamaica, at the risk and expense of M. & Co. The goods were shipped on board the ship C., and were, by the terms of the bills of lading, deliverable to M. & Co. or their assigns, on payment of freight. The goods were not paid for. While the vessel was on her voyage, M. & Co. became bankrupt. On her arrival at Jamaica, the agents of P. & G. went on board, and demanded a package of the cargo, in the name of the whole, on behalf of P. & G. Before the arrival of the goods at Jamaica, P. & G. wrote to their agents, saying, "In disposing of the cargo, use your own judgment," and forwarded a power of attorney for that purpose; but the letter did not arrive at Jamaica till after the agents had seized the cargo:—Held, first, that the agents, at the time of the seizure of the goods, had authority to stop the goods in transitu on behalf of P. & G. *Hutchings* v. *Nunes*, 1 Moore, P. C. (N.S.) 243; 10 Jur. (N.S.) 109; 9 L. T. 125.

Held, secondly, that there was an effectual stoppage in transitu of the goods by the agents. *Ib.*

—— **End of Transit.**]—W. at Bahia sold goods to A. at Glasgow. By the contract W. shipped them on board a vessel chartered by himself, to proceed either direct or viâ Falmouth, Cowes, or Queenstown, for orders to any port in the United Kingdom, or a specified part of the continent. The bill of lading was made out in the name of W. to order, or his assigns, signed by the master, and indorsed in blank by W., who forwarded it with the charter-party and invoice, which expressed the goods to be shipped on the account and at the risk of A., through his agents, to A. The bill of lading, charter-party, and invoice were received by A. When the vessel arrived at Falmouth W.'s agents applied to A. for instructions as to the port of destination; but, before such instructions were given, heard of A.'s insolvency:—Held, that W.'s agents had a right to stop in transitu, as the goods had never arrived at their destination. *Fraser* v. *Witt*, L. R. 7 Eq. 64; 19 L. T. 440; 17 W. R. 92.

—— **Agent Treated as Purchaser.**]—A. & C., merchants of Londonderry, instructed their correspondent, A., a merchant in London, to purchase corn on their account. A. purchased a cargo of Indian corn, and sent a contract note to the vendors, R. & Co., which stated that the cargo was "sold by order and for account of R. & Co., to our principals, shipped per 'Cleopatra,'" at the price of 24*s.* 6*d.* per quarter. The entry of the sale in the books of R. & Co. made A. "debtor to the cargo of Indian corn;" and they sent to A. the charter-party, the bill of lading duly indorsed, an invoice, and an order directing the captain to act upon the instructions of A. In the invoice A. was made the purchaser of the cargo. On the day of the purchase A. wrote to A. & Co., advising them of "having purchased for your account the cargo at 24*s.* 9*d.*" and inclosing the bill of lading and other documents received from R. & Co., as also A.'s draft for 1,525*l.* 16*s.* 3*d.* at three months, and an invoice signed by A., and stating that the cargo was bought by order, and for account and risk of A. & Co., at 24*s.* 9*d.* per quarter. A. afterwards wrote requesting the draft to be made payable at a bankers, "as it facilitates our discounting the bill." The draft was returned to A. accepted, and before the bill was due he became bankrupt, and R. & Co. thereupon stopped the cargo in transitu, not having received payment for it "on account (as they stated) of the bankruptcy of the cargo buyer." A. & Co. then wrote to R. & Co., stating that A., "from whom we bought the cargo," had informed them of its being stopped, and stating that they would then take up their acceptance upon the cargo being allowed to proceed. A. & Co. afterwards paid to R. & Co. the amount of the cargo, as invoiced by R. & Co. to A., upon being indemnified by R. & Co., and the cargo was allowed to proceed as ordered by A. & Co.:—Held, in an action by the assignees of A. to recover the amount of A. & Co.'s acceptance, that the documents

showed that A. was the purchaser of the corn from R. & Co. and the seller of it to A. & Co., and not merely an agent; that, therefore, R. & Co. had not at the time the right of stoppage in transitu; and that the assignees were entitled to recover. *Pennell* v. *Alexander*, 3 El. & Bl. 283; 23 L. J., Q. B. 171; 18 Jur. 627.

Alien Enemy—Licence.]—A trading licence from the crown to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalising the purchase by the subject, legalises the sale by the enemy, and impliedly legalises the vendor-enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only (which was offered to be refunded), and also to employ an agent here for that purpose; and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. *Fenton* v. *Pearson*, 15 East, 419.

c. Effect of Part Payment or Acceptances.

Part Payment.]—A consignor's right of stopping goods in transitu is not taken away by the consignee's having partly paid for the goods. *Hodgson* v. *Loy*, 7 Term Rep. 440; 4 R. R. 483.

Acceptances.]—But the vendor, having taken the vendee's acceptances in payment, cannot stop the goods in transitu, unless the bills have been dishonoured. *Davis* v. *Reynolds*, 1 Stark. 115.

—— **Condition Precedent.**]—A., a merchant in Liverpool, bought certain winches of yarn of B., in London, through C., who acted as broker for both parties, "To be taken immediately from the wharf in London and paid for by the buyer's acceptance at four months." B. sent an invoice of the goods to A., inclosing a bill of exchange for his acceptance, and on the same day C., acting as agent for A., directed the goods to be forwarded by rail to Liverpool. Upon their arrival there the railway company sent A. the usual advice note that the goods "remained there to his order, and were then held by the company, not as carriers, but as warehousemen." A. did not accept the bill of exchange, but filed a petition for liquidation. B. having claimed the right of stoppage in transitu as against the trustee under A.'s liquidation:—Held, that the acceptance of the bill of exchange was not a condition precedent to the passing of the property in the goods; and also that the goods on arriving at Liverpool had reached their final destination, and consequently that the transitus had ended. *Catling, Ex parte, Chadwick, In re*, 29 L. T. 431.

—— **Of Factor.**]—If, in consideration of goods being consigned to him, a factor accepts bills drawn by the consignor, and pays part of the freight, and becomes insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them in transitu. *Kinloch* v. *Craig*, 4 Bro. P. C. 47; 3 Term Rep. 119, 783; 1 R. R. 664.

—— **Tender of Bill.**]—A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them without tendering back the bill. *Edwards* v. *Brewer*, 2 M. & W. 375; 6 L. J., Ex. 135.

—— **Balance of Account.**]—A., being indebted to B. on the balance of accounts, including bills still running accepted by B. for A., consigned goods to B. on account of this balance:—Held, that A. had a right to stop the goods in transitu, upon B. becoming insolvent before the bills were paid. *Vertue* v. *Jewell*, 4 Camp. 31.

d. Notice or Claim to Stop.

Sufficiency.]—A claim made without obtaining actual possession is sufficient in the case of stoppage in transitu. *Northey* v. *Field*, 2 Esp. 613. S. P., *Holst* v. *Pownall*, 1 Esp. 240.

To whom.]—A notice of stoppage in transitu, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L. J., Ex. 157.

To Captain of Consignee's Vessel.]—A timber merchant in Sweden agreed to sell timber to L. and R. By the original contract, the goods were to be delivered "free on board, payable by buyers' acceptance of seller's drafts, at six months from date of bills of lading; shipment to London," &c.; the seller was to provide ships at rates not exceeding a certain limit. It was subsequently agreed that the buyers should themselves charter a ship to convey the timber to London. The buyers accordingly chartered a ship, and the goods were loaded on board of her. The ship was obliged to put into Copenhagen, and there, the buyers having stopped payment before the acceptance became payable, the vendor caused a notice of stoppage in transitu to be served on the captain:—Held, that the notice was effectual. *Berndtson* v. *Strang*, 36 L. J., Ch. 879; L. R. 3 Eq. 481; 16 L. T. 583; 15 W. R. 1168.

Mistake of Carrier.]—If a carrier, after notice from the vendor of goods to stop them in transitu, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee. *Litt* v. *Cowley*, 7 Taunt. 169; 2 Marsh. 457; Holt, N. P. 338; 17 R. R. 482.

Demand of Bills of Lading—Agreement for Lien on.]—An agreement was entered into between L., a merchant in London, and W., a manufacturer in Yorkshire, that W. should from time to time supply L. with goods, W. drawing upon L., and L. accepting bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai, for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular ship-

ment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to R. In pursuance of the agreement L. ordered a parcel of goods of W. The goods were packed by W.'s packer, who forwarded them by railway to London in bales marked for Shanghai, and addressed to a ship called the "Gordon Castle" designated by L., which was loading in the West India Docks for Shanghai. The freight to London was paid by W. The packer, in advising L. of the dispatch of the goods, told him that they were at his disposal. L. accepted a six months' bill of exchange drawn upon him by W. for the invoice price. The railway company, in advising L. of the arrival of the goods at their Poplar Docks Station, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the 'Gordon Castle.'" The goods were shipped on board that vessel. The bills of lading were by L.'s directions made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for Shanghai with the goods on board. A few days previously L. had stopped payment, and shortly after she had sailed he committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in London, of whom they were claimed by W. and by the trustee in the bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, and the proceeds of sale paid to the person who should be entitled to them:—Held, that the agreement did not deprive W. of the right to stop the goods in transitu; that the transit was not ended till the goods arrived at Shanghai, and that the demand by W. of the bills of lading from the shipowners was an effectual stoppage in transitu. Consequently, that W. was entitled to have the bill of exchange satisfied out of the proceeds of sale. *Watson, Ex parte, Love, In re*, 46 L. J., Bk. 97; 5 Ch. D. 35; 36 L. T. 75; 25 W. R. 489—C. A.

Held, also, that W. could have obtained an injunction to restrain L. from sending the goods to any other destination than Shanghai. *Ib.*

Delivery of Bills of Lading—Telegram.]—J., P. & Co., merchants at Pernambuco, having in the course of their business received orders from customers to purchase goods on their account in New York, instructed S. J. & Co., their agents at Liverpool, to purchase the goods and have them shipped to J., P. & Co. S. J. & Co. then instructed R. B. B., the agent at New York of J., P. & Co. and S. J. & Co., to purchase the goods. R. B. B. purchased the goods and shipped them to J., P. & Co., sending with them the invoices and bills of lading. To provide himself with funds to purchase the goods, R. B. B. drew bills of exchange on S. J. & Co., in which were the words "and charge to account as advised." Attached to each bill was a counterfoil headed "Advice of draft." This was addressed to S. J. & Co., mentioned the number, date, and amount of the bill, and concluded with these words (mutatis mutandis), "Against shipments per steamship 'Glensannox,' No. 6, N. Y. to Brazil, viâ Baltimore. Please protect the drafts as advised above, and oblige drawer. R. B. B., New York, May 9, 1879." These bills were sold for value in New York, and R. B. B. advised S. J. & Co. of the bills, and at the same time forwarded a statement of account. On presentation of the bills for acceptance, S. J. & Co. detached the counterfoils and kept possession of them. On the 10th June, 1879 (while the plaintiffs, P., S. & Co., were the holders of these bills, drawn, according to this course of business, in respect of a shipment to J., P. & Co., to whom the bills of lading were at the same time sent), S. J. & Co. suspended payment. The same day the failure was known in New York, and R. B. B., under some pressure from P., S. & Co., telegraphed to J., P. & Co., "Having pledged documents and shipments 'Glensannox,' hold proceeds subject order P., S. & Co." The ship "Glensannox" arrived at Pernambuco on the 11th June, and the goods were delivered to the customers (of J., P. & Co.) who had ordered them, the purchase money being received by J., P. & Co. The court found that the bills of lading had been delivered to the customers before the telegram was received. The bills of exchange were dishonoured by S. J. & Co. when presented for acceptance. J., P. & Co. claimed to retain the purchase moneys against moneys alleged to be due to them by S. J. & Co.:—Held, that even if the telegram had reached J., P. & Co. before the transitus was at an end, it would not operate to stop them in transitu. *Phelps* v. *Comber*, 54 L. J., Ch. 1017; 29 Ch. D. 813; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. C. 428—C. A.

Notice to Shipowner.]—Semble, that notice of stoppage in transitu given to a shipowner imposes no duty on him to communicate the notice to the master of the ship, and that it is not effectual until it is communicated to the master. *Falk, Ex parte, Kiell, In re*, 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280—C. A. *And see the case in* H. L., sub nom. *Kemp* v. *Falk*, infra.

e. Determination of Transitus.

i. *Generally.*

Destination.]—Upon a sale of goods the transitus continues until the goods have reached their ultimate destination under the contract of sale, or the vendor has given a new direction to the property. *Morley* v. *Hay*, 3 M. & Ry. 696; 7 L. J. (o.s.) K. B. 104.

The transitus continues until the goods arrive at the place mentioned by the vendee to the vendor. *Coates* v. *Railton*, 6 B. & C. 422; 9 D. & R. 593; 5 L. J. (o.s.) K. B. 209; 30 R. R. 385.

Possession of Purchaser.]—Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that the ultimate destination has not been communicated to the vendor. *Rosevear China Clay Co., Ex parte, Cock, In re*, 48 L. J., Bk. 100; 11 Ch. D. 560; 40 L. T. 730; 27 W. R. 591—C. A.

Where consignee becomes insolvent, consignor has a right to stop goods at any time before they come to his hands. *D'Aquila* v. *Lambert*, 2 Eden, 75; Ambl. 399.

A., being beyond sea, consigns goods to B., then in good circumstances in London, but before the goods arrive he becomes a bankrupt. If A. can, by any means, prevent the goods coming into the hands of B. or the assignees, it

is allowable in equity; and B. or the assignees shall have no relief in equity. *Wiseman* v. *Vandeputt*, 2 Vern. 203.

If A. sends goods to B. from beyond sea to the use of B., and before these goods are paid for B. dies insolvent, A. cannot have his goods again; but if A. sends goods to a factor to dispose of to A.'s use, and he becomes a bankrupt, these goods are not liable to the debts of such bankrupt. *Godfrey* v. *Furzo*, 3 P. Wms. 185.

End of Voyage.]—Where a cargo is consigned, and before the ship's arrival the consignee becomes a bankrupt, the arrival of the ship in the port, where she is taken possession of by the assignees, but from whence she is ordered out to perform quarantine, is not such a completion of the voyage as will vest the property in the assignees; but the consignor may still consider the goods as in transitu, and stop them. *Holst* v. *Pownall*, 1 Esp. 240.

The test of the consignor's right of stoppage in transitu is not whether the voyage is at an end, but whether there has been a delivery of goods to the consignee. *Coventry* v. *Gladstone*, 37 L. J., Ch. 492; L. R. 6 Eq. 44; 16 W. R. 837.

Sub-Sale—Right of Vendor to Purchase Money of Sub-Purchaser.]—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as a security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales, but before the delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the sub-sales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase money:—Held, that the right of stoppage in transitu was not at an end when notice was given, and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp* v. *Falk*, 52 L. J., Ch. 167; 7 App. Cas. 573; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1—H. L. (E.)

The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the transitus, or destroy the right of the original vendors to stop the goods in transitu. *Golding, Ex parte, Knight, In re*, 13 Ch. D. 628; 42 L. T. 270; 48 W. R. 481—C. A.

The rule being that effect will be given to a vendor's right of stoppage in transitu, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop in transitu before his vendee has received the purchase money of the goods from his sub-purchaser, is entitled, on the principle of *Spalding* v. *Ruding* (6 Beav. 376), to have the original purchase money satisfied out of the unpaid purchase-money of the sub-purchaser. *Ib.*

A resale of goods by a vendee, and payment to him, does not destroy the vendor's right of stoppage in transitu. *Craven* v. *Ryder*, 6 Taunt. 433; 2 Marsh. 127; Holt, N. P. 100; 16 R. R. 644.

Transfer of Bill of Lading.]—The transfer of a bill of lading for valuable consideration to a bonâ fide transferee defeats the right of stoppage in transitu of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder. *Leask* v. *Scott*, 46 L. J., Q. B. 576; 2 Q. B. D. 376; 36 L. T. 784; 25 W. R. 654—C. A.

In December, 1875, G. & Co. purchased from the defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to the plaintiff, applied to him for a further advance, which, he said, he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and the plaintiff at once advanced them a further sum of 2,000*l.* On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from the defendant, and they accepted the defendant's draft; and on the following day they handed the bill of lading to the plaintiff with other securities, in fulfilment of their promise to give him cover. This transaction between the plaintiff and G. & Co. was bonâ fide. On the arrival of the ship on the 3rd of February, G. & Co. having in the meantime stopped payment, the defendant sought to stop the nuts in transitu, and the plaintiff claimed them under the bill of lading:—Held, that the plaintiff had a good title as against the defendant. *Ib.*

The vendee of goods may by assignment of the bills of lading to a bonâ fide transferee, defeat the vendor's right to stop them in transitu, in case of the vendee's insolvency. The consignor may stop goods in transitu before they get into the hands of the consignee in case of the insolvency of the consignee; but if the consignee assigns the bill of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. *Lickbarrow* v. *Mason*, 2 Term Rep. 63; 1 H. Bl. 357; 6 East, 21; 1 R. R. 425.

And see SHIPPING (*Bills of Lading*).

—— **Consideration—Pre-existing Debt.**]—The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage in transitu. *Rodger* v. *Comptoir d'Escompte de Paris*, 5 Moore, P. C. (N.S.) 538; 38 L. J., P. C. 30; L. R. 2 P. C. 393; 21 L. T. 33; 17 W. R. 468.

L. & S., carrying on business in London and at Hong Kong, as L., S. & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from Hong Kong to meet the acceptances of L. & S. given for the price of the goods, on receipt of the bills of lading. L. & S. contracted for the carriage, and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong, or their assigns, were signed by the master and handed over to L. & S., who accepted the draft of the vendors for the amount of the purchase. Before the goods or bills of lading reached Hong Kong, L., S. & Co., being insolvent, and pressed by two banking firms at Hong Kong, to whom

they were largely indebted, in consideration of their debt to the bank assigned to them the "whole of their property, premises and chattels, specified in the schedule thereto, with all the estate, right, title, interest, claim or demand of L., S. & Co. arising thereout or therefrom." The schedule enumerated "all goods and bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the bills of lading were indorsed and handed over to the banking firms, to whom the insolvent circumstances of L., S. & Co. at that time were well known :—Held, that a pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid vendors to stop the goods in transitu. *Ib.*

Place of Delivery—Generally.]—It is not necessary, in order to divest the consignor's right to stop in transitu, that the goods should have been taken by the very hands of the consignee himself. *Ellis* v. *Hunt*, 3 Term Rep. 464 ; 1 R. R. 743.

—— **Consignee taking Samples at Warehouse.**]—Where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place ; but if he by his own act prevents the delivery which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the transitus is thereby terminated : and, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt :—Held, that the transitus was at an end, and that the vendor was not entitled to stop them. *Foster* v. *Frampton*, 6 B. & C. 107 ; 9 D. & R. 108 ; 2 Car. & P. 469 ; 5 L. J. (O.S.) K. B. 71 ; 30 R. R. 255.

Agents Receiving and Forwarding.]—Where A. & B., traders, living in London, were in the habit of ordering goods from cotton manufacturers at Manchester, to be sent to M. & Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. & B. at Hamburg ; and A. & B. sent orders to the manufacturers for goods to be sent to M. & Co. at Hull to be shipped for Hamburg as usual :—Held, that, as between buyer and seller, their right to stop as in transitu was at an end when the goods came to the possession of M. & Co. at Hull ; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods ; and the goods after their arrival at Hull were to receive a new direction from the vendees. *Dixon* v. *Baldwen*, 5 East, 175.

A., residing in Guernsey, employed his agent at Southampton to ship all goods which arrived there directed to him. The agent paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods :—Held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them after they had been put on board a vessel for Guernsey. *Nicholls* v. *Le Feuvre*, 2 Bing. (N.C.) 81 ; 1 Hodges, 255 ; 2 Scott, 146 ; 7 Car. & P. 91 ; 4 L. J., C. P. 281.

—— **Ulterior and Subsequent Transit.**]—When goods have been sent by an unpaid vendor through a carrier to a forwarding agent, who has been appointed by the vendee, and who receives the necessary orders from the vendee and not from the vendor, the transit of the goods upon reaching the hands of the forwarding agent is at an end, and the right to stop in transitu is lost, even although the goods may have been intended to be sent to an ulterior and subsequent destination. L. bought certain goods of W. at Bolton, saying nothing as to the place of delivery. L. afterwards arranged with M. that the goods should be sent by steamer from Garston to Rouen. L. then instructed W. to send the goods to M. at Garston. W. accordingly despatched the goods by railway. The railway company gave notice to M. of the arrival of the goods, and further gave notice that they would hold the goods as warehousemen. L. then filed a petition for the liquidation of his affairs by arrangement ; he had not paid W. for the goods. W. thereupon stopped the delivery of the goods, and M. returned them to him. The trustee in liquidation of L. having brought an action against M. and W. to recover the value of the goods :—Held, that the transit of the goods had ceased when the goods reached Garston and came into the possession of M., as forwarding agent for L., that the right to stop in transitu was then at an end, and that the trustee was entitled to recover the value of the goods. *Kendall* v. *Marshall*, 52 L. J., Q. B. 313 ; 11 Q. B. D. 356 ; 48 L. T. 951 ; 31 W. R. 597—C. A.

ii. *Delivery to Carrier.*

Delivery to Railway Company as Purchaser's Agent.]—Cotton was shipped at Charleston, in America, for carriage to Liverpool. The purchaser resided at Luddenham Foot, in Yorkshire. The cotton was consigned to the vendor's agent at Liverpool, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by the vendor on the purchaser. On the arrival of the cotton at Liverpool, the bill of exchange was sent by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in Liverpool, who paid the sea freight and obtained possession of the cotton, which was then forwarded by the railway to Luddenham Foot station. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to Liverpool, consigned to order, for account and risk of the purchaser, Luddenham Foot. The bill of lading provided for the shipment of the cotton into the port at Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods :—Held, that the transitus prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it in transitu. *Gibbes, Ex parte, Whitworth, In re*, 45 L. J., Bk. 10 ; 1 Ch. D. 101 ; 33 L. T. 479 ; 24 W. R. 298.

Goods sold by a defendant to W., were by him delivered at a railway station, together with a delivery note (such delivery being in accordance with previous transactions between the parties), on 7th November. On the 9th W. became bankrupt, and on the 11th (he not having in the meantime given any orders respecting the goods, or signified his acceptance of them) the defendant

gave notice to the station master not to part with the goods. On 1st December, W.'s assignees gave notice to the railway company that they claimed the goods, which, on the 5th were re-delivered to defendant:—Held, that by delivery at the railway station, defendant had divested himself of the right of stoppage in transitu. *Smith* v. *Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.

Manufacturers at Sheffield contracted to deliver goods free on board at Liverpool, and would have sent the goods thither in their own name but for a subsequent arrangement with the purchasers, under which the goods were loaded in trucks sent by the purchasers, and on their arrival at Liverpool were warehoused in the name of the purchasers' agent there:—Held, under the circumstances, that the transit was at an end in law when the goods were loaded in the trucks. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418; 5 Ch. D. 205; 36 L. T. 395; 25 W. R. 457.

—— **On Refusal by Consignee to Accept.**]—A. sold to B. goods which were lying at X., one of the stations of a railway company. A portion was by B.'s order sent to Y., another station of the railway company, was there taken by him, and was paid for. B. refused to take any more but A. sent the remainder to Y. to be delivered to him. B. refused to take them, and they were sent back to X.; A. also refused to take them, and they were again sent to Y., where they remained till B. became bankrupt. A. then directed the railway company to keep them for him, and they did so:—Held, that he had a right of stoppage in transitu, and that the company was therefore justified in detaining the goods for him. *Bolton* v. *Lancashire and Yorkshire Ry.*, 35 L. J., C. P. 137; L. R. 1 C. P. 431; 12 Jur. (N.S.) 317; 13 L. T. 764; 14 W. R. 430.

Goods Shipped to Order of Vendee.]—The right of the vendor of goods to stop them in transitu is not lost by the mere fact that by the bill of lading under which they are shipped they are deliverable to the vendee or his assignees. *Brindley* v. *Cilgwyn Slate Co.*, 55 L. J., Q. B. 67.

The plaintiffs entered into a contract with the defendants to purchase seventy tons of slates. At the request of the plaintiffs the defendants chartered a ship and loaded her with the slates for Southampton, taking bills of lading by which the slates were deliverable to the vendees or their assignees. Before the arrival of the ship at Southampton the defendants heard of the insolvency of the plaintiffs, and gave orders to the master to stop the slates in transitu. In an action by the plaintiffs for non-delivery of the slates:—Held, that the transit was not at an end, and that the defendants had a right to stop the delivery of the slates. *Ruck* v. *Hatfield* (5 B. & Ald. 632); *Rosevear China Clay Co., Ex parte* (11 Ch. D. 560), followed. *Ib.*

Where Carrier named by Vendee.]—Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts. *Rosevear China Clay Co., Ex parte, Cook, In re*, 48 L. J., Bk. 100; 11 Ch. D. 560; 40 L. T. 730; 27 W. R. 591—C. A.

A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and gave notice to the master of the ship to stop the clay in transitu. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—Held, that, the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time. *Ib.*

L. & S., carrying on business in London and at Hong Kong, as L., S. & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. L. & S. contracted for the carriage and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong were signed by the master and handed over to L. & S. L. & S. became insolvent, and the goods were stopped in transitu:—Held, that the transitus had not ended before the arrival of the goods at Hong Kong, as the transitus continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them. *Rodger* v. *Comptoir d'Escompte de Paris*, 5 Moore, P. C. (N.S.) 538; 38 L. J., P. C. 30; L. R. 2 P. C. 393; 21 L. T. 33; 17 W. R. 468.

The transitus of goods is not ended by delivery on board a ship chartered by the vendee. *Berndtson* v. *Strang*, 37 L. J., Ch. 665; L. R. 3 Ch. 588; 19 L. T. 40; 16 W. R. 1025.

Coals sold at Hull were shipped on board a vessel chartered by the buyer, to be paid for in cash, against bill of lading in the hands of the seller's agent, in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that the price being unpaid, the seller was entitled to intercept the delivery. *Moakes* v. *Nicolson*, 19 C. B. (N.S.) 290; 34 L. J., C. P. 273; 12 L. T. 573.

Goods were shipped by a vendor on board a ship belonging to the purchaser, but employed as a general trader. Four bills of lading were made under which the goods were deliverable to the purchaser or assigns; three of the bills were kept by the vendor, and one by the master of the ship:—Held, that the delivery on board the purchaser's ship was a delivery to the purchaser so as to preclude a stoppage in transitu before the delivery of the goods at the port of consignment. *Schotsmans* v. *Lancashire and Yorkshire Ry.*, 36 L. J., Ch. 361; L. R. 2 Ch. 332; 16 L. T. 189; 15 W. R. 537.

Goods having been purchased by merchants in London of manufacturers in Wolverhampton, the purchasers wrote to the vendors asking them to consign the goods "to the 'Darling Downs,' to Melbourne, loading in the East India Docks." The goods were accordingly delivered by the vendors to carriers to be forwarded to the ship. The vendors being subsequently informed of the purchaser's insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the "Darling Downs." The ship sailed with the goods on board for Melbourne, but before she arrived the vendors

claimed the goods from the shipowners as their property :—Held, that the transit was not at an end till the goods reached Melbourne, and therefore that the vendors had till then a right to stop them in transitu. *Bethell* v. *Clark*, 57 L. J., Q. B. 302 ; 20 Q. B. D. 615 ; 59 L. T. 808 ; 36 W. R. 611 ; 6 Asp. M. C. 346—C. A.

A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them in transitu ; but where the delivery was made on board such a ship in Russia, and, by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, and retain them till payment ; and the owners hearing of the insolvency of the vendee, applied to the captain on board whose ship the goods had been delivered to sign the bills of lading to their order, which he complied with, without the necessity of suing out process :—Held, that this was a substantial compliance with such law, and that the captain, on his arrival here, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt. *Inglis* v. *Usherwood*, 1 East, 515. And see *Fowler* v. *M'Taggart*, 1 East, 522, n. ; 7 Term Rep. 442, n. ; 4 R. R. 485.

A trader in England chartered a ship on certain conditions for a voyage to Russia, and to bring goods home from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and sent to him the invoices and bills of lading of the cargo :—Held, that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency in the meantime, before actual delivery, any more than if they had been delivered on board a general ship for the same purpose ; and a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee :—Held, that the consignor might maintain trover against them. *Bohtlingk* v. *Inglis*, 3 East, 381 ; 7 R. R. 490. *S. C.*, nom. *Boehtlinck* v. *Schneider*, 3 Esp. 58.

The fact that the ship is named by the consignee makes no difference as to stoppage in transitu. *Thompson* v. *Trail*, 2 Car. & P. 334 ; 30 R. R. 242.

Upon a question between the consignees of the bill of lading and the vendor, as to the right of the latter to stop in transitu, in the absence of any contradictory evidence, the bill of lading, stating that the agent of the purchaser shipped the goods by his order, is conclusive as to the fact of delivery to the purchaser. In such case the court of chancery will not interpose on behalf of the vendor to protect the property pending litigation, but will leave the vendor to the assertion of his right at law. *Meletopulo* v. *Ranking*, 6 Jur. 1095.

Goods Bought by Agent in England for Foreign Principal.]—A commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. He ordered the goods of the manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters, with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months' bills drawn by the manufacturers on the commission agent and accepted by him. On the 11th of September the commission agent wrote to the manufacturers, telling them to pack the goods and mark them with the mark previously mentioned, and to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." On the 13th September, the manufacturers sent the invoice of the goods to the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, and adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, and the words "Kingston, Jamaica," and numbered with specified numbers, but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. On the 14th of September the commission agent sent to the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, and stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, and the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, and the manufacturers, who had not been paid for the goods, gave notice to the shipowners to stop them in transitu :—Held, that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton, and that the notice to stop was given too late. *Watson*, *Ex parte* (5 Ch. D. 35), distinguished. *Miles*, *Ex parte*, *Isaacs*, *In re*, 54 L. J., Q. B. 566 ; 15 Q. B. D. 39—C. A.

—— **Delivery on Principal's Vessel—Mate's Receipts.**]—B. & S., acting as agents in England for a foreign principal, purchased from F. & Co., in England, cement for the New York market ; the cement was ordered to be sent alongside a vessel which B. & S. had purchased for their principal, and was shipped on board that vessel : mate's receipts for the cement were taken by F. & Co. and handed on to B. & S., who exchanged them for bills of lading in which B. & S. were stated to be the shippers, and which made the goods deliverable to the order of B. & S. B. & S. gave all necessary directions as to the destination of the goods and the sailing of the vessel. While the vessel was on its way to New York, B. & S. became bankrupt, and F. & Co. claimed as unpaid vendors to stop the cement in transitu. F. & Co. knew not only that the vessel belonged to B. & S.'s principal, but also that the cement was bought by B. & S. for that principal :—Held, that F. & Co. were not entitled to stop the cement in transitu. *Francis*, *Ex parte*, *Bruno*, *In re*, 56 L. T. 577 ; 6 Asp. M. C. 138 ; 4 Morrell, 146.

Goods in Carriers' Warehouse.]—Merchants in London sold goods to Worsdell, a trader at Falmouth, and forwarded the goods by steamer to Worsdell, Killigrew-street, Falmouth ; and

they also sent by post to the purchaser an invoice which stated that the goods were sent by steamer. On the 31st of October the goods were discharged at Falmouth and placed by the company's agents in a warehouse belonging to the company. The course of business of the Falmouth agents was to hold the goods subject to the order of the consignee on his paying freight and warehouse rent. On the 30th of October, Worsdell committed an act of bankruptcy by absconding from Falmouth, and no notice of the arrival of the goods could be given to him. He was adjudicated bankrupt on the 4th of November, and a receiver appointed, and on the same day, the goods not having been paid for and not having been claimed on behalf of the consignee, the merchants telegraphed to the company's agents to stop delivery:—Held, that the transit was not at an end when the goods were stopped, nothing having taken place to constitute the company's agents at Falmouth bailees for the consignee. *Barrow, Ex parte, Worsdell, In re*, 46 L. J., Bk. 71; 6 Ch. D. 783; 36 L. T. 325; 25 W. R. 466.

Semble, that a wharfinger holding goods in transitu cannot turn himself into an agent for the consignee so as to put an end to the transitus without the express authority of the consignee. *Ib.*

Where goods were conveyed by a carrier by water, and deposited in his warehouse, for the convenience of the vendee, to be delivered out as he should want them:—Held, that the transitus was at an end, and the vendor's right to stop in transitu gone, although it appeared that the carrier claimed to have a lien on the goods. *Allan* v. *Gripper*, 2 C. & J. 218; 2 Tyr. 217; 1 L. J., Ex. 71.

A trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent shortly after their arrival in London. The goods consigned to him remained in the waggon office of the carriers, until they were removed by his agent for the purpose of being shipped:—Held, that the transitus of the goods was at an end on their arrival at the waggon office. *Rowe* v. *Pickford*, 1 Moore, C. P. 526; 19 R. R. 466.

Where goods were given into the custody of carriers as agents of the vendor, and, by direction of the purchaser, they set out on a journey which was to begin at Bradford and end at Shanghai, where they were to be delivered to a firm, who would have been under an obligation to the vendor if he had thought fit to give him notice of his rights. The bills of landing were retained in England, and the goods remained in the possession of the carriers. Before delivery of the goods an arrangement was come to by all parties that the goods should be sold:—Held that the transitus was not ended. *Watson, Ex parte, Love, In re*, 46 L. J., Bk. 97; 5 Ch. D. 35; 36 L. T. 75; 25 W. R. 489—C. A.

Notice by Carrier of Arrival.]—G. sold sixteen casks of oil by letter to the bankrupts, upon terms of payment by acceptance at thirty days' date. The oil arrived, and its arrival was notified to the bankrupts by the carrier. Subsequently G. telegraphed to stop the delivery. The carrier gave notice to the parties to interplead:—Held, that the transitus ended with the notice of arrival of the goods, and that the trustee in bankruptcy was entitled. *Gouda, Ex parte, Millo, In re*, 20 W. R. 981.

Retention of Bill of Lading.]—When an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his own order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg* v. *Shuter*, 45 L. J., C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100—C. A.

Deliverable under Mate's Receipts.]—Where goods were sold free on board, and on their shipment the agent of the vendor tendered a receipt to the mate in the absence of the captain, by which the goods were acknowledged to be shipped on account of the vendor, which the mate kept, but refused to sign, and on the following day signed bills of lading to the order of the vendees:—Held, that the transitus was not at an end, but that, on the insolvency of the vendees, the vendor was entitled to stop the goods. *Ruck* v. *Hatfield*, 5 B. & Ald. 632; 24 R. R. 507.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which, the sellers having drawn, was accepted by the purchasers; the sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the accepted bill was running, became insolvent:—Held, that trover would not lie for the goods; for that, on their delivery on board the vessel, they were no longer in transitu so as to be stopped by the sellers, and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. *Cowasjee* v. *Thompson*, 5 Moore, P. C. 165; 3 Moore, Ind. App. 422.

iii. *Delivery to Wharfingers.*

Authority to End.]—Semble, that a wharfinger holding goods in transitu cannot turn himself into an agent for the consignee so as to put an end to the transitus without the express authority of the consignee. *Barrow, Ex parte, Worsdell, In re*, 46 L. J., Bk. 71; 6 Ch. D. 783; 36 L. T. 325; 25 W. R. 466.

Habitual Use of Warehouse.]—If a consignee generally makes use of a wharfinger's warehouse as a place to keep his goods, the transitus is at an end when the goods are deposited there. *Tucker* v. *Humphrey*, 4 Bing. 516; 1 M. & P. 378, n.; 6 L. J. (o.s.) C. P. 92. S. P., *Richardson* v. *Goss*, 3 Bos. & P. 119; 6 R. R. 727.

But where the consignee, though accustomed to make such use of the wharfinger's warehouse, had not produced his bill of lading to the wharfinger, nor exercised any act of ownership, and the wharfinger delivered the goods to a person who had an order from the shippers:—Held, that the transitus was not at an end on the arrival of the goods at the wharfingers. *Ib.*

Bales of flax sold by A., in London, to B., residing at Mickley Mill, near Ripon, were

addressed to B., Mickley, and were shipped for Hull, under a bill of lading, making them deliverable "at the port of Boroughbridge, for B., Mickley Mill." The bales were forwarded from Hull to Boroughbridge by water-carriage, and deposited there in the warehouse of C., a party unconnected with the carrier, who was in the habit of receiving goods for B., and holding them at his risk, and without charging warehouse rent, until fetched away by B., or delivered to other persons by his order:—Held, that the transitus was at an end, and the bales could not be stopped by A. upon the insolvency of B., although B. had exercised no act of ownership over them. *Dodson* v. *Wentworth*, 4 Man. & G. 1080; 5 Scott (N.R.) 821; 12 L. J., C. P. 59; 6 Jur. 1066.

—— **Partial Stoppage.**]—H. & Co., of Hull, having sold to W., of Mickley Mills, near Leeds, twenty mats of flax, they were on the 10th of August sent by railway to Leeds, and arrived at the defendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., and to give him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart and took away ten of the mats. On the 18th of August, H. & Co. sold to W. twenty other mats of flax and a quantity of other goods; the flax was sent by railway to Leeds, and arrived at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at the defendants' warehouse, notice was given to W. by letter, which stated that, unless the goods were sent for, they would remain there at warehouse rents. On the 23rd of August, W. sent his cart and took away ten of the latter mats, and left there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped in transitu at Hull; and on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. & Co. On the 11th of September, the sheriff entered and seized all the flax in the defendants' warehouse sent by H. & Co., under an execution against W. On the 15th of September, there was also a stoppage by H. & Co. of the remaining ten mats of the first parcel. It was found by the jury at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills:—Held, that the transitus was at an end on the arrival of the goods at the defendants' warehouse. *Wentworth* v. *Outhwaite*, 10 M. & W. 436; 12 L. J., Ex. 172.

Held, also, that the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to the defendants' warehouse at Leeds, although comprised in one joint contract with the other goods. *Ib.*

Held, also, that the vendor had no right to retake that part which had arrived at its journey's end. *Ib.*

Goods to be Forwarded.]—Goods sent by the directions of the purchaser to a wharfinger to be forwarded to him, may be stopped in transitu by the vendor in the wharfinger's hands. *Smith* v. *Goss*, 1 Camp. 282; 10 R. R. 684.

The purchaser of goods directed the vendors to deliver the goods at a certain wharf, to be forwarded by a certain ship, consigned to the purchaser at a certain port. The vendors delivered the goods, and took receipts from the shipowners for the same, which they delivered to the purchaser, who exchanged them for bills of lading, and was himself a passenger by the same ship:—Held, that the goods were subject to the right of stoppage in transitu. *Lyons* v. *Hoffnung*, 59 L. J., P. C. 79; 15 App. Cas. 391; 63 L. T. 293; 39 W. R. 390; 6 Asp. M. C. 551—P. C.

—— **Receipt Stating Goods Bought by Vendee.**]—If goods are ordered from the vendor to be delivered at the London Docks with marks as specified by the vendee, and the vendor forwards the goods so marked to the docks with shipping instructions from the vendee that they are to be shipped on a named ship, and the dock company gives a receipt for them to the vendor, stating that they have been bought of the vendors on account of the vendee, the transit is determined when the receipt is given, and the vendor has therefore no right to stop the goods in transit. *Hughes, Ex parte, Gurney, In re*, 67 L. T. 598; 7 Asp. M. C. 249; 9 Morrell, 294.

—— **Delivery to Vendee.**]—But where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods in transitu can take place. *Noble* v. *Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, N. P. 248; 17 R. R. 445.

Not Landed in Consignee's Name.]—Goods were consigned to A., deliverable in the port of London. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business, and saw B. his clerk—A. being from home—and pressed him to send a craft for the goods, or he should be under the necessity of landing them. After some days, B. wrote to the captain, stating that A. was from home, but he, B., thought he had better land the goods on A.'s account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with freight and charges set opposite to them, and not in the name of any party as consignee. While they were lying there, A. became insolvent, and they were stopped by the consignor:—Held, that the transitus was not determined. *Edwards* v. *Brewer*, 2 M. & W. 375; 6 L. J., Ex. 135.

Wharfingers Forwarding.]—M. purchased lead of the plaintiff at Newcastle, without specifying any place of delivery; after a time, M. desired that it should be forwarded to him in London, and the plaintiff gave M.'s agent an order on the plaintiff's servant for its delivery; the agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London; the vessel arrived in London on 21st June, and the wharfingers undertook the delivery of the lead; M. failed on that day; on the 22nd and 24th M. demanded the lead of the captain of the vessel, who refused to deliver it, though the freight was tendered, alleging that the wharfingers had stopped it on account of the failure of M. On the 28th a letter arrived from the vendor, ordering the lead to be stopped in transitu; it was then on board a lighter belonging to the wharfingers:—Held, that the transitus was not at an end, and that the vendor was in time to

stop the lead. *Jackson* v. *Nichol*, 5 Bing. (N.C.) 508; 7 Scott, 577; 8 L. J., C. P. 294.

iv. *Delivery to Purchaser's Packer.*

At Warehouse.]—Where a trader has been in the habit of having goods consigned to him deposited in the warehouse of his packer, the delivery is complete, and the transitus of such goods terminates upon their arrival at the packer's. *Scott* v. *Pettit*, 3 Bos. & P. 469; 7 R. R. 804.

A., the general agent in London of B. & Co., a house at Paris, with power to export for them to such markets as he should think fit, purchased goods in the name of B. & Co., of C. at Manchester, and directed them to be sent to D., a packer in London. After their arrival A. had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of B. & Co.:—Held, that the goods in D.'s hands were no longer in transitu, and that C. therefore had no right to stop them. *Leeds* v. *Wright*, 3 Bos. & P. 320; 4 Esp. 243; 7 R. R. 779.

—— **Conditional.**]—Although goods are delivered to the packer of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they still may be stopped in transitu. *Loeschman* v. *Williams*, 4 Camp. 181; 16 R. R. 772.

v. *Part Delivery.*

Delivery of Part not constructive Delivery of Whole.]—A cargo of 114 tons of miscellaneous iron castings was consigned from Scotland to London on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons of the cargo had been delivered to the purchaser the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition and a receiver was appointed. The balance of the freight was paid by the receiver, and the remainder of the iron was placed in medio:—Held, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole cargo, and that, consequently, the transitus was not at an end as to the remainder of the cargo, and the vendor's notice to stop in transitu was given in time. *Cooper, Ex parte, McLaren, In re*, 48 L. J., Bk. 49; 11 Ch. D. 68; 40 L. T. 105; 27 W. R. 518—C. A.

In an earlier case part delivery by a carrier to the consignee was held to be primâ facie such a virtual delivery of the whole as to put an end to the consignor's right of stoppage in transitu. *Betts* v. *Gibbins*, 4 N. & M. 64; 2 A. & E. 57; 4 L. J., K. B. 1.

A., at a foreign port, shipped goods by the order and on the account of B., to be paid for at a future day; and bills of lading were accordingly signed by the master of the ship. One of the bills was immediately transmitted to B., who, before the arrival of the ship at the place of destination, sold the goods, and indorsed the bill of lading to C. After the arrival of the ship, and a delivery of part of the goods to the agent of C., B. became bankrupt, without having paid A. the price of the goods:—Held, that by this delivery the transitus was at an end as to the whole of the goods. *Slubey* v. *Heyward*, 2 H. Bl. 504; 3 R. R. 386.

This case observed on in *Kemp* v. *Falk*, in C. A., 14 Ch. D. 466; 42 L. T. 780; 28 W. R. 785—C. A. In H. L., ante, col. 607.

—— **To Sub-Vendees.**]—Goods were forwarded in bales by ship to London, deliverable to B. & Co., or their assigns, who were factors, for sale, and were landed at the defendants' wharf. B. & Co. gave the defendants orders to weigh and deliver the goods to M., who had contracted with B. & Co. for the purchase of them. They were accordingly weighed, and an account of the weights sent to B. & Co., who made out invoices to M. accordingly. M. resold several bales of the goods, which were delivered by the defendants, upon his order, to his vendees; the rest remained at the defendants' wharf until they were stopped by B. & Co., as unpaid vendors. They were never transferred in the defendants' books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him:—Held, that B. & Co.'s right of stoppage in transitu was not determined by the part delivery to M.'s vendees. *Tanner* v. *Scovell*, 14 M. & W. 28; 14 L. J., Ex. 321. See also *Wentworth* v. *Outhwaite*, ante, col. 617.

Several Parcels.]—The vendor sold several parcels of goods, and sent them by railway to be delivered to the purchaser; the expense of delivery was to be paid by the vendor. Part of the goods was delivered, when the vendor, having suspicions as to the solvency of the purchaser, directed the proper officer of the railway company not to deliver the rest:—Held, that the vendor had a right to stop in transitu. *Cross, Ex parte*, 1 Fonb. N. R. 215.

vi. *Effect of Delivery Orders.*

Delivery passing Right to Goods.]—Wharfinger's certificates are not documents of title, and their delivery passes no right to the goods; and no custom of trade can give them the effect of warrants or documents of title as against the vendors. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.

—— **Custom.**]—By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418; 5 Ch. D. 205; 36 L. T. 395; 25 W. R. 457.

Whether fresh Agreement as to Goods.]—G. shipped linseed from Smyrna to W. in London by a general ship. W. having obtained the bill of lading, mortgaged the cargo, and subsequently, before the ship's arrival, became bankrupt. W.'s mortgagees, after the ship had arrived, obtained a delivery order for the linseed, and handed it to an officer on board the ship, who promised to deliver the linseed to them when he got it clear:—Held, that this did not amount to a constructive delivery of the goods, and that the consignor's right of stoppage in transitu remained.

Coventry v. *Gladstone*, 37 L. J., Ch. 492; L. R. 6 Eq. 44; 16 W. R. 837.

The test of the consignor's right of stoppage is not whether the voyage is at an end, but whether there has been a delivery of the goods to the consignee. *Ib.*

In order to create a constructive delivery, there must be a fresh agreement between the parties as to holding or delivering the goods. *Ib.*

Whether Attornment by Carriers.]—Goods were consigned to the plaintiffs' order to a railway station, and the usual advice note was sent by them to the company. On the 12th April the plaintiffs sold these goods to J., payment half by cash, half by bill at three months, due the 13th July, and handed over the advice note to J., with an indorsement directing the company to deliver the goods to J.'s order. On the 24th April, J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D., with a second indorsement ordering the company to deliver the goods to D.'s order. But neither this delivery order nor that made by the plaintiffs was stamped in accordance with the Stamp Act, 1870, s. 89. J. becoming insolvent, D. on the 14th May wrote to the company inclosing the delivery order, and directing them to hold the goods to his order. To this he received the following reply from the goods manager, dated the 15th May: "I have yours of yesterday, inclosing transfer of rails, and beg to say I hold them to your order; but you will please produce this order when applying for the rails, and which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the act of parliament. You will be aware they remain here at owner's risk, and subject to our usual rent-charges." On the 19th May, D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamps, as required by ss. 24 and 89, and the same were never, up to trial, so cancelled. On the 23rd May, the company wrote to the plaintiffs, asking if they consented to the goods being delivered to D., to which they replied on the 23rd and 30th June, giving the company formal notice to hold them to their (plaintiffs') order; but upon indemnity being given by D. the goods were handed over to D. The bill given to the plaintiffs by J. in part payment of these goods not being met at maturity, the plaintiffs claimed the goods as partial unpaid vendors, and brought an action against the company for wrongfully parting with the possession of them:—Held, that the condition in the company's letter of the 15th May, as to the transfer stamp, was no qualification of their admission that they held the goods to D.'s order; that the letter was an absolute attornment by the company to D., by which the plaintiffs' right of possession as unpaid vendors was destroyed, and that the plaintiffs were, therefore, not entitled to recover. *Pooley* v. *G. E. Ry.*, 34 L. T. 537.

Carriers declining to Act upon.]—Where goods were entered in the books of the West India Dock Company in the name of the original consignee as owner, such consignee having sold them to A., who had afterwards made a sub-sale to B., and had given to B. a delivery order for the goods upon the company:—Held, that the right of A. to stop the goods in transitu was not thereby defeated, such order being one upon which the company, according to their invariable custom, had declined to act, and had refused to deliver the goods to B. without an order from the original consignee. *Lackington* v. *Atherton*, 8 Scott (N.R.) 38; 7 Man. & G. 360; 13 L. J., C. P. 140; 8 Jur. 406.

—— **Priorities under.**]—On the 3rd of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt-day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the dock house with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the dock house before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the docks company, who refused to act upon it. In an action by the plaintiffs, claiming as against the docks company, C., and D., to be entitled to the goods:—Held, that D. was the surety and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had passed to D.; that the title to the goods was in D. *Imperial Bank* v. *London and St. Katharine Docks Co.*, 46 L. J., Ch. 335; 5 Ch. D. 195; 35 L. T. 233.

vii. *Taking Possession as Owner.*

Parol Evidence of Intention.]—Goods were consigned to A., deliverable in the river Thames; on the arrival of the vessel in the river, the captain pressed A. to have them landed immediately; A. in consequence sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, and kept until he carted them away to his customers in his own carts; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were by B.'s direction landed at the wharf, and there stopped in transitu by the vendor. In trover for the goods by the assignees, on the bankruptcy of A., against the wharfinger:—Held, that the declarations so made by A. to B. were admissible, although they were not communicated to the vendor or to the wharfinger; and that they showed that A. had not taken possession of the goods as owner, and therefore that the transitus was not determined. *James* v. *Griffin*, 2 M. & W. 622; 6 L. J., Ex. 241.

Transfer in Wharfinger's Books.]—A vendor

by a delivery order, directed wharfingers to deliver to the vendee 1,028 bushels of oats, bin 40, to be weighed, and the expense of weighing to be charged to the vendor. The vendee afterwards gave an order to the same effect, on a sale to the plaintiffs. There were no other oats in the bin, and they were transferred to the plaintiffs in the books of the wharfingers, but never weighed over. The vendor, on the failure of the first vendee, claimed a right of stoppage in transitu:—Held, without reference to any estoppel against the wharfingers, that the property had passed as between buyer and seller, so as to defeat the vendor's right of stoppage. *Swanwick* v. *Sothern*, 1 P. & D. 648; 9 A. & E. 895.

Sampling and Selling Part.]—A cargo of eighty quarters of wheat was shipped in London, on the 6th December, 1839, on board a vessel bound to Barmouth and Tremadoc, and, by the bill of lading, was to be delivered at the port of Barmouth and Tremadoc to T., or to his assigns, on his paying freight, &c. The cargo was paid for by T. partly in cash, and partly by his acceptance at two months. On the 28th January, 1840, T. assigned all his estate and effects to the plaintiff and A., in trust for the benefit of themselves and his other creditors. T. was at that time insolvent, to the plaintiff's knowledge. The bill of lading was indorsed by T. to the plaintiff as follows (the indorsement being without date):—"I do hereby order that Captain J. do deliver the possession of the within-mentioned quantity of wheat to Mr. R. J., being one of my assignees, to be disposed of as he may think proper." On the 4th February, the vessel arrived at Barmouth with the wheat on board, and J. there went on board and took samples, and sold seventy of the eighty quarters, for which he paid the freight, and they were delivered to the purchasers; and he directed the master to take forward the remaining ten quarters to Tremadoc. On the 9th February T.'s acceptance became due and was dishonoured; and on the 10th, the shippers gave notice to the captain at Barmouth not to deliver the wheat, but to hold it to their use. On the 23rd, the vessel arrived at Tremadoc, where J. demanded the remaining ten quarters, tendering the freight, but the master refused to deliver it:—Held, that, under these circumstances (even supposing the plaintiff to be in the same situation as T.), the right of stoppage in transitu was determined, as to the whole of the cargo, by the acts done by the plaintiff at Barmouth. *Jones v. Jones*, 8 M. & W. 431; 10 L. J., Ex. 481.

Marking Timber—Consent of Vendor.]—The defendants having sold timber, then lying at their own wharf, to D., for bills, payable at a future day; which timber was then marked by D., and a small part of it was forwarded by the defendants to one place, and part to another; and then D., before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered that it was very well; and then, in their presence, the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the two other stages:—Held, that the defendants, after such assent to the transfer, and such marking by the plaintiff, could not retain or stop any of the timber as in transitu upon the subsequent insolvency, before the day of payment, of D., the original vendee, to whom payment had been made by the plaintiff, whatever question there might have been as between the original vendors and vendee. *Stovell* v. *Hughes*, 14 East, 308; 12 R. R. 523.

Timber merchants at Ledbury, in Herefordshire, sold to G., a timber merchant at Birmingham, timber, at a certain price per foot, "to be delivered free to boats when required. Payment, 100*l.* by bill at one month, and balance by bill at four months from measurement." The vendors brought the timber to a wharf belonging to a canal company, and whilst it was there G. measured and numbered each tree, and marked it with his initials, and expended money in squaring it. G. afterwards gave the bills, and inquired of the vendors whether they wished to freight the timber at Birmingham, and their terms. One of the bills was paid; but before the others were due, and whilst the timber remained on the wharf, the buyer became insolvent:—Held, that both the property and possession of the timber vested in G., and therefore the vendors had no right of stoppage in transitu or of lien. *Cooper* v. *Bell*, 3 H. & C. 722; 34 L. J., Ex. 161; 12 L. T. 466.

Redelivering for Special Purpose.]—A., a merchant at Birmingham, bought goods of B. & Co., commission agents at Manchester and Leeds. On the 20th March, 1844, the goods were, by A.'s direction, sent to L. & Co., shipping agents at Liverpool, employed by A. to receive and forward them to Valparaiso; and on the same day B. & Co. wrote to L. & Co., advising them of the transmission of patterns, which they requested them to ship with the goods, "as A. might direct them to be shipped." The goods were, on the 4th April, shipped by L. & Co. on board a vessel bound for Valparaiso, and afterwards relanded by order of a member of the house at Valparaiso, to which they were consigned by A., and sent to B. & Co.'s house at Manchester, for the purpose of being repacked in smaller cases. The price of the goods became payable on the 26th April, but was not paid, A. having, in the meantime, become insolvent:—Held, that the property and possession of the goods had vested absolutely in A., the vendee, before they were redelivered to B. & Co. at Manchester, and that by such redelivery the latter acquired no new rights as unpaid vendors. *Valpy* v. *Gibson*, 4 C. B. 837; 16 L. J., C. P. 241; 11 Jur. 826.

Receipt—Offer to Rescind.]—Goods were consigned from London to A. at Sunderland, according to order, and a draft for the price: the invoice and the bill of lading were forwarded on the arrival of the goods at Sunderland. A. was in difficulties, and desired that they should not be received from the wharf where they then lay; but in his absence, and without his consent, the goods were deposited on his premises. He afterwards knew of these facts, and took and kept the key of the warehouse in which the goods were deposited. On the 4th of February, he wrote to the vendor, returning the draft unaccepted, and stating the circumstances as to the goods, and that a stoppage of his business was decided upon, and continued: "I immediately sent for my solicitor, to get his advice as to whether I could not, under the circumstances, return the hemp to the wharf. He declared not, which placed me under the necessity of depriving you of what I consider your right. I retain your draft, and, although it can be little satis-

faction to you, must express my extreme regret that you are so unfortunately placed." On the 6th February the vendor applied to A. for the goods, and was referred by him to his solicitor. On 25th February, A. made an assignment to trustees for the benefit of his creditors, and delivered the key of the warehouse to them; the goods were demanded of them, and were refused, and they sold them:—Held, that the property in the hemp passed to A. by the delivery on board ship, and the forwarding of the bill of lading; that there was no valid rescission of the contract, for that such can only be by mutual consent; that therefore, any expression of wish to rescind uttered by one party, and not communicated to the other, is immaterial; that the letter of 4th February, which was communicated to the vendor, did not amount to an offer against A. to rescind, but to an assertion that he could not do so; and that there was no valid stoppage in transitu; for the natural transit was ended, and the facts showed that A. had taken to the goods as owner, whilst they were in his possession. *Heinekey* v. *Earle*, 8 El. & Bl. 410; 28 L. J., Q. B. 79; 4 Jur. (N.S.) 848; 6 W. R. 687—Ex. Ch.

Acts of Ownership by Assignees of Vendee.]—Where goods were consigned to A., and on his becoming a bankrupt his assignee went to the inn where they had arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt:—Held, that the consignor could not afterwards stop them, because they were not then in transitu. *Ellis* v. *Hunt*, 3 Term Rep. 464; 1 R. R. 743.

f. Rights of Third Parties.

Lien of Carriers.]—A usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods in transitu. *Oppenheim* v. *Russell*, 3 Bos. & P. 42; 6 R. R. 604.

A. consigned iron to B. in barter, and sent it to a carrier to be conveyed, who delivered part of the cargo on the wharf of B., but before the remainder was delivered the carrier discovered that B. was insolvent, and reshipped the part delivered, and retained the whole to satisfy his lien for the freight of the cargo, and for a general account between him and the consignee:—Held, that the consignor's right of stoppage in transitu was not gone; and that he might maintain trover against the carrier for the goods. *Crawshay* v. *Eades*, 2 D. & R. 288; 1 B. & C. 181; 1 L. J. (O.S.) K. B. 90; 25 R. R. 348.

A claim of lien by carriers who hold goods for a consignee does not enlarge the consignor's right to stop in transitu. *Allan* v. *Gripper*, 2 C. & J. 218; 2 Tyr. 217; 1 L. J., Ex. 71.

—— **Wharfinger.**]—A., of Newcastle, shipped goods for London to order of B.; before their arrival B. wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this A. returned a general answer without making any mention of the goods, but immediately left Newcastle for London, and on his arrival applied at the wharf of C., where the goods had in the meantime arrived (and where goods shipped for B. usually were landed and kept till sent for by him), tendering the freight and charges paid for the goods, and requiring a delivery of them which was refused, unless upon payment of a general balance due from B. to C. for wharfage:—Held, that the contract as between A. and B. having been rescinded previously to the arrival of the goods, C. had no right to retain against A. for a general balance due to him from B. *Richardson* v. *Goss*, 3 Bos. & P. 119; 6 R. R. 727.

Under Foreign Attachment.]—A right of stoppage in transitu is not divested by a foreign attachment at a suit of a creditor of the vendee. *Oppenheim* v. *Russell*, 3 Bos. & P. 42; 6 R. R. 604. S. P., *Smith* v. *Goss*, 1 Camp. 282; 10 R. R. 684.

SALFORD HUNDRED COURT.

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SALMON.

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SALVAGE.

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As applied to Life Insurance Policies.]—*See* INSURANCE.

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SANITARY LAW.

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SATISFACTION.

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Of Portion by Legacy, and Ademption of Legacy by Portion.]—*See* PORTION—WILL.

Of Debt by Legacy to Creditor.]—*See* WILL.

Advances and Debts between Parent and Child.]—*See* INFANT.

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SATISFIED TERMS.

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SCHOOL AND SCHOOL BOARD.

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1. CONTRACTS AS TO SCHOOLING.

Breach of School Rules by Parent—Right of Schoolmaster to Refuse to Complete his Contract.]—The defendant's son was a pupil at the plaintiff's school, one of the rules of which—the defendant having notice of it—was that no "exeat," or permission to leave the school and remain away for one night, was allowed during Easter Term. During Easter Term the defendant requested that his son might be allowed to come home and remain for the night, which the plaintiff refused to allow; but subsequently, on the defendant repeating the request and sending a servant for the boy, the plaintiff allowed him to go home, writing to the defendant at the same time that he did so on the understanding that the boy returned the same night. On the boy reaching home, the defendant telegraphed to the plaintiff that it was not convenient to send the boy that day, but he could return the next morning, to which the plaintiff telegraphed in reply that unless the defendant's son returned that night he should not receive him back. In consequence of the last telegram the defendant did not send the boy back, and the present action was brought to recover the school fees due on the first day of Easter Term, of which term less than three weeks had expired when the boy left. The defendant paid 13*l.* into court with a denial of liability, and counter-claimed damages for breach of contract by the plaintiff:—Held, that the plaintiff's contract was to board, lodge, and educate the defendant's son for the term on the condition that he should be at liberty to enforce, with regard to the boy, the rules of the school, or such of them as were known to the defendant; that this condition having been broken by the defendant, the plaintiff had the right to refuse to complete his contract, and was consequently entitled to succeed in this action both on claim and counter-claim. *Price* v. *Wilkins*, 58 L. T. 680.

Action for Cost of Schooling—Amount Recoverable.]—Under a count, stating, that in consideration that the plaintiff had taken W. as a schoolboy into an academy kept by him, and that he had left it without having given due notice, the defendant promised to pay so much as the plaintiff reasonably deserved to have:—Held, that the plaintiff was entitled to recover for a quarter over the time which W. stayed, on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken. *Eardley* v. *Price*, 2 Bos. & P. (N.R.) 333; 9 R. R. 654.

A child at school, for whom payment had been made quarterly, was sent home on account of illness four days after the commencement of a quarter, and did not return:—Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day school in which the child was the only boarder. *Collins* v. *Price*, 5 Bing. 132; 2 M. & P. 233; 6 L. J. (O.S.) C. P. 244; 30 R. R. 542.

—— **Removal of Pupil without Notice.**]—A father sent his son to a school, on the terms that when he removed him from the school he would either give the schoolmaster a term's notice or pay him an equivalent in money. To an action against the father for removing his son without giving such notice or paying an equivalent, it is a good defence to show that the removal was only a temporary one, whilst the son was unable, from illness, to return to the school. *Simeon* v. *Watson*, 46 L. J., C. P. 679.

—— **When Money becomes Due.**]—School-money for education, payable half-yearly, is not a debt due until the end of the half year, so as to be recoverable under a commission against the parent, who became bankrupt a few days before the end of the half-year, though he had, just before his bankruptcy, taken his son home for the holidays, the contract not being thereby put an end to. *Parslow* v. *Dearlove*, 4 East, 438; 1 Smith, 281; 5 Esp. 78.

A schoolmaster sued the defendant for a quarter's schooling of his son, the payment of which was contracted to be made quarterly. The defendant became bankrupt during such quarter:—Held, that his liability to pay on the quarter-day was not a liability on a contingency within 12 & 13 Vict. c. 106, s. 178, nor a debt payable after the bankruptcy within s. 172, and that the claim was therefore not barred by the certificate. *Thomas* v. *Hopkins*, 7 C. B. (N.S.) 711; 29 L. J., C. P. 187; 6 Jur. (N.S.) 301; 8 W. R. 262.

—— **Who Liable to Pay.**]—A mother took her son to school, and saw the master, but no evi-

dence was given of what passed at that time. Afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—Held, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under the circumstances, whether the original credit was given to the uncle. *Darnell* v. *Fealt*, 2 Car. & P. 82.

—— **How far Necessary that Agreement should be Stamped.**]—Where a schoolmaster brings an action on an agreement contained in a prospectus of terms, delivered to the defendant, it is necessary to get that identical copy stamped which has been delivered, and it is not sufficient to get another copy stamped. *Williams* v. *Stoughton*, 2 Stark. 292.

But in another case a somewhat similar prospectus was allowed to be read to show what the terms were, although it was not stamped. *Edgar* v. *Blick*, 1 Stark. 464; 18 R. R. 809.

In an action by a schoolmaster for a sum of money, in lieu of three months' notice of the removal of the defendant's sons from school, it appeared that the defendant's agent having expressed a wish to place his sons under the plaintiff's care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice or payment was required previously to the removal of the pupil. The plaintiff, at the time of delivering the prospectus, agreed verbally that the boys should be charged for at the rate of fifty guineas per annum each. The boys were thereupon sent to the plaintiff's, and were taken away without the stipulated notice:—Held, that the prospectus was a proposal and not an agreement, and that no stamp was necessary. *Clay* v. *Crofts*, 20 L. J., Ex. 361.

—— **Evidence in.**]—Where, to an action by a schoolmaster for the board and education of the defendant's sons, the defendant pleads that the plaintiff did not furnish his sons with proper instruction, board and lodging, and that he therefore removed them from the school, he must confine himself to evidence as to the treatment of his own sons, and cannot go either into general evidence of the plaintiff's mode of conducting the school, or into evidence of his conduct with reference to other particular boys. *Clement* v. *May*, 7 Car. & P. 678.

—— **Set-off.**]—In an action to recover a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by the defendant in order to reduce the amount of the bill, such a collateral breach being the subject of a cross action and not of set-off. *Hennequin* v. *O'Dowd*, 21 L. T. 802.

—— **For Price of Clothes.**]—A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar. *Clements* v. *Williams*, 8 Car. & P. 58.

2. Masters of Schools.

Appointment.]—Masters of grammar schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion: it is a good return to a mandamus (to the ordinary to grant such a licence) to state that he had suspended granting his licence until the party would submit himself to be examined, touching his sufficiency in learning. *Rex* v. *York (Archbishop)*, 6 Term Rep. 490.

A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were eleven), and, in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result in the dernier ressort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens, especially if such an election is supported by usage. *Withnell* v. *Gartham*, 6 Term Rep. 388; 3 R. R. 218.

—— **Alienation of Right of.**]—A grammar school was founded and endowed by virtue of letters patent, which ordained that the school should be altogether in the patronage and disposition of the founder and his heirs, by whom the schoolmasters and guardians should be nominated for ever:—Held, that such right of nomination might lawfully be aliened. *Att.-Gen.* v. *Brentwood School*, 3 B. & Ad. 59; 1 L. J., K. B. 57.

—— **Need not be in Writing.**]—An appointment to the situation of a schoolmaster, under a conveyance to charitable uses, may be made without writing. *Wilkinson* v. *Malin*, 2 Tyr. 544; 2 C. & J. 636; 1 L. J., Ex. 234.

Power and Duty of.]—An action will lie against a schoolmaster who permits an infant pupil under his care to make use of fireworks, and he is responsible for the mischief which ensues. *King* v. *Ford*, 1 Stark. 421; 18 R. R. 794.

—— **To Expel Boy.**]—Although the master of a school has the same authority over the scholars as the parents would have, and therefore may impose reasonable restraints upon their persons, either by way of prevention or punishment of disorderly conduct, yet he has not a discretionary power of expulsion, but only for reasonable cause. In judging of the cause, however, great regard must be had to his necessary discretion, as to the enforcement of discipline, and the wilful breach of its reasonable rules may be sufficient cause, and the repetition of acts of disobedience, each in itself separately insufficient, may be sufficient, as showing a persistent disregard of discipline, and a habit of disobedience. But if the expulsion is justified on the ground of some particular act or conduct, not only as likely to be seriously injurious to the peace and good order of the establishment, but as committed with that object, it must appear that it was of that character, or the justification would fail. *Fitzgerald* v. *Northcote*, 4 F. & F. 656.

—— **False Imprisonment of Pupil.**]—Where a master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid, according to contract, but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home, and been refused, or was in any way restrained, though kept at school during the Christmas fortnight, an action for false imprisonment cannot be maintained against the master. *Herring*

v. *Boyle*, 1 C. M. & R. 377; 6 Car. & P. 496; 4 Tyr. 801; 3 L. J., Ex. 344.

Dismissal of.]—The governing body of a school constituted under the Public Schools Act, 1868, has, under s. 13, absolute power to dismiss the head master of the school at its pleasure, that is, without assigning any reason; and so long as this power is fairly and honestly exercised the court of chancery cannot interfere. *Hayman* v. *Rugby School Governors*, 43 L. J., Ch. 834; L. R. 18 Eq. 28; 30 L. T. 217; 22 W. R. 587.

They may do so, moreover, although the head master received his appointment from a prior governing body in existence before the passing of the act, whose powers of dismissal were subject to restrictions as to time and place of exercise. *Ib.*

Queen Elizabeth founded and endowed a grammar-school, and incorporated certain persons and their successors as governors, and granted to them, for ever, full power and authority, from time to time, of electing, nominating and appointing a master and usher of the school, so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the master or usher from the school according to their sound discretion, and of placing or appointing other or others, more fit, in their stead or steads:—Held, that by the terms of the charter the governors might, in their discretion, remove a master without summons or hearing, and although no charge against him had been exhibited to them. *Reg.* v. *Darlington School Governors*, 6 Q. B. 682; 14 L. J., Q. B. 67; 9 Jur. 21—Ex. Ch.

The governors were empowered to make by-laws, and they made a by-law requiring certain qualifications in the master, and ordaining (for the encouragement of well-qualified persons to accept the office) that no master should thereafter be displaced, removed or removable from the office, unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause:—Held, that the governors had no right thus to limit the discretion given by the charter, and that the by-law was void. *Ib.*

The neglecting of scholars would be a good ground of amoval. *Doe* d. *Coyle* v. *Cole*, 6 Car. & P. 359.

A schoolmaster elected by a majority of the trustees of a public charity at a meeting of the body, cannot be dismissed except at a similar meeting. *Wilkinson* v. *Malin*, 2 Tyr. 544; 2 C. & J. 636; 1 L. J., Ex. 234.

P., in 1674, devised estates for support of a school for parish children, and directed that the trustees, with consent of the parishioners, should provide and keep an honest schoolmaster; and if at any time the schoolmaster should be idle, negligent, or abuseful of his scholars, the trustees and parishioners should have power to dismiss him. On a vacancy occurring the trustees resolved that they would give 60*l.* a year to a master, or 55*l.*, he finding certain things; that the appointment was to be for one year, commencing on the 25th March next, and liable to be terminated by either party giving three months' notice, and that they would recommend the plaintiff for the post. At a vestry meeting of the parishioners the latter adopted the recommendation, and appointed the plaintiff schoolmaster, subject to the regulations of the trustees. On the 17th of April the trustees wrote to the plaintiff, that they would pay him at the rate of 55*l.* per annum so long as, by mutual consent, he should retain the office of master; the appointment to be subject to termination by three months' notice from either party. The plaintiff wrote back, assenting to hold on the terms mentioned. The plaintiff had entered into the office in March previously, and performed the duties. On the 1st of March, 1854, at a meeting of the trustees, a resolution was adopted, by a majority, that a notice should be given to the plaintiff to quit his office at the end of three months from the 25th of March, 1854, and a notice to that effect, signed by a majority of the trustees, was forthwith served on him. Notwithstanding the notice, he continued to act as schoolmaster until the 25th of March, 1855, and sued a trustee for the three quarters' salary ending at that date:—Held, that the trustees, without the assent of the parishioners, had power to give the notice to determine the appointment, as the plaintiff's contract was with them alone; that the notice need not be one that required the plaintiff to quit at the end of a current year, but that his holding might be terminated by a three months' notice to quit at any period of the year; consequently, that the plaintiff was not entitled to recover the three quarters' salary which he claimed. *Ryan* v. *Jenkinson*, 25 L. J., Q. B. 11.

—— **Right to be Heard before Dismissal.**]—By a scheme for the management of Edward the Sixth's Grammar school at Ludlow, confirmed by the lord chancellor, it was declared that the trustees should have authority, upon such grounds as they should at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed:—Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal. *Doe* d. *Childe* v. *Wills*, 5 Ex. 894; 20 L. J., Ex. 85. See *Reg.* v. *Darlington School Governors*, supra.

The deed of trust establishing a school provided that the master of the school should be appointed by the vicars of three named parishes, or the greater number of them; and the said vicars might remove the master for certain specified causes. In December, 1890, two of the vicars served on the plaintiff, the master of the school, a notice of dismissal signed by them. No meeting of the three vicars had been summoned to consider the question of the plaintiff's dismissal, and he had had no opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted in the matter:—Held, that the plaintiff was entitled to an injunction restraining the two vicars, who had signed the notice, from removing him from his office until after the holding of a meeting of the vicars in accordance with the terms of the deed, and until the plaintiff should have had an opportunity of being heard at such meeting in reply to any charges made against him. Held, also, that for the purpose of

obtaining this relief, the consent of the charity commissioners, under s. 17 of the Charitable Trusts Act. 1853, was not necessary. *Fisher* v. *Jackson*, 60 L. J., Ch. 482 ; [1891] 2 Ch. 84 ; 64 L. T. 782.

—— **Committee—Vacancies—Default of Election—Informality of Resolution.**]—A trust deed of a school, dated in 1857, provided that its conduct and the appointment and dismissal of the teachers should be managed by a committee of the vicar, curate, and churchwardens, and five lay members possessing certain property qualifications, and that vacancies should be filled by nomination on the part of subscribers, but that "no default of election nor any vacancy during any current year" should prevent the continuing members from acting meanwhile. The plaintiff was appointed schoolmaster in 1861. The defendant became vicar in 1888. At that time all the original lay members' places had become vacant, and had not been filled up, and the school was managed by the ex-officio members. At Easter, 1891, a vicar's churchwarden was elected, but not a people's churchwarden. In September, 1891, a committee meeting was held by the vicar, his curate, and churchwarden, there being present also one or both of the sidesmen, who, though not members of the committee, had been in the habit of attending the meetings, and a resolution was passed to dismiss the plaintiff and the other teachers. One of the sidesmen voted for the resolution. The people's churchwarden of the previous year had no notice of the meeting, and did not attend. The resolution was on the ground that owing to the financial position of the school it was desirable to rearrange the staff of teachers. The plaintiff was not invited to attend the meeting:—Held, that the resolution was invalid, first, because of the unauthorised addition to the committee; secondly, because notice of the meeting had not been given to the people's churchwarden: that on the construction of the deed, the remaining members of the committee could act although there had been default in previous years to elect. *Lane* v. *Norman*, 61 L. J., Ch. 149 ; 66 L. T. 83 ; 40 W. R. 268.

—— **Contract with Unauthorised Managers—Trust Deed.**]—A schoolmistress appointed by de facto managers of a school, by an agreement made by her with them, under which either party could terminate the engagement by giving three months' notice does not, by remaining in office for thirteen years, acquire such an interest under the trust deed by which the affairs of the school ought to be regulated, that she is no longer liable to be dismissed by the de facto managers, but can insist on receiving notice from properly appointed trustees of the deed. *Pottle* v. *Sharp*, 65 L. J., Ch. 908 ; 75 L. T. 265—C. A.

Tenure—Compensation under Lands Clauses Act.]—By a royal charter persons were incorporated as the governors of the possessions, revenues, goods and chattels of a free grammar school. By the charter, the governors were to find a house, to be called the schoolhouse, in which the school should be fitly kept. They had also power to elect and remove the master as often as, according to their discretion, they might see necessary and convenient. They appointed a schoolmaster, and put him into possession of the schoolhouse. The resolution by which he was appointed contained terms to which he subscribed his consent, and by which he was to keep the house in repair, to take certain articles at a valuation, and give them up at quitting, being paid for them at a valuation, and to give three calendar months' notice before relinquishing his appointment. Two-thirds of the governors, with the sanction of the bishop, were to have the power of removing him, giving three months' notice; but in either case the office was to be vacated only on the 21st June or 21st December: Held, that the schoolmaster had no greater interest in the house than as a tenant for a year, or from year to year, and therefore in seeking compensation under the Lands Clauses Act, 1845, was confined to the remedy given by s. 121. *Reg.* v. *Manchester, Sheffield and Lincolnshire Ry.* 4 El. & Bl. 88 ; 1 Jur. (N.S.) 419 ; 3 W. R. 591.

Ejectment after Dismissal.]—The visitors and feoffees of a free grammar school, who have dismissed the schoolmaster for misconduct, cannot maintain ejectment for the recovery of the possession of the schoolhouse, till they have determined the master's interest therein, upon summons in the ordinary manner, when he may be heard in answer to the charges forming the ground of such dismissal. *Doe* d. *Thanet (Earl)* v. *Gartham*, 8 Moore. 368 ; 1 Bing. 357 ; 2 L. J. (O.S.) C. P. 17 ; 25 R. R. 649. And see *Rex* v. *Gaskin*, 8 Term Rep. 109 ; 4 R. R. 633 ; and *Newman, Ex parte*, 9 Jur. 959.

In ejectment against a schoolmaster who has been removed by the sentence of the trustees of the school for misbehaviour, it is not necessary to prove the grounds of the sentence, nor can he disprove them. *Doe* d. *Davy* v. *Haddon*, 3 Dougl. 310.

He may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of showing that his signature was corruptly obtained. *Ib.*

The master of an ancient endowed school is entitled to the schoolhouse, unless he has been in due manner amoved from his office by those having authority to do so. *Doe* d. *Coyle* v. *Cole*, 6 Car. & P. 359.

The vicar of the parish cannot recover the school house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appears that the house was built on the site of a very old schoolhouse, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may remove that part. *Ib.*

Of Board Schools.]—*See* infra.

3. Scholarships.

Trust Deed—Refusal to Elect—Action by Candidate.]—A trust deed provided a scholarship for a pupil leaving a school and going to University or New College, London, who should pass the best examination in subjects chosen by an examiner appointed by the trustees. An examination was held, at which only two candidates competed, and the plaintiff obtained the highest number of marks. The examiner, however, certified that in his opinion neither candidate was deserving of so valuable a scholarship. The trustees refused to award the scholarship, and the plaintiff brought an action for a declaration that he was entitled to the

scholarship :—Held, that no candidate was entitled to the scholarship unless he passed to the satisfaction of the examiner, although he might have obtained the highest number of marks, and that the trustees had acted rightly. *Rooke* v. *Dawson*, 65 L. J., Ch. 31 ; 73 L. T. 399 ; 44 W. R. 77.

Examination—Announcement not Resulting in Contract.]—An announcement that an examination for a scholarship will be held does not imply a condition that the scholarship will be given to the competitor obtaining most marks. Consequently there is no contract on which such competitor can sue the trustees of the scholarship. *Spencer* v. *Harding* (L. R. 5 C. P. 561) followed. *Rooke* v. *Dawson*, 64 L. J., Ch. 301 ; [1895] 1 Ch. 480 ; 13 R. 269 ; 72 L. T. 248 ; 43 W. R. 313 ; 59 J. P. 231.

4. Accidents to Scholar.

Voluntary School—Negligence of Teacher—Liability of Committee of Management.]—The plaintiff was a scholar in a voluntary school, and the defendant, as vicar of the parish, was a trustee of the school, and a member of the committee of management. The plaintiff was injured by the fall of a black board which was being used by a pupil teacher, who was in charge of the class in which the plaintiff was. The schoolmistress was appointed by the committee of management, but neither they nor the defendant had any control over the way in which the school was managed beyond the power of dismissing the mistress subject to an appeal by her to the bishop of the diocese :—Held, that the mere fact of the fall of the board was not evidence of negligence on the part of the mistress or the pupil teacher ; and that if there had been negligence on the part of either of them the defendant would not have been liable. *Crisp* v. *Thomas*, 63 L. T. 756 ; 55 J. P. 261—C. A.

5. School Boards.

a. Transfer of Schools to.

Appointment of Trustees.]—By two deeds, made in 1838 and 1849, the two joint rectors of a parish were appointed trustees of a Church of England school. In 1871, it having become necessary to appoint a new master, the rectors could not concur in any appointment, and the school was closed. A school board having been elected in the district, it was then proposed that the school should be transferred to the board under the Education Act of 1870, s. 23, which requires a majority of two-thirds of the trustees to effect such a transfer. With this view a memorial was presented to the charity commissioners, asking them to appoint three additional trustees, so that the requisite majority might be obtained. This course was opposed by one and supported by the other of the two joint rectors. The commissioners, however, made an order appointing three additional trustees, all of whom were churchmen, one of them being chairman of the school board. On a petition by the opposing rector, by way of appeal from the order, praying for the discharge of the order :—Held, that it is no objection to such an order, notwithstanding the Charitable Trusts Act, 1860, s. 5, that the commissioners have made it on an application of a contentious character. *Burnham National Schools, In re, Bates, Ex parte*, 43 L. J., Ch. 340 ; L. R. 17 Eq. 241 ; 29 L. T. 495 ; 22 W. R. 198.

The Charitable Trusts Act, 1853, ss. 28, 32, gives the jurisdiction to appoint trustees to the master of the rolls and the vice-chancellors in cases in which it was previously necessary to file an information, bill, or petition, and by the Act of 1860 this jurisdiction is transferred to the charity commissioners :—Held, that the power to appoint additional trustees is clear under the ordinary jurisdiction of the court of chancery ; that s. 32 of the Trustee Act, 1850, gives a statutory power for that purpose, and therefore that such a power is vested in the commissioners. *Ib.*

The court will not, upon appeal, interfere with the exercise of discretion by the commissioners, except in a very strong case of miscarriage of justice, and such discretion is properly exercised in a case where, in consequence of differences between the existing trustees, the school is closed, and education denied to the children of the district. *Ib.*

Objections to Transfer.]—In the case of a school established by and united with the national society, on the express condition that the children attending it were to be instructed in the holy scriptures, and in the liturgy and catechism of the Church of England, the instrument declaring the trusts of the school providing that the school was to be always in union with, and conducted according to the principles of, and in furtherance of the ends and designs of, the national society, but containing no provision whatever for its alienation, the consent of the national society was not required to a transfer of the school to a school board, under the Elementary Education Act, 1870, s. 23 ; and the proper mode of the society to give effect to any objections to a transfer was by appealing before the education department. *National Society* v. *London School Board, Att.-Gen.* v. *English*, 44 L. J., Ch. 229 ; L. R. 18 Eq. 608 ; 31 L. T. 22 ; 23 W. R. 2.

The majority of two-thirds of the school trustees required by the Education Act anticipates any objection to the transfer of a school whose trustees are required to be churchmen. *Burnham National Schools, In re, Bates, Ex parte*, supra.

Application of Funds on.]—Semble, in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school, as, for instance, by establishing exhibitions or scholarships, and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. *Poplar and Blackwall Free School, In re*, 8 Ch. D. 543 ; 39 L. T. 88 ; 26 W. R. 827.

By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of 90*l.* should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in Flint Street, Walworth, "or any other school that may be established in its stead," provided that no sum should be paid to any denominational school ; and that if such

school should "become materially altered in discipline, number of children, or other circumstance," then the 90*l.* should, in the discretion of the trustees, be applied for educational purposes amongst other schools of a similar character in the parish. A transfer of the Flint Street school and its endowment having been made by the managers to the School Board for London:—Held, that the Flint Street school had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance"; and that the trustees were bound to pay the endowment of 90*l.* a year to the School Board. *London School Board* v. *Faulconer*, 48 L. J., Ch. 41; 8 Ch. D. 571; 38 L. T. 636; 26 W. R. 652.

b. Election of Members.

Ballot-papers—Validity of.]—The Ballot Act, 1872, sched. II., which applies to municipal elections, directs that a voter shall vote by placing a cross on the right-hand side of the ballot-paper opposite the name of each candidate for whom he votes. A general order of the Education Department, made under the Elementary Education Acts, provides that the poll at elections of school boards in boroughs shall be conducted in like manner as the poll at a contested municipal election as directed by the Ballot Act, 1872, is to be conducted, and the provisions of that Act shall, subject to the provisions of the order, apply to elections of school boards, provided that—"Every voter shall be entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them amongst the candidates as he thinks fit. The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly":—Held, applying the principal of *Woodward* v. *Sarsons* (L. R. 10 C. P. 733), that the provisions of the general order and of the Ballot Act, 1872, were sufficiently complied with where ballot-papers at the election of a school board in a borough were marked otherwise than in the mode prescribed by the order, if it could be ascertained with reasonable certainty for whom the voter in each case intended to vote, and how many votes he intended to give, and if it appeared that he had not intended to give a greater number of votes than there were members of the school board to be elected:—Applying the above principles, the court held that ballot-papers marked by placing crosses instead of figures, or crosses and figures, or single strokes, opposite the names of candidates, were valid. *Phillips* v. *Goff*, 55 L. J., Q. B. 512; 17 Q. B. D. 805; 35 W. R. 197; 50 J. P. 614.

—— **Principle of Counting Votes.**]—Where at a school board election—the number of votes at the disposal of a single voter being regulated by the number of candidates—a voter chooses to mark his ballot paper with crosses instead of figures, each cross is to be counted as a single vote; and there is no presumption that by placing a single cross against the name of one candidate only the voter intended to bestow all his votes on, and thus to exhaust his whole voting power in favour of, such candidate. *Morris* v. *Beves*, 66 L. J., Q. B. 299; [1897] 1 Q. B. 449; 76 L. T. 120; 45 W. R. 430; 61 J. P. 263.

Validity, how determined.]—By the Elementary Education Act, 1870, s. 33, questions as to the right of any person to act as a member of a school board may be inquired into by the education department. A petition against his election cannot be sustained under the Corrupt Practices (Municipal) Act, 1872, for although the provisions of the Ballot Act, 1872, have been applied to school board elections by the Elementary Education Amendment Act, 1873, s. 26, sched. 2 the provisions of the Corrupt Practices (Municipal) Act, 1872, have not been applied to such elections, notwithstanding the terms of s. 2 enacting that this act shall, so far as is consistent with the tenor thereof, be "construed as one" with the acts relating to boroughs and elections in boroughs. *West Bromwich School Board, In re*, 49 L. J., C. P. 641; 5 C. P. D. 191; 28 W. R. 766; 44 J. P. 426.

Returning Officer—Bill of Charges.]—The bill of charges of a returning officer at a school board election was referred to the education department under rule 20 of the regulations of 1886, which provides that "if any question shall arise between the returning officer and the school board as to his bill for expenses or remuneration, such bill shall be referred to the Education Department, whose decision thereon shall be final and conclusive." The department awarded the returning officer a smaller sum than he had claimed:—Held, that they were entitled, with the consent of both parties, to reopen the inquiry and award him a different amount. *Parsons* v. *Lakenheath School Board*, 58 L. J., Q. B. 371.

Though it is not necessary that the person employed as returning officer at the first election of a school board should be a solicitor, nevertheless if he be so, the board who is directed to pay his expenses may have his bill taxed. *Jones, In re*, 41 L. J., Ch. 367; L. R. 13 Eq. 336; 20 W. R. 395.

Candidates, when Eligible.]—When under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), sched. 2, part 1, r. 14, a member of a school board vacates his office by absenting himself during six successive months from all meetings of the board, such absence not being due to temporary illness, or other cause approved by the board, r. 12 does not render him ineligible for re-election at the next triennial election of the board. *Reg.* v. *Turmine*, 48 L. J., Q. B. 5; 4 Q. B. D. 79; 37 L. T. 255; 27 W. R. 150.

Where a debtor has been adjudged bankrupt prior to January 1, 1884, he is not subject to the disqualifications mentioned in s. 32 of the Bankruptcy Act, 1883, and may, therefore, be elected and act as a member of a school board after that date. *Bourke* v. *Nutt, Pulborough School Board Election, In re*, 63 L. J., Q. B. 497; [1894] 1 Q. B. 725; 9 R. 395; 70 L. T. 639; 42 W. R. 388; 1 Manson 172; 58 J. P. 572—C. A.

Vacating Seat—Imprisonment for "Crime."]—By r. 14 of sched. 2, part 1, to the Elementary Education Act, 1870, it is provided that, if a member of the school board is . . . . punished with imprisonment for any crime, ... his office shall thereupon become vacant. The

plaintiff, a member of a school board, suffered imprisonment in Ireland on the charge of taking part in a criminal conspiracy heard before a court of summary jurisdiction under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887:—Held, that the plaintiff's office as member of such school board had become vacant under the above rule. *Conybeare* v. *London School Board*, 60 L. J., Q. B. 44; [1891] 1 Q. B. 118; 63 L. T. 651; 39 W. R. 288; 17 Cox, C. C. 191; 55 J. P. 151.

Declaring Member in Default.]—A school board cannot declare a member to be in default on the ground of six months' absence, unless an opportunity is given to the member to explain. *Richardson* v. *Methley School Board*, 62 L. J., Ch. 943; [1893] 3 Ch. 510; 3 R. 701; 69 L. T. 308; 42 W. R. 27.

—— **Injunction to Restrain.**]—The court has jurisdiction under the Judicature Act, 1873, s. 25, sub-s. 8, to restrain by injunction a school board from declaring a member in default and proceeding to the election of a new member. *Ib.*

Personation of Voters.]—The Elementary Education Acts (33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, second sched.), which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personating at the voting for a resolution for application for a school board; and an order in council purporting to be made under the acts, and imposing a penalty upon any one guilty of such offence, is invalid. *Reg.* v. *Sankey*, 47 L. J., M. C. 96; 3 Q. B. D. 379.

Corrupt Practices at Election—Conviction for.]—An election for a school board was about to take place, and A. and a friend attended at a public-house in the district, and there met several inhabitants, many of whom were voters. His friend, after discussing various local matters, suggested A. as a fit and proper person to be elected to the school board. A. addressed those present upon the subject of a school board and of his candidature. He was then proposed by one of those present as a fit and proper person to be elected, and his health and success were drunk. Glasses round for those present were then ordered by four different persons in succession, A. having given and paid for one of such orders. He was afterwards a candidate, and went to the poll. An information having been laid against him under 33 & 34 Vict. c. 75, s. 91, for corrupt practices, and being convicted by the justices:—Held, that the conviction was correct. *Turnbull* v. *Welland*, 24 L. T. 730.

W. G. was charged in an information with having been guilty, at the election of members of the school board of S., of "corrupt practices, contrary to the sub-s. of s. 91 of the Elementary Education Act, 1870," and was thereon convicted:—Held, that the conviction was bad, as the information insufficiently described the offence, for that under the Elementary Education Act, 1873, s. 24, sub-s. 1, the offence ought to have been specified, and the time and place mentioned. *Reg.* v. *Ingall*, 42 L. T. 533; 29 W. R. 288; 44 J. P. 552.

—— **"Conviction" includes "Summary Conviction."**]—On a motion to quash a conviction of G. for treating at a school board election, the objection raised was that treating was an indictable offence, and not punishable on summary conviction, the words in 33 & 34 Vict. c. 75, s. 91, being "conviction," and not, as in the previous sections, "summary conviction":—Held, that the word "conviction" in s. 91 meant "summary conviction," and the justices had jurisdiction, and that the conviction was good. *Reg.* v. *Gaunt*, 50 L. J., M. C. 32; 43 L. T. 696; 29 W. R. 289; 45 J. P. 222.

Appeal from Commissioner's Decision.]—The high court has no jurisdiction to entertain an appeal against the decision of a commissioner appointed to inquire into alleged corrupt or illegal practices at a school board election, except on points of law reserved for its decision by way of a case stated by the commissioner. *School Board Election, In re, Ayres, Ex parte*, 54 L. T. 296.

c. Contracts with.

Compulsory Purchase of Lands—Agreement for Exchange with Third Party Prior to Notice to Treat.]—A school board served on R. the customary notice to treat for land belonging to him, all the requisite preliminaries required by the Elementary Education Act, 1870, having previously been complied with. Prior, however, to the service of such notice to treat and to the passing of the confirmation act as required by the above act, the board had entertained and adopted, subject to the sanction of the education department, a proposal from one B., a neighbouring landowner, for exchanging a portion of the land to be acquired by the board from R. for a piece of B.'s land, he undertaking to form the land so to be conveyed to him by the board into a public road. There was evidence to show that such road, when made, would be advantageous to the school intended to be erected:—Held, on motion by R. for an injunction to restrain the board from putting in force their statutory powers with respect to so much of the land comprised in the notice to treat as they proposed to convey to B., that the board were justified in the course they had taken, and could, if they obtained the sanction of the education department, carry out the proposal. *Rolls* v. *London School Board*, 27 Ch. D. 639; 51 L. T. 567; 33 W. R. 129.

—— **Land taken by Agreement—Restrictive Covenant—Compensation.**]—A school board taking land by agreement for the purposes of the Elementary Education Act, 1870, are not liable to an action for breach of a restrictive covenant, by which the land was bound in the hands of their vendor, but the only remedy of the covenantee is compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. *Kirby* v. *Harrogate School Board*, 65 L. J., Ch. 376; [1896] 1 Ch. 437; 74 L. T. 6; 60 J. P. 182—C. A.

—— **Easement—Compensation.**]—A school board taking lands under the Elementary Education Act, 1870, need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for lands injuriously affected. *Clark* v. *London School Board*, 43 L. J., Ch. 421; L. R. 9 Ch. 120; 29 L. T. 903; 22 W. R. 354.

To borrow Money temporarily.]—A school board have not power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates. *Reg.* v. *Reed*, 49 L. J., Q. B. 600; 5 Q. B. D. 483; 42 L. T. 835; 28 W. R. 787; 44 J. P. 633—C. A.

Officer—Architect—Contract not under Seal—Liability of Board.]—By 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), s. 30, sub.-s. (1), a school board shall be a body corporate . . . having a perpetual succession and a common seal . . . sub.-s. (4), any minute made of proceedings at meetings of the school board, if signed by . . . the chairman . . . shall be receivable in evidence in all legal proceedings without further proof . . . sub.-s. (6), the rules contained in the third schedule shall be observed. By s. 35 a school board may appoint a clerk and a treasurer and other necessary officers . . . By the Third Schedule, 7, the appointment of any officer of the board may be made by a minute of the board signed by the chairman of the board, and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board. By a minute signed by the chairman of a school board and countersigned by the clerk, the plaintiff was appointed architect of the board, and under orders given by subsequent minutes so signed and countersigned and communicated to him, he prepared plans for the board:—Held, that by virtue of the provisions of the act he was entitled to recover payment for his services although the appointment and orders were not under seal. *Scott* v. *Great Clifton School Board*, 1 Cab. & E. 435; 14 Q. B. D. 500; 52 L. T. 105; 33 W. R. 368. Affirmed in C. A.

d. Attendance of Children—Fees.

School Fees.]—Money granted under the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 3, for the education of the children of persons receiving relief out of the workhouse, need not be paid to the parents, but may in the discretion of the guardians be directly applied in payment of the school fees. *Darlington Union, In re*, 32 L. T. 320.

—— **Action to recover—Implied Promise to pay.**]—No action to recover arrears of fees for tuition can be maintained by a school board against the parent of a child attending a public elementary school; for it being compulsory upon the parent to cause his child to attend a school, his act in sending the child to school is not voluntary, and no promise to pay the fees can be implied; and the Elementary Education Acts, 1870 to 1880, contemplate that the remedy to enforce payment of fees shall be by an attendance order and by summary proceedings before justices and not by action. *Saunders* v. *Richardson* (7 Q. B. D. 388) approved. *London School Board* v. *Wright*, 53 L. J., Q. B. 266; 12 Q. B. D. 578; 50 L. T. 606; 32 W. R. 577; 48 J. P. 484—C. A.

By-Laws for Attendance at School.]—A by-law made by a school board, with the approval of the Education Department, under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, provided that all children in the district subject to the act should attend school for thirty hours a week. The justices refused to convict a father for neglecting to cause his son, between five and thirteen years of age, to attend school as required by that by-law, because the son was employed in a boot manufactory, and attending school more than ten hours a week, pursuant to the Workshops Regulation Act, 1867 (30 & 31 Vict. c. 146), s. 14:—Held, that this by-law was not contrary to the section of the Workshops Act, which requires every child who is employed in a workshop to attend school for at least ten hours a week; and that the father ought to have been convicted. *Bury* v. *Cherry-holm*, 1 Ex. D. 457; 35 L. T. 403.

—— **Enforcing—Factory Acts.**] — A school board is not entitled to enforce the provisions of its by-laws, with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to the Factory Acts. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those acts. *Mellor* v. *Denham*, 48 L. J., M. C. 113; 4 Q. B. D. 241; 40 L. T. 395; 27 W. R. 496.

—— **No Appeal to Court of Appeal.**]—The court of appeal has no jurisdiction to hear an appeal from a decision of the high court of justice upon a case stated by justices as to an information for contravening the by-laws of a school constituted under the Elementary Education Act, 1874: for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. *Mellor* v. *Denham*, 49 L. J., M. C. 89; 5 Q. B. D. 467; 42 L. T. 493; 44 J. P. 472—C. A.

Non-Attendance—"Reasonable Excuse.]—A by-law made under the Elementary Education Acts provided that, "The parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Reasonable excuses: Any of the following reasons shall be a reasonable excuse, viz.: (a) That the child is under efficient instruction in some other manner; (b) That the child has been prevented from attending school by sickness or an unavoidable cause; (c) That there is no public elementary school open which the child can attend within two miles. . . ." From the 18th May to the 23rd of September, the respondent, an engine-driver, caused his child to be sent daily from home in time to arrive at school when it opened. He did not receive any notice that the child had not duly attended, except on two occasions. On both occasions the respondent's wife corrected the child. Nevertheless it often failed to attend school. At the hearing of an information, which charged that the respondent on and ever since the 18th of May had neglected the by-law in not causing his child to attend school, the justices found that he had done all that could reasonably be expected of him to secure the attendance of the child at school, and had reasonable grounds for believing, and did believe, the child was duly attending school, and had, therefore, a "reasonable excuse" for not causing the child to attend school:—Held, that there may be other "reasonable excuses" for not causing the child to attend school:—Held, that there may be other "reasonable excuses" within the meaning of the by-

law besides the three reasons therein specified, and that the justices were right. *Belper School Board* v. *Bailey*, 51 L. J., M. C. 91; 9 Q. B. D. 259; 46 J. P. 438.

A school board made a by-law under s. 74 of the Elementary Education Act, 1870, providing that "the parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance," and that "any of the following reasons shall be a reasonable excuse, namely, that the child is under efficient instruction in some other manner; that the child has been prevented from attending school by sickness or any unavoidable cause; that there is no public elementary school open which the child could attend, within two miles from the residence of such child." Where it was shown that the non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious and respectable people, and applied them to the support of their other children, whom otherwise, from no fault of the parents, they would have been unable sufficiently to support:—Held, that these facts constituted a "reasonable excuse" for non-attendance. *London School Board* v. *Duggan*, 53 L. J., M. C. 104; 13 Q. B. D. 176; 32 W. R. 768; 48 J. P. 742.

Neglect to Cause Child to Attend — Non-payment of Fees.]—The London School Board made by-laws under s. 74 of the Elementary Education Act, 1870, providing that the parent of every child, if not less than five nor more than thirteen years of age, should cause such child to attend school unless there was a reasonable cause for non-attendance, and that every parent who should not observe or should neglect any by-law should be liable, upon conviction, to a penalty. The respondent sent his child, aged ten, to one of the Board's schools, but did not pay, though he was able to pay, the weekly fees for tuition prescribed by the School Board with the consent of the Education Department. The child was admitted to the school, and received instruction therein:—Held, that the respondent had not caused his child to attend school within the meaning of the by-laws, and therefore was liable to the penalty. *London School Board* v. *Wood*, 54 L. J., M. C. 145; 15 Q. B. D. 415; 54 L. T. 88; 50 J. P. 54.

—— **Liability of Mother.**]—B. was the mother of a boy under thirteen years of age, and was charged with neglecting to cause the boy to attend school. The child was living with her and under her control, as her husband was at sea, and it was not stated that he was the father of the child. The justices refused to convict her, on the ground that she was a married woman:—Held, that they were wrong, and that B. should have been convicted, as having the actual custody of the child. *Hance* v. *Burnett*, 45 J. P. 54.

—— **Residence apart from Parent.**]—The respondent, a widow, was summoned for neglecting, as a parent, to comply with an order to send her child to a certified efficient school. She pleaded poverty, and that, being quite unable to maintain the child, she had sent her to an aunt at Fulham. The respondent also stated that the child was sometimes sent to stay with another aunt. The magistrate dismissed the summons on the ground that it was not proved that the child was residing with and under the control of the respondent, and that 33 & 34 Vict. c. 75, s. 3, by which the term "parent" includes "every person who is liable to maintain or has the actual custody of any child," contemplates that the liability should be with the person who had the actual custody of the child:—Held, that the magistrate was wrong, and that upon the above facts the respondent was liable to be convicted. *London School Board* v. *Jackson*, 50 L. J., M. C. 134; 7 Q. B. D. 502; 30 W. R. 47; 45 J. P. 750.

Quære, what would be the effect, if proved, of a permanent residence of a child apart from the parent. *Ib.*

—— **Habitual Neglect to send Child to School.**]—H. was summoned for habitually neglecting, without excuse, to send his child to school, contrary to a by-law made in 1879. The magistrates thought it was a case of habitual neglect, and that proceedings should have been taken under 39 & 40 Vict. c. 79, s. 11 (Elementary Education Act, 1876), and not under the by-law, which they held to be ultra vires, and they dismissed the summons:—Held, that the magistrates were right. *Morgan* v. *Heycock*, 44 J. P. 199.

When, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to by-laws made by the board under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the by-laws, and to require them to take out a summons under s. 11, for the option given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the by-laws applies only to offences punishable under the act, and the offence of habitual neglect is not so punishable. *London School Board, Ex parte, Murphy, In re*, 46 L. J., M. C. 193; 2 Q. B. D. 397; 36 L. T. 698; 25 W. R. 536.

Attendance Order — Child attending Board School without Fees—Liability of Parent.]—A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend school, but without the school fees, and without having applied to the guardians under 33 & 34 Vict. c. 75, for payment of such fees, or to the school board under s. 17 for a remission of them, is liable to be convicted under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order. *Richardson* v. *Saunders* (infra) overruled; *Murphy, In re*, (supra), discussed. *Saunders* v. *Richardson*, 50 L. J., M. C. 137; 7 Q. B. D. 388; 45 L. T. 319; 29 W. R. 800; 45 J. P. 782.

A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend the school, but without the school fees, is not liable to conviction under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-

compliance with the order, although he may have failed to apply to the guardians, under s. 10, to pay the fees, and refused to obtain a remission of them under 33 & 34 Vict. c. 75, s. 17. *Richardson* v. *Saunders*, 50 L. J., M. C. 65; 6 Q. B. D. 313; 44 L. T. 474; 29 W. R. 631; 45 J. P. 344. Overruled. *See preceding case.*

—— **"Full Time Employment."**]—By 39 & 40 Vict. c. 79, s. 11, sub-s. 1, if the parent of any child above the age of five years "who is under this act prohibited from being taken into full-time employment," habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may order that the child do attend school:—Held, that sub-s. 1 refers to s. 8, which applies certain sections of the Factory Acts to the employment and education of children, and that, as those sections have been repealed by 41 Vict. c. 16, sched., there can be no child within the terms of 39 & 40 Vict. c. 79. s. 11, sub-s. 1, "who is under this act prohibited from being taken into full-time employment," and therefore sub-s. 1 has ceased to operate. *Saunders* v. *Crawford*, 51 L. J., Q. B. 460; 9 Q. B. D. 612; 46 L. T. 420; 46 J. P. 344. *But see next case.*

By s. 5 of the Elementary Education Act, 1876, a person shall not take into his employment any child (1) who is under the age of ten years, or (2) who, being of the age of ten years or upwards, has not obtained the certificate of proficiency, or of due attendance at school, prescribed by the act, unless such child, being of the age of ten years and upwards, is employed and attending school under the Factory Acts, or any by-law made under the Elementary Education Act, 1870. By s. 11, if the parent of any child above the age of five years, "who is under this act prohibited from being taken into full-time employment," habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for such child, an order that the child attend one of the prescribed schools may be obtained by the local authority of the district before a court of summary jurisdiction. By s. 48, "a child in this act means a child between the ages of five and fourteen years." An attendance order was applied for under s. 11, in respect of two children aged nine and thirteen years respectively. Neither of the children were in any employment, nor attending any school, nor had either of them obtained any certificate under s. 5:—Held, that the words of s. 11 "any child who is under this act prohibited from being taken into full-time employment" applied to any child prohibited from being taken into employment by s. 5, and therefore that an attendance order could be made in respect of each child. *Saunders* v. *Crawford* (9 Q. B. D. 612) not followed. *Winyard* v. *Toogood*, 52 L. J., M. C. 25; 10 Q. B. D. 218; 48 L. T. 229; 31 W. R. 271; 47 J. P. 325.

—— **Enforcement against Mother on Father's Death.**]—An attendance order made on the father of a child under s. 11 of the Elementary Education Act, 1876, cannot, on the death of the father, be enforced against the mother under s. 12. *Hance* v. *Fairhurst*, 51 L. J., M. C. 139; 47 J. P. 53.

——**Jurisdiction of Justices—Union extending into several Counties.**]—The effect of s. 34 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), which incorporates for certain purposes all enactments relating to guardians and their officers, is to enable proceedings, before justices for non-compliance with attendance orders and for breach of by-laws under the Elementary Education Acts, in cases where the parents proceeded against reside in a union extending into different counties, to be taken before the justices of either county. *Reg.* v. *Eaton*, 51 L. J., M. C. 31; 8 Q. B. D. 158; 46 L. T. 663; 30 W. R. 335; 46 J. P. 231.

—— **Complaint to Justices — Jurisdiction — School willing to Receive.**]—In the absence of selection by a parent, it is the duty of a local authority to name some public elementary school willing to receive a child in respect of whom an attendance order is sought from justices under the provisions of section 11 of the Elementary Education Act, 1876. *Thompson* v. *Rose*, 61 L. J., M. C. 26; 65 L. T. 851; 40 W. R. 155; 56 J. P. 438.

—— **"Reasonable Excuse" for Non-compliance therewith.**]—By s. 12 of the Elementary Education Act, 1876, where an "attendance order" (made under s. 11) is not complied with without any "reasonable excuse" within the Act, a court of summary jurisdiction may order the child to be sent to an industrial school:—Held, that the reasonable excuse referred to must be one of those described in s. 11—namely (1) that there is not within two miles from the residence of such child any public elementary school which the child can attend; or (2) that the absence of the child from school has been caused by sickness or any unavoidable cause. *Hewett* v. *Thompson*, 58 L. J., M. C. 60; 60 L. T. 268; 53 J. P. 103.

The parent of a child on whom an attendance order has been served under s. 11 gave as an excuse that he had used every endeavour, short of taking the child to the school, to ensure its regular attendance, but that the child had played truant against his wish:—Held, that the failure to comply with the attendance order was without any "reasonable excuse" within the Act, and that the magistrate had therefore jurisdiction to order the child to be sent to an industrial school. *Ib.*

By-law — Penalty and Costs — Amount.] — By s. 74 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), "no penalty imposed for the breach of any by-law shall exceed such amount as, with the costs, will amount to 5*s.* for each offence":—Held, that this does not include the cost of a distress to enforce payment under 11 & 12 Vict. c. 43, s. 19. *Cook* v. *Plaskett*, 46 L. T. 383; 47 J. P. 265.

Proof of Conviction for Non-Compliance with Attendance Order.]—An order of a court of summary jurisdiction under the Elementary Education Act, 1876, imposing a penalty on the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute-books of the court containing an entry of the order; and it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions. *London School Board* v. *Harvey*, 48 L. J., M. C. 130; 4 Q. B. D. 451; 27 W. R. 786.

e. Masters.

Authority to Punish—Offence Committed off School Premises.]—The authority of the master of a board school to punish pupils attending the school is not limited to acts of misconduct committed by them on the school premises. *Cleary* v. *Booth*, 62 L. J., M. C. 87; [1893] 1 Q. B. 465; 5 R. 263; 68 L. T. 349; 41 W. R. 391; 17 Cox, C. C. 611; 57 J. P. 375.

Caning Child — Conviction for Assault.]—A magistrate, being of opinion that caning on the hand was attended by risk of serious injury, convicted a schoolmaster of an assault for giving a pupil four strokes, though the boy deserved corporal punishment, and the caning was inflicted unobjectionably and did not cause injury:—Held, that the magistrate's reasons were insufficient, and the conviction must be quashed. *Gardner* v. *Bygrave*, 53 J. P. 743.

School Hours — Home Lessons — Unlawful Detention of Scholar.]—The Elementary Education Acts, 1870 and 1876, do not authorise the setting of lessons to be prepared at home by children attending a board school. The detention at school after school hours of a child for not doing home lessons is therefore unlawful, and renders the master who detains the child liable to be convicted for an assault. *Hunter* v. *Johnson*, 53 L. J., M. C. 182; 13 Q. B. D. 225; 51 L. T. 791; 32 W. R. 857; 15 Cox, C. C. 600; 48 J. P. 663.

Closing School through Disease — Right to Compensation.]—The urban sanitary authority, owing to an attack of measles, ordered the board school to be closed for a fortnight, whereby the master lost his fees, amounting to 30*s.* per week. He claimed compensation under the Public Health Act, 1875, s. 308:—Held, that his claim could not be allowed, the power to close being given by the Education Code, 1866, s. 98, and not by the Public Health Act. *Roberts* v. *Falmouth Sanitary Authority*, 52 J. P. 741.

Superannuation Fund — Contract for Deductions from Salaries—Ultra Vires.]—A contract between a school board and its teachers, appointed under the authority of the Elementary Education Act, 1870, s. 35, that an annual deduction should be made from each teacher's salary for the purpose of a superannuation fund for the benefit of such teachers, is not void on the ground that such contract is ultra vires on the part of the school board, even though some of the management expenses of such a fund may be paid out of money raised from the rates. *Phillips* v. *London School Board*, 66 L. J., Q. B. 878; [1898] 1 Q. B. 4; 77 L. T. 397; 46 W. R. 155; 61 J. P. 758.

Quære (per Wright, J.), whether there would be any illegality amounting to ultra vires in the payment of such management expenses out of the rates. *Ib.*

f. Clerk to Board.

Quo Warranto.]—A quo warranto will not lie for the office of clerk to a school board, as he holds his office during the pleasure of the board. *Bradley* v. *Sylvester*, 25 L. T. 459.

g. Enforcing Precept.

Contributory District — School Attendance Committee—Burden of Expenses of Committee shared by Contributory District.] — C. S., a parish in the union of P., had not a school board of its own, but was made, by an order of the education department, a contributory district of the neighbouring parish of C., in which there was a school board, and the children of C. S. were in the habit of attending the school board in C. In 1877 the guardians of the P. union appointed, under the authority of 39 & 40 Vict. c. 79, s. 7, a school attendance committee for certain parishes of the union, including C. S., and the school attendance committee appointed school attendance officers for the said parishes. In 1880 the school attendance committee incurred certain expenses in connection with enforcing the attendance of children at school, and issued a precept to the overseers of C. S., requiring contribution of the share of the parish in such expenses. The overseers refused to pay the said contribution on the ground that the parish of C. S. was under the jurisdiction and control of the parish of C., and not under that of the school attendance committee. The guardians then summoned the overseers of C. S. before two justices for the county of C., who took the same view as the overseers, and dismissed the summons. The guardians of the P. union appealed:—Held, on appeal, that the justices were wrong, and that, notwithstanding that C. S. was a contributory district to C., it was not a parish "under any other local authority," within the meaning of the Education Act, 1876, and so was under the jurisdiction of the school attendance committee appointed by the guardians of the P. union, whose order for the payment of the contribution was right and proper. *Reg.* v. *Vane, Penrith Union* v. *Castle Sowerby Overseers*, 51 L. J., M. C. 114; 47 L. T. 21; 47 J. P. 69.

Objections to.] — The overseers of a parish refused to obey a precept of the school board under the Elementary Education Act, 1870, s. 54, on the ground that the deficiency arose in and about the providing school accommodation for children not resident in the district of the board, without alleging that any extra expense had been incurred on account of such children:—Held, that the return showed no improper use of the funds and was bad. *Shelley School Board* v. *Shelley Overseers*, 22 W. R. 154.

Mandamus.]—The court will grant a rule nisi for a mandamus to the overseers of a parish, within the district of a school board, to pay precepts issued by such board, or to levy rates for the purpose of paying them. Ord. LII. of the Rules of the Supreme Court, 1883, does not apply to applications for writs of mandamus, inasmuch as by Ord. LII. r. 5, the practice in use before the making of the rules of 1883 with regard to such application is preserved. *Gribthorpe School Board* v. *Gribthorpe Overseers*, 47 J. P. 727.

6. Industrial Schools.

Child apparently under Fourteen Charged with Larceny—Charge Dismissed.]—Where a child apparently under the age of fourteen years is brought before justices upon a charge of larceny and the charge is dismissed, but evidence is given that the child frequents the company of reputed thieves, the justices have jurisdiction to order him to be sent to an industrial school,

under s. 14 of the act, without his being brought again before them by summons or otherwise upon a substantive charge under that section. *Reg.* v. *Jennings*, 65 L. J., M. C. 26; [1896] 1 Q. B. 64; 73 L. T. 412; 44 W. R. 128; 18 Cox, C. C. 205; 60 J. P. 199.

Child Living in House resided in by Prostitutes.]—A child under fourteen who lives with and under the guardianship of her mother in "a house resided in by prostitutes," may be ordered to be sent to an industrial school under 29 & 30 Vict. c 118, s. 14, although there is no evidence of any act of prostitution on the part of the mother. *Hiscocks* v. *Jermonson* or *Jermonson, In re*, 52 L. J., M. C. 42; 10 Q. B. D. 360; 48 L. T. 225; 31 W. R. 656; 47 J. P. 183.

—— **Right of Private Person to apply.**]—Where a child apparently under the age of fourteen is living in a house resided in by a prostitute, a private person, as well as the local authority, has a right to apply to justices for the removal of the child to an industrial school, and it need not be proved that application has been made to the local authority requesting them to apply, and that they have declined to take proceedings. *Walker* v. *Laxton*, 10 R. 404; 70 L. T. 690; 58 J. P. 574.

—— **Summons against Child.**]—The Industrial Schools Act, 1886, s. 14, provides that there shall be a power to any person to bring before two justices or a magistrate, any child, apparently under the age of fourteen years, that comes within certain descriptions therein set out, to which the Industrial Schools Act Amendment Act, 1880, s. 1, adds the following descriptions, namely, "that is lodging, living or residing with common or reputed prostitutes, or in a house resided in or frequented for the purpose of prostitution; that frequents the company of prostitutes." The court is always desirous of doing all that can be done to carry out the beneficent object of these acts, and will require justices to whom complaint has been made to issue a summons against the child. If the child does not appear, then a warrant may be issued to bring her before the justices. *Hampshire JJ., In re*, 52 J. P. 311.

The power given under 29 & 30 Vict. c. 118, s. 14, and 43 & 44 Vict. c. 15, s. 1, to any person to bring before justices a child residing with prostitutes includes the bringing of the child by way of legal process; hence a summons may be served on the child, and process to arrest in the usual way may follow as provided by the Summary Jurisdiction Acts. *Reg.* v. *Moore*, 52 J. P. 375.

Liability to Poor Rate.]—*See* RATES.

7. REFORMATORY SCHOOLS.

Absconding from.]—Where a lad was found guilty of absconding from a reformatory school, and sentenced to be imprisoned for that offence under 17 & 18 Vict. c. 86, s. 4:—Held, that the justices had no authority to add to such sentence of imprisonment an order that after the expiration thereof he should be again detained within the reformatory school. *Robson* v. *Anderson*, 5 L. T. 789.

Rating.]—A reformatory, established under 17 & 18 Vict. c. 86, is not ratable to the relief of the poor. *Sheppard* v. *Bradford Churchwardens*, 16 C. B. (N.S.) 369; 33 L. J., M. C. 182; 10 Jur. (N.S.) 799; 10 L. T. 421; 12 W. R. 867.

Expense of Providing requisite Clothing for Prisoner.] — By the Prisons Act, 1877, the "prison authority," constituted under the Prisons Act, 1865, s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1867, ss. 14. 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in the Prisons Act, 1877, s. 57, and must be defrayed out of moneys provided by parliament, under s. 4. *Prison Commissioners* v. *Liverpool Corporation*, 49 L. J., Q. B. 431; 5 Q. B. D. 332; 42 L. T. 838; 29 W. R. 6; 44 J. P. 616—C. A.

J. M.

SCIRE FACIAS.

1. *Generally*, 650.
2. *At suit of the Crown*, 651.
3. *Practice*, 652.
4. *Against Members of Companies.*—*See* BANKER—COMPANY.
5. *To repeal Letters Patent*—*See* PATENT.
6. *Abatement of Actions by Death*—*See* PRACTICE (PARTIES).
7. *Change of Parties by Death, Marriage, or Bankruptcy.* — *See* PRACTICE (PARTIES).

1. GENERALLY.

Whether a New Action.]—A scire facias is held to be in many cases an action. *Winter* v. *Kretchman*, 2 Term Rep. 46.

A sci. fa. to revive is not a new action, but a continuation of the old one; and therefore, where the attorney of a testator had, before his death, agreed not to bring a writ of error in the old action:—Held, that his executors after his death could not do so. *Wright* v. *Nutt*, 1 Term Rep. 388.

A scire facias on a judgment is not a mere continuation of a former suit, but creates a new right. *Farrell* v. *Gleeson*, 11 Cl. & F. 702.

To a scire facias, issued in 1837, by the executors of a conusee of a judgment recovered in Ireland, in 1810, against the heirs and terre-tenants of the conusor, one of the terre-tenants pleaded the 3 & 4 Will. 4, c. 27, s. 40; to which the executors replied a judgment of revivor, recovered by themselves within twenty years before the issuing of scire facias:—Held, first, that the plea was a sufficient answer to the claim stated in the writ. *Farran* v. *Beresford*, 10 Cl. & F. 319.

Held, secondly, that the replication was a departure from the writ, and, therefore, bad on general demurrer. *Ib.*

Held, thirdly, that a new right accrued to the executors by the judgment of revivor recovered by themselves. *Ib.*

Where a judgment was obtained in 1831, and the defendant went abroad, and remained there until 1842, and the plaintiff then sued out a scire facias to revive the judgment, and on such scire

facias upon an affidavit of the presumed intention of the defendant to quit England, procured a capias, by order of a judge, and the defendant was arrested, the court ordered the defendant to be discharged out of custody; for, if proceedings by scire facias are merely a continuance of the original action, and do not constitute a new action, the power to arrest is taken away by the 1 & 2 Vict. 110, s. 5; and if they are to be viewed as the commencement of a fresh action, no capias can be granted, as ss. 2 and 3 of 1 & 2 Vict. c. 110 refer only to actions wherein the defendant was liable to arrest at the time of the passing of that act. *Agassiz* v. *Palmer*, 5 Man. & G. 697; 6 Scott (N.R.) 603; 1 D. & L. 18; 12 L. J., C. P. 245; 7 Jur. 972.

A scire facias is not in nature of a new action, but a continuation of the old one only. *Morrice* v. *Hankey*, 3 P. Wms. 148. See *S. C.*, 2 Eq. Abr. 528.

Prerogative Judicial Writ.]—The writ of scire facias to repeal or revoke grants or charters of the crown is a prerogative judicial writ, which, according to all the authorities, must be founded upon a record. *Reg.* v. *Hughes*, 35 L. J., P. C. 23; L. R. 1 P. C. 81; 12 Jur. (N.S.) 195; 14 L. T. 808; 14 W. R. 441.

Granting a Judicial Act.]—The duty of the court of exchequer, under 11 Geo. 4 and 1 Will. 4, c. 73, s. 2, was not merely administrative, but judicial; and therefore, upon an application for a writ of sci. fa. against the sureties of a newspaper proprietor to recover the amount of damages, for which judgment had been given against the latter in an action for libel in another court, the court would inquire whether, under the circumstances of the case, the plaintiff was entitled to have execution against the defendant upon such judgment. *Jones* v. *Young*, 9 Jur. (N.S.) 726; 8 L. T. 672; 11 W. R. 1079.

2. At the Suit of the Crown.

Plea.]—To a scire facias on bond to the crown for excise duties, a plea of payment after the day, but before writ issued, and acceptance of the crown in satisfaction, was held insufficient. *Rex* v. *Ellis*, 1 Price, 23.

Practice.]—For the mode of proceeding in scire facias on a forfeited recognisance, see *Rex* v. *Willin*, 2 Car. & P. 10.

Validity.]—A scire facias against two, "that they severally be and appear to show cause," &c., on a bond to the crown executed by three, is bad. *Rex* v. *Chapman*, 3 Anst. 811.

A scire facias against two on a joint and several recognisance of four to the crown, without averring the others to be dead, is bad, and may be taken advantage of without a plea in abatement, and is not cured by pleading over. *Rex* v. *Young*, 2 Anst. 448.

When it Lies.]—A scire facias will lie to repeal the grant of a franchise where the owner has neglected his duty. *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J. (o.s.) K. B. 282; 30 R. R. 504.

A charter of incorporation was granted by the crown to certain persons to form a company, for the purpose of purchasing and making a profit of lands and of working mines in an island. It directed that 100,000*l.*, half the intended capital of the company, should be subscribed within twelve months, and 50,000*l.* of it paid up within the same period; and that the company should not begin business until it should have been certified to the Board of Trade, by three directors, that the required capital had been subscribed, and the 50,000*l.* paid up. There were other directions respecting the preparing, executing and depositing a deed of settlement. Then followed a proviso to the effect, that if the company should fail to enter into, execute and deposit the deed of settlement within the time prescribed, or "shall not comply with any other the directions and conditions in our said letters-patent contained, it shall be lawful for us, our heirs or successors, to revoke and make void our said royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as we or they shall think fit." A second proviso empowered the crown, at any time after the expiration of twenty-one years, to revoke and make void the charter, or add modifications or conditions. The charter concluded with a statement, that it was granted on the express condition that the company should conform to the directions of a secretary of state, with regard to their intercourse and dealings with foreign powers. The company commenced business without having 50,000*l.* of their capital paid; but three of the directors had knowingly sent in a certificate to the Board of Trade, falsely stating that it had been paid up:—Held, by some of the judges, that the sending in the false certificate was a breach of a condition of the charter; by others, that, though not a breach of a condition, it was a misuser and an abuse of their franchise by the company; but that, on either view, the sending the certificate and commencing business without the prescribed capital, rendered the charter liable to forfeiture. *Eastern Archipelago Co.* v. *Reg.*, 2 El. & Bl. 857; 2 C. L. R. 145; 23 L. J., Q. B. 82; 18 Jur. 481; 2 W. R. 77—Ex. Ch.

Held, by all (excepting Parke, B.), that the first proviso did not limit the power of repealing the charter by scire facias, but was intended (though possibly without effect) to give the crown an additional power of revocation; consequently that a party might, on the fiat of the attorney-general, proceed by scire facias to repeal the charter without having previously obtained a revocation of it by the crown under the great seal or sign manual. *Ib.*

Parke, B., was, however, of opinion, that the non-payment of the capital and the giving the false certificate were breaches of the directions and conditions in the charter; that, by the proviso, it became necessary for a party seeking to avoid the charter for such breaches, to obtain first a revocation in writing under the great seal or sign manual, and that it was lawful for the crown to annex such a condition to the charter. *Ib.*

3. Practice.

Validity of Judgment not Impeachable.]—Upon a motion to revive a judgment by scire facias, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment. *Thomas* v. *Williams*, 3 D. P. C. 655.

Lapse of Time.]—A scire facias might issue to revive a judgment, although more than twenty years had elapsed since it was signed, if payments within that time had been made on ac-

count. *Williams* v. *Welch*, 3 D. & L. 565 ; 1 B. C. Rep. 69.

An affidavit in support of a rule for a writ of revivor to revive a judgment more than twenty years old did not state that any part of the principal or interest had been paid within twenty years, or that there had been an acknowledgment in writing within the same period :—Held, insufficient. *Loveless* v. *Richardson*, 2 Jur. (N.S.) 716 ; 4 W. R. 617.

An application for a sci. fa., upon a judgment ten years old, will not be granted upon an affidavit of the plaintiff's attorney, which merely stated that the debt and costs were still unpaid ; it must also have shown that he was the attorney when the judgment was obtained, or there must have been an additional affidavit of the attorney then employed, or of the plaintiff himself. *Norfolk* (*Duke*) v. *Spencer* or *Leicester*, 4 D. P. C. 746 ; 1 M. & W. 204 ; 1 Tyr. & G. 249 ; 5 L. J., Ex. 90.

Death of Public Officer.]—A public officer of a banking company, who was plaintiff, died after the issuing of a ca. sa., but before its execution :—Held, that it was not necessary to bring a scire facias, and that the defendant was therefore not entitled to be discharged, on the ground that the action had abated. *Todd* v. *Wright*, 16 L. J., Q. B. 311 ; 11 Jur. 471.

T., suing as public officer, died after issue joined. The nisi prius record was made up from the plea roll as though he was alive ; the venire was awarded as between T. and the defendants, and no entry was made on the plea roll of the death of T., or of the appointment of B. as the new public officer. After the nisi prius was passed so made up, a memorandum was entered on it of the death of T., and of the appointment of B., not by way of suggestion, nor followed by confession by the defendants, or a "nient de dire." The cause was then entered for trial in the name of B. as plaintiff, and was tried by the jury returned to the venire awarded between T. and the defendants. On the evening of the commission-day, notice was given to the defendants of the death of T., and that such entry would be made and the cause tried. The defendants appeared under protest, and the plaintiff had a verdict :—Held, that the entry on the nisi prius record was irregular, and did not authorise the trial of the cause in the name of B. *Barnewall* v. *Sutherland*, 9 C. B. 380 ; 1 L. M. & P. 159 ; 19 L. J., C. P. 290 ; 14 Jur. 720.

Identity Denied.]—On a summons for leave to enter a suggestion on a judgment recovered fourteen years before, the defendant totally denying his identity, and the transaction out of which the cause of action arose, the judge first allowed time to answer the affidavits, and ultimately declined to make an order, and left the plaintiff to his remedy by action. *Wabey* v. *Wensley*, 1 F. & F. 415.

When the identity of the defendant is denied, upon a summons to revive a judgment, the plaintiff's remedy is by an action on the judgment, and the proper course for the defendant is to deny the averment of identity. *Ib.*

Breach of Faith.]—Notwithstanding the 1 & 2 Vict. c. 110, s. 18, it is no answer to a scire facias upon a judgment for 94*l.* 12*s.*, that, after the obtaining of the verdict, and before the giving of the judgment for that sum, it was, by a rule of court, ordered that the verdict should be reduced to 1*s.*, and that the defendant should pay to the plaintiff's attorney the costs of the action, and that the scire facias was sued out, after the making of the rule, fraudulently, and in breach of good faith. *Farmer* v. *Mottram*, 6 Man. & G. 684 ; 7 Scott (N.R.) 408 ; 1 D. & L. 781 ; 13 L. J., C. P. 10 ; 7 Jur. 994.

To Recover Costs.]—The plaintiffs recovered a verdict on two bills of exchange for 68*l.* 6*s.* for damages and costs. After a fiat in bankruptcy issued against the defendant, they signed judgment. Afterwards, they proved under the fiat for the amount of the bills of exchange, the commissioners refusing to allow them to prove for the costs. The bankrupt never obtained his certificate, nor was any dividend paid under the bankruptcy. The plaintiffs subsequently sued out a scire facias to revive the judgment, solely with a view of recovering the costs. The court granted a rule to stay proceedings on the scire facias. *Woodward* v. *Meredith*, 2 D. & L. 136 ; 13 L. J., Q. B. 322.

Waiver of Irregularity.]—Where a sci. fa. had been issued irregularly, to which an appearance was entered ; and the plaintiff having delivered a declaration, to which a plea was filed pending a motion to set aside the writ :—Held, that the plea was a waiver of the irregularity. *Sloman* v. *Gregory*, 1 D. & R. 181.

Nonsuit.]—In scire facias the plaintiff may be nonsuited. *O'Mealey* v. *Wilson*, 1 Camp. 484 ; 10 R. R. 732.

Staying Proceedings.]—The court will stay proceedings in sci. fa. on a judgment on a warrant of attorney, on a suggestion that matters occurred before the signing of the judgment, from which it would appear that nothing was due to the plaintiff, and will refer the case to the master to report. *Greenslade* v. *Vaughan*, 8 D. P. C. 687.

Costs.]—The 8 & 9 Will. 3, c. 11, s. 3, did not extend to a scire facias to repeal a patent prosecuted in the name of the king. *Rex* v. *Miles*, 7 Term Rep. 367.

In scire facias against the conusor of a recognisance to the crown, no costs are recoverable by the defendant, though he succeeds on demurrer and in error. *Rex* v. *Bingham*, 1 Tyr. 262 ; 1 C. & J. 379 ; 1 D. P. C. 280.

An order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revival, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable for costs. *Boynton* v. *Boynton*, 4 App. Cas. 733 ; 41 L. T. 450 ; 27 W. R. 825—H. L.

Pleadings.]—A defendant cannot plead any matter in bar to a scire facias on a judgment which he might have pleaded to the original action. *Baylis* v. *Hayward*, 5 N. & M. 613 ; 4 A. & E. 256 ; 1 H. & W. 609 ; 5 L. J., K. B. 52. S. P., *Cooke* v. *Jones*, Cowp. 728.

To a writ of revivor the defendant pleaded, on

equitable grounds, payment of a small sum by a third person at the defendant's request, in accord and satisfaction of the entire sum due on the judgment :—Held, a good equitable plea. *Lawder* v. *Peyton*, Ir. R. 11 C. L. 41.

To a declaration in scire facias against a shareholder of a company, on a judgment recovered against the secretary of the company, a plea, that no memorial of the names, residences and descriptions of the directors and secretary had ever been inrolled in chancery, as required by act of parliament, is bad, as containing matter which might have been pleaded to the original action. *Bradley* v. *Urquhart*, 2 D. (N.S.) 1042 ; 11 M. & W. 456 ; 12 L. J., Ex. 459. S. P., *Bradley* v. *Eyre*, 11 M. & W. 432 ; 12 L. J., Ex. 450 ; *Phillipson* v. *Egremont* (*Earl*), 6 Q. B. 587 ; 14 L. J., Q. B. 25.

It was no ground for setting aside a scire facias as irregular, that there had been no return to an alias fi. fa. issued on the same judgment, although something had been done under that writ, because this might be the subject of a plea to the scire facias. *Holmes* v. *Newlands*, D. & M. 642 ; 5 Q. B. 634 ; 13 L. J., Q. B. 339 ; 8 Jur. 615.

It was no answer that a fi. fa. issued under the same judgment, within a year after the judgment, unless it appeared that the debt was satisfied by the levy which took place under such writ. *Ib.*

If the original judgment was obtained collusively or fraudulently, such fraud and collusion may be pleaded in bar to a scire facias, or a motion may be made to set aside the proceedings as fraudulent. *Dodgson* v. *Scott*, 2 Ex. 457 ; 6 D. & L. 27 ; 17 L. J., Ex. 321. S. P., *Phillipson* v. *Egremont* (*Earl*), 6 Q. B. 587 ; 14 L. J., Q. B. 25.

It is not a good plea, either in abatement or in bar to a declaration in scire facias, that a writ of error has been sued out before the return of the scire facias and is still depending. *Snooke* v. *Mattock*, 6 N. & M. 783 ; 5 A. & E. 239 ; 2 H. & W. 188 ; 5 L. J., K. B. 206.

To a declaration on a scire facias, suggesting the breach of a bond, the defendant pleaded, that by a judge's order it was ordered that the plaintiff should be at liberty to sign judgment in the action, with costs, and that the proceedings should be stayed on the costs being paid. Averment, that such costs were paid before the issuing of the scire facias :—Held, bad. *Tabor* v. *Edwards*, 4 C. B. (N.S.) 1 ; 27 L. J., C. P. 183 ; 4 Jur. (N.S.) 339.

J. M.

SCRIP.

See COMPANY.

SCULPTURE.

See COPYRIGHT.

SEA AND SEA SHORE.

1. *Ownership of, and Rights on, the Sea Shore*, 656.
2. *Sea Walls and Banks*, 668.
3. *Wreck*, 673.—*And see* SHIPPING.
4. *Fishery.*—*See* FISH AND FISHERY.

1. OWNERSHIP OF, AND RIGHTS ON, SEA SHORE.

Foreshore—Primâ facie Title in the Crown.]—The foreshore between high and low water mark primâ facie belongs to the crown ; the burden of proving the contrary is on the claimant. *Att.-Gen.* v. *Richards*, Anst. 603 ; 3 R. R. 63.

Ownership of—Several Fishery—Presumption.]—Primâ facie the crown is entitled to every part of the foreshore of the sea between high and low watermark ; but proof of the ownership of a several fishery over part of the foreshore raises a presumption against the crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery. *Att.-Gen.* v. *Emerson*, 61 L. J., Q. B. 79 ; [1891] A. C. 649 ; 65 L. T. 564 ; 55 J. P. 709—H. L. (E.)

Private Rights of Crown, subject to Public Rights.]—The crown may grant by letters patent to a corporation, a town and borough, being caput portûs as Portsmouth, all the land between the high and low water marks ; but this subject matter of grant, as being jus privatum in the king, must be subject to the jus publicum, or public right of the king and people to the easement of passing and repassing both over the water and the land. *Att.-Gen.* v. *Burridge*, 10 Price, 350 ; 24 R. R. 705.

Where a part of the sea coast or shore, being the property of the crown, and giving jus privatum to the king, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the jus publicum therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect a nuisance by working injury to the public right ; or it is a grant which does not divest the crown, or invest the grantee. *Att.-Gen.* v. *Parmeter*, 10 Price, 378 ; 24 R. R. 723.

Grant of Lands to be Reclaimed.]—A grant of lands to be recovered from the sea must be reduced into possession within a reasonable time. *Att.-Gen.* v. *Richards*, 2 Anst. 614 ; 3 R. R. 632.

Lands Recovered from the Seas—Claim by the Crown.]—Where the crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if the defendant disputes the crown's title to the soil between the present high and low water mark, the court will direct issues to try that right before inquiring how far, in former times, the ancient high-water mark extended inland ; and this notwithstanding the hardship it may impose upon the defendant, who by admitting the soil to be part of the foreshore, will have proved the case of the crown, in the event of his failing to satisfy a jury that a grant must be presumed. *Att.-Gen.* v. *Chamberlaine*, 4 Kay & J. 292.

But if the defendant admits the crown's title

to the soil between present high and low water mark, then, upon an inquiry what is the boundary of the foreshore, the onus would be thrown upon the crown of showing that the high-water mark in former times extended further inland than at present. *Ib.*

Encroachment on Sea Shore—Claim by Crown—Public Right.]—A proprietor of a feu, described in the feu charter as bounded by the sea shore, enclosed a portion of the sands, which it was proved the public had immemorially used for purposes of enjoyment and otherwise :—Held, that the feuar being a wrongdoer, the officers of state on behalf of the crown, irrespective of the question as to the right of property, were entitled to the interdict. *Smith* v. *Stair* (*Earl*), 2 H. L. Cas. 807 ; 13 Jur. 713.

Title against the Crown—Scottish Grant—Evidence of Possession—Seaware—Acts of Ownership.]—*Lord Advocate* v. *Young*, 12 App. Cas. 544—H. L. (Sc.), post, col. 661.

Right of Crown under Grant from a Subject.]—The crown held to be entitled to Sutton Pool, Plymouth. Semble, under a grant from a subject. *Att.-Gen.* v. *Ceeley*, Wightw. 208. And see *Att.-Gen.* v. *Plymouth Corporation*, Wightw. 134 ; 12 R. R. 719.

Limit of Crown's Rights.]—In the absence of all evidence of particular usage, the extent of the right of the crown to the sea shore landwards is primâ facie limited by the line of the medium high tide between the springs and the neaps. *Att.-Gen.* v. *Chambers*, 4 De G. M. & G. 206 ; 23 L. J., Ch. 662 ; 18 Jur. 779 ; 2 W. R. 636.

Rights of Crown and Public—Arms of the Sea and Navigable Rivers.]—The right of the crown to the soil in arms of the sea and public navigable rivers is subject to the public right of passage, and any grantee of the crown must take subject to such right. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339 ; 15 L. J., Q. B. 59 ; 9 Jur. 1090.

The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessel along the channel. *Ib.*

It is therefore no excuse if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although by custom or agreement a fine may be payable to the lord of the soil for such grounding.

The bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is vested in the crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part ; and every grant made by the crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. *Gann* v. *Whitstable* (*Free Fishers*), 11 H. L. Cas. 192 ; 20 C. B. (N.S.) 1 ; 35 L. J., C. P. 29 ; 12 L. T. 150 ; 13 W. R. 589.

If a payment is claimed from ships by the owner of the soil of an estuary or a navigable river as an anchorage due, some facts must be shown which either prove, or from which it can be inferred, that the soil of such estuary or river was originally within the precincts of a port or a harbour, or that some service or aid to navigation was rendered to the public in respect of which the grant of soil was made. *Ib.*

Such a claim cannot be supported on the ground of its having been immemorially made and submitted to. *Ib.*

Foreshore of the Thames decreed to the crown in right of the prerogative. *Att.-Gen.* v. *Philpott*, 2 Anst. 607.

The owners in fee of the manor of Whitstable, in an action for anchorage dues, claimed in respect of a vessel casting anchor on a certain anchorage ground situate within the sea below low-water mark, adduced evidence that the tolls had been taken from time immemorial, that they kept buoys, beacons, and lights to mark the bounds between the oyster beds and the anchorage ground ; that Whitstable, before and since the time of legal memory, had been mentioned in official documents as a port : and that in ancient times there was a place within the manor for the unlading of merchandise :—Held, that the anchorage dues had a legal origin, the existence of a port being established. However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the crown ; but evidence of traffic in respect of tolls of merchandise being taken, of a place being mentioned as a port in early documents, and of natural configuration favourable to the formation of a port, justify an inference of fact that a port did exist. *Foreman* v. *Whitstable* (*Free Fishers*), L. R. 4 H. L. 266 ; 21 L. T. 804 ; 18 W. R. 1046.

In a royal river the land between high and low water marks belongs to the crown unless the grantee of adjacent land can show perception of profits thereof. *Kisley* d. *Killigrew* v. *Gibbs*, 2 Keb. 294.

Semble, in the absence of prescription, the soil of tidal rivers, as far as the tide goes, is in the crown, and not in the owner of the adjacent manor. *Bulstrode* v. *Hall*, 1 Sid. 148.

—— **What is a Navigable River.**]—A creek or arm of the sea in order to be navigable, in the legal sense of the term, must be affected by the ebb and flow of ordinary or mean tides. The circumstance that it can be traversed by small boats does not make navigable a creek which is not so affected. The rights of private owners over the foreshore extend down to ordinary high-water mark, and there is no legal right for fishermen (apart from exceptional circumstances such as stress of weather) to draw up or leave their boats above that line. The expressions "navigable" and "ebb and flow" considered and explained. *Ilchester* (*Earl*) v. *Raishleigh*, 61 L. T. 477 ; 38 W. R. 104.

—— **Nuisance to Navigation.**]—The crown has no right to place upon the soil between high and low water marks in a tidal navigable river an erection which is a nuisance to navigation ; nor can it grant any such right to another. *Att.-Gen.* v. *Johnson*, 2 Wils. Ch. 87 : 18 R. R. 156. *Rex* v. *Lord Grosvenor*, 2 Stark. 511 ; 20 R. R. 732.

Property Passing by Grant.]—Queen Elizabeth, by royal letters patent, granted to the corporation of Hastings lands in and about Hastings, which were liable to forfeiture, as being affected by superstitious uses, and had been previously concealed, and "all that her

parcel of land and her hereditaments called the Stone Beache, with the appurtenances in Hastings aforesaid, in her county of Sussex, and all messuages, houses, edifices, and buildings whatsoever, with their appurtenances, in and upon the aforesaid parcel of land called the Stone Beache":—Held, first, that there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high-water mark. *Hastings Corporation* v. *Ivall*, infra.

Held, secondly, that inasmuch as it appeared that the expression "Stone Beach" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high-water mark, and that the inferior boundary, called the "Stone's Foot," was liable to vary according to the state of the wind and tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be included in the grant, and injunction granted accordingly to restrain the deposit of earth on the sand below the Stone's Foot. *Ib.*

By an act reciting that a tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title, might be productive if embanked, and that the king had consented to such embankment, a part of the land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea shore, and overgrown with brushwood and old trees. The company in embanking the bay made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with seaweed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides:—Held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown; and did not, therefore, pass to the company by the act of parliament. *Lowe* v. *Govett*, 3 B. & Ad. 862; 1 L. J., K. B. 224.

The charter of 11 Edw. 3, as interpreted by 21 & 22 Vict. c. 109, conveyed to the Duke of Cornwall all the rights of the crown in the foreshore of the county of Cornwall, and not merely the foreshore attached to the manors granted by the charter. *Penryn Corporation* v. *Holm*, 46 L. J., Ex. 506; 2 Ex. D. 328; 37 L. T. 133; 25 W. R. 498.

By a royal patent (temp. Jac. II.), lands specifically described by name, adjoining a sea-shore, were granted, "and also all and singular lands, tenements, &c., to the aforesaid premises, &c., belonging, &c., or with the said premises or any part or parcel thereof used, occupied or enjoyed." The person in whom the estate of the grantee became invested brought an action for trespass on the adjacent sea shore between high and low water mark, and for trover and conversion of ungathered drifted seaweed thereon, and at the trial proved convictions at petty sessions for trespasses on the locus in quo, and an award in his favour in a former action by him against an alleged trespasser:—Held, first, that the general words of the patent, explained by user and enjoyment, passed the sea shore adjoining the lands granted down to low-water mark. *Brew* v. *Haren*, Ir. R. 11 C. L. 198—Ex. Ch.

A grant by the crown of "all coals under the commons, waste grounds, or marshes" of a certain manor, held to pass coal lying under the space between high and low water mark on the shore of such manor. *Att.-Gen.* v. *Hanmer*, 6 W. R. 804.

A grant of "sea-grounds," "shores," and "oyster layings" held to pass the sea-shore. *Scratton* v. *Brown*, 4 B. & C. 485; 6 D. & R. 536; 28 R. R. 344.

A grant of a fishery does not necessarily include the soil. *Ib.*

Successive Grants by Crown.]—Foreshore was granted to different persons in succession by the crown:—Held, that the first grantee was entitled. *Vyner* v. *Mersey Docks*, 14 C. B. (N.S.) 753.

Quære, whether the crown can grant lands under the sea, which after the grant become derelict; and as to what words are necessary to pass such lands. *Att.-Gen.* v. *Farmer*, 2 Lev. 172; Sir Th. Raymond, 246; 2 Mod. 106.

Grant of Foreshore—Possessory Title—Evidence of.]—A possessory title sufficient against a trespasser may be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the crown. *Hastings Corporation* v. *Ivall*, L. R. 19 Eq. 558; 22 W. R. 724.

In a suit against a trespasser by persons claiming title to foreshore and giving evidence of acts of ownership in support of their title, it is not open to the defendant to prove any acts of ownership by the crown except such as can be shown to have been done with the knowledge of the plaintiffs. *Ib.*

Evidence of acts of ownership on parts of the foreshore which were separated and divided from the part in dispute by the foreshore admitted to belong to the crown, is admissible to prove the defendant's right to the whole of which they formed part. *Att.-Gen.* v. *Portsmouth Corporation*, 25 W. R. 559.

A patent of James I. granted the priory of Holmpatrick, situate at Skerries, and also the four islands to the priory belonging, to wit, the island called Skennick, containing three acres, &c.; and the patent used large general words granting wreck of the sea, flotsam, jetsam, &c.; and all the appurtenances to the priory belonging:—Held, that these words, coupled with proof of enjoyment for seventy years of the foreshore, by letting to tenants to take seaweed, &c., were sufficient evidence to support a finding that the shore passed under the grant. *Healy* v. *Thorne*, Ir. R. 4 C. L. 495; 18 W. R. 1004.

Upon the evidence furnished by ancient documents and modern acts of ownership which have passed unquestioned by the crown, a title to a portion of the soil lying between high and low water mark of the Thames, as forming part of the adjoining manor, may be sustained as against the crown, although no grant from the crown of the land in question can be produced. *Alston's Estate, In re*, 5 W. R. 189.

The crown granted all the regions, countries, or territories of C., and also all other manors, lands, &c., lying and being in and within the limits, meres, and bounds of the said territory; and stated, in describing the boundaries, that the river of L. on the west and north-west, "and the sea shore towards the east, and the bank of the

bay of K. towards the north, is held to be the most noted mere and boundary within the territory aforesaid," and excepted from the grant all weirs and fisheries in the river :—Held, first, that the description did not necessarily exclude from the grant the shore of the bay between high and low water mark. *Ranfurly (Earl), Ex parte*, Ir. R. 1 Eq. 128.

Held, secondly, that continuous acts of ownership by the grantees on the shore of the bay were admissible to show that the foreshore constituted part of the premises granted. *Ib.*

The pursuer brought an action to establish his title as against the defenders and the crown to the foreshore of the sea ex adverso land of which he was the proprietor. He claimed under a grant of feu made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to show that the grantor had an express title from the crown. He, however, endeavoured to prove his title to the foreshore by prescriptive possession following on his own title, and, inter alia, adduced evidence to show that his predecessor in 1827 built a retaining wall upon a portion of the foreshore ; that he and his predecessors had taken stone and sand from the shore ; and that they and their tenants had exclusively carted away the drift seaware. The crown, on the other hand, adduced evidence to show that stones and sand were taken from the shore to build a harbour, and that the villagers had carried away in creels drift seaware :—Held, that, notwithstanding the absence of an express title in the superior, the pursuer had given sufficient proof that he and his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617, c. 12, and the act of 37 & 38 Vict. c. 94, by virtue of their heritable infeoffments, and that he had consequently a valid right of property in the solum of the foreshore as against the crown. *Lord Advocate* v. *Young*, 12 App. Cas. 544—H. L. (Sc.)

Taking of wreck, building jetties, bringing actions and taking royalties for mussel fishing, are evidence of user of right to the soil. *Lestrange* v. *Rowe*, 4 F. & F. 1048.

Evidence of user of foreshore by taking seaweed, &c., held sufficient to establish title to foreshore not specifically granted. *Daly* v. *Murray*, 17 L. R. Ir. 185.

User held admissible to explain ancient grant of foreshore. *Donegall (Marquis)* v. *Templemore*, 9 Ir. C. L. Rep. 374.

Taking stones and seaweed by the public held not to displace a title to the seashore proved by ancient grant explained by user by the grantee. *Hamilton* v. *Att.-Gen. for Ireland*, 5 L. R. Ir. 555.

Evidence of acts of ownership on the foreshore coupled with a grant from the crown of a manor adjoining the sea held to prove that the foreshore passed to the grantee of the manor. *Att.-Gen.* v. *Jones*, infra, col. 663.

A jury is at liberty to infer ownership from repeated acts of ownership, as evidencing a grant from the crown. *Wyse* v. *Leahy*, Ir. R. 9 C. L. 384.

—— **Scotch Law—Evidence of User.**]—There is no presumption in Scotch law that the foreshore passed under a crown grant of the adjoining land ; but it may be shown by evidence of user and possession that the grant included the foreshore. *Agnew* v. *Lord Advocate*, 11 Ct. of Sess. Cas. (3rd. ser.) 309.

In 1861, the trustees for sale under the will of A. (executed in 1854) purported to convey to M. the foreshore of a townland, and in 1865 he obtained a verdict against P. K., a tenant of adjoining lands, for trespassing on the foreshore and taking seaweed therefrom. In that action, proof was given of exclusive acts of ownership over the foreshore by M. and his predecessors in title for above sixty years, but there was no positive evidence of a grant of it from the crown. In 1873, T. K. and others, who were also adjacent tenants, proceeded to carry off the seaweed in assertion of an alleged public right, whereupon M.'s successors in title having filed a bill against them praying that the plaintiffs might be declared entitled to the foreshore and seaweed, and be quieted in the exclusive possession and enjoyment thereof, and for the usual injunction : — Held, that upon the facts, the plaintiffs were entitled to the relief sought ; and that as the defendants and P. K. were members of the same local class, asserting an adverse public right, the record and judgment in the action of 1865 were properly receivable in evidence. *Mulholland* v. *Killen*, Ir. R. 9 Eq. 471.

A. claimed the sea shore in front of his land, upon the ground of uninterrupted enjoyment for sixty years, evidence of user being that his cattle had been allowed to stray over the invisible line of boundary separating his land from the seashore :—Held, that where property is of a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, mere user is not sufficient to establish a right. *Att.-Gen.* v. *Chambers*, 4 De G. & J. 55 ; 5 Jur. (N.S.) 745 ; 7 W. R. 404.

A grant of wreck from Hen. II., to an abbey upon all their lands by the sea, confirmed by inspeximus by Hen. VIII., and a subsequent grant by him of the island of B. and its shores, belonging to the late abbey, supported by evidence, that between forty and fifty years back the proprietor of the island of B. raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition :—Held, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public ; yet, that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants, served to establish such right. *Chad* v. *Tilsed*, 5 Moore, 185 ; 2 Br. & B. 403 ; 23 R. R. 477.

So, where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had frequently repaired the landing-place, although both the fishery and landing-place had originally belonged to one person, but no evidence was offered in an action for the disturbance of the lessor's rights, to show that he or those who owned the shore at A. under him knew of the lessees of the fishery landing their nets there :—Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees by some former owner of the shore at A. *Gray* v. *Bond*, 5 Moore, 527 ; 2 Br. & B. 667 ; 23 R. R. 530.

Lords of Manors—Ownership of Foreshore.]—The foreshore below high-water mark may be

parcel of the adjoining manor, and where, by an ancient grant of the manor, its limits are not sufficiently defined, acts of ownership are admissible evidence that such foreshore is parcel of the manor. *Walton-cum-Trimley Manor, In re, Tomline, Ex parte*, 28 L. T. 12; 21 W. R. 475.

The sea shore between high and low water mark may be parcel of the adjoining manor. *Beaufort (Duke)* v. *Swansea Corporation*, 3 Ex. 413.

Where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible to show that such sea shore is parcel of the manor. *Ib.*

On a trial of an information of intrusion, the question being as to the title of the defendant, as against the crown, to a portion of the sea shore between high and low water mark, adjacent to Cemmaes, in the Isle of Anglesea, he gave in evidence a grant by James I. of the manor of Cemmaes to an ancestor of the present lord of the manor, and also gave evidence of acts of ownership over the sea shore both by himself and the lord of the manor; and there was also evidence of acts of ownership on the part of the crown. The judge told the jury that the grant of the manor did not pass the sea shore, and he left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the crown: —Held, a misdirection; and that the proper question was, whether the evidence of user coupled with the grant satisfied the jury that the defendant had such title. *Att.-Gen.* v. *Jones*, 2 H. & C. 347; 33 L. J., Ex. 249; 6 L. T. 655.

Acts of ownership exercised by a lord of a manor upon the sea shore adjoining, between high and low water mark, such as the exclusive taking of sand, stones, and seaweed, may be called in aid, to show that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, and which professes to grant the manor, with "wreck of the sea," "several fishery," and other rights of an extensive description, does not expressly purport to convey "littus maris." *Calmady* v. *Rowe*, 6 C. B. 861.

In an action by the lord of a manor for taking shell fish and shingle on the foreshore of the manor, between high and low water mark, his title being under a royal grant of the manor, with anchorage and groundage, but with no express mention of the shore:—Held, that this grant afforded of itself a presumption that it included the soil of the shore; and the jury was directed that, upon matters of that nature, they would properly be guided by the opinion of a judge. *Le Strange* v. *Rowe*, 4 F. & F. 1048.

An earlier grant from the crown to a corporation of rights of anchorage, groundage and ballast over the shore of the locus in quo would not weigh much against positive evidence of the exercise of rights of ownership over the shore by the ancestors of the present lord of the manor, under the grant of the manor. *Ib.*

Evidence of such acts of ownership as licences to take shingle, sand and seaweed, is receivable to support the presumption of a grant of the soil of the shore. *Ib.*

A lord of a manor, by lease and release, bargained and sold certain sea grounds, oyster layings, shores, and fisheries, extending from the south, at low-water mark, to north, at high-water mark, and containing, in the whole, by estimation, 800 acres of land, covered with water, or thereabouts, as the same are beaconed, marked, and stubbed out; since the date of the deed, the sea had imperceptibly encroached upon the land, and the high and low water marks had varied in the same proportion:—Held, that so much of the soil of the shore as from time to time lay between high and low water mark had passed to the grantee under this deed. *Scratton* v. *Brown*, 6 D. & R. 536; 4 B. & C. 485; 28 R. R. 344.

Seaweed—Right to Take.]—A. was owner of an estate, of which the estate of N. M. formed part. A portion of the land was let on lease to a "tenant, with liberty to take the seaware, along with the other tenants, for manuring the land." In 1814 part of the estate known as N. M. was sold to F., and the lands were described in the conveyance as "the same is presently possessed by the tenant." The conveyance contained no express grant of the right to take the seaware, but it contained the words "together with all the appurtenances":—Held, that there was no easement created by prescription, and that the words "together with the appurtenances" did not of themselves pass an easement to F. to go and collect the seaware adjoining A.'s estate to manure his lands. *Baird* v. *Fortune*, 7 Jur. (N.S.) 926; 5 L. T. 2; 10 W. R. 2.

The lord of a manor cannot establish a claim to the exclusive right of cutting seaweed on rocks situate below low-water mark, except by a grant from the crown, or by such long and undisturbed enjoyment of it as to give him a title by prescription. *Benest* v. *Pipon*, 1 Knapp, P. C. 60.

By a royal patent (temp. Jac. II.), lands specifically described by name, adjoining a sea shore, were granted, "and also all and singular lands, tenements, &c., to the aforesaid premises, &c., belonging, &c., or with the said premises or any part or parcel thereof used, occupied or enjoyed." The person in whom the estate of the grantee became vested brought an action for trespass on the adjacent sea shore between high and low-water mark, and for trover and conversion of ungathered drifted seaweed thereon, and at the trial proved convictions at petty sessions for trespasses on the locus in quo, and an award in his favour in a former action by him against an alleged trespasser:—Held, that trover lay by the owner of the shore for the wrongful taking of seaweed cast by the sea upon the shore between high and low water mark, though such seaweed had been left ungathered by the plaintiff. *Brew* v. *Haren*, Ir. R. 11 C. L. 198—Ex. Ch.

Held, secondly, that the convictions and award were properly received in evidence. *Ib.*

There is not, at common law, a general right in the public in entering the sea-shore for the purpose of taking seaweed. *Howe* v. *Stowell*, 1 Alcock & Napier, 348. S. P., *Hamilton* v. *Att.-Gen. for Ireland*, 5 L. R. Ir. 555.

—— Scotch Grant—"Parts Pendicles and Pertinents."]—In Scotland a grant of lands adjoining the sea "in the parts pendicles and pertinents," although the sea is not mentioned as a boundary, passes the sea shore and the right to take seaweed. *Macalister* v. *Campbell*, 15 D. B. & M. Sess. Cas. 490.

Right to Shingle.]—A surveyor of highways cannot justify under a prescriptive right or a custom to take stones from the waste, whether

adjoining the sea shore between high and low-water mark or otherwise, for the purpose of repairing the highways of a parish. *Padwick* v. *Knight*, 7 Ex. 854; 22 L. J., Ex. 198.

In an action for taking stones and sand from the sea-shore, the defendant pleaded a custom in the inhabitants of a township, of which he was a member, and also a prescriptive right for the inhabitants and overseers of the highways of that township, to take such stones and sand for the repair of the highways:—Held, that such a custom was bad, being a profit à prendre in alieno solo; and that the overseers of the highways, and the inhabitants of a township, not being a corporation, were not capable of taking by grant, and therefore could not claim such right by prescription. *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; 32 L. J., C. P. 240; 11 W. R. 698.

It is the duty of the crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it. In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom, so as to expose the plaintiff's land to the inroads of the sea; although the shingle was removed for sale in a natural and ordinary user of the land. *Att.-Gen.* v. *Tomline*, 49 L. J., Ch. 377; 14 Ch. D. 58; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617—C. A.

Right to Sand.]—A custom for the inhabitant landholders of a parish to dig or take, from closes adjoining the sea shore, sand which had been from time to time drifted from the shore, and carried by the wind from the shore into and deposited upon such closes, is bad. First, because the sand when deposited becomes a part of the soil of the closes, and therefore the custom is for taking a profit in alieno solo; and, secondly, for uncertainty, it being impossible to distinguish between the original soil of the closes and the sand from all time drifted upon it. *Blewett* v. *Tregonning*, 5 N. & M. 234: 3 A. & E. 554; 1 H. & W. 431; 4 L. J., K. B. 223.

There can be no custom to take sand from foreshore belonging to the crown, or to a subject. *Macnamara* v. *Higgins*, 4 Ir. C. L. R. 326.

Right of Surveyors of Highways to take Shingle.]—The plaintiff, by virtue of a grant from the crown, made 36 Hen. 8, claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high and low water mark. The defendants, the surveyors of highways, took the stones to mend the highway of the parish. Upon a bill filed by the plaintiff against them, the defendants put in their answer, denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, and also by prescription, and also under the Highways Act, 5 & 6 Will. 4, c. 50; and upon a motion to dissolve the injunction obtained by the plaintiff:—Held, that the rights claimed by the plaintiff were legal, and must be decided by an action; that the court must consider which of the two parties were likely to sustain most injury; that, notwithstanding the want of distinct evidence respecting injury, the court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. *Clowes* v. *Beck*, 20 L. J., Ch. 505.

A highway board is not entitled, under 5 & 6 Will. 4, c. 50, ss. 51, 52, to remove shingle for the repair of the highways from below high-water mark, so as to cause increased danger of encroachment by the sea. *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195; 19 W. R. 884.

A special custom to take shingle from the beach above high-water mark for the repairing of the highways of the parish is bad as to such portion of the beach as is private property, being a custom of a profit à prendre in another man's land. *Ib.*

Duchy of Cornwall—Presumption of Grant or Statute.]—Primâ facie, foreshore in the duchy is within the parliamentary grant to the Black Prince, and therefore inalienable; but evidence of enjoyment by the owner of the adjoining manor may justify the presumption of a statute (or prior grant from the crown?) vesting it in the landowner. *Lopes* v. *Andrews*, 3 M. & Ry. 329; 5 L. J. (O.S.) K. B. 46.

Claim by Prince of Wales—Duchy of Cornwall—Procedure by Information.]—*Att.-Gen. (Prince of Wales)* v. *St. Aubyn*, Wightw. 167; 12 R. R. 718, n.

Shell Fish.]—Semble, the public have a right to take shell fish from the foreshore, unless a several fishery has been specially granted, but (semble) not to take fish shells. *Bagot* v. *Orr*, 2 Bos. & P. 472; 5 R. R. 668.

Grant of Fishery—Soil.]—A grant of a fishery in an arm of the sea, coupled with leases thereof and of royal fish:—Held, to pass an interest in the soil. *Rex* v. *Ellis*, 1 M. & S. 652.

Quay below Low Water—Trespass.]—A quay erected below low-water mark at Yarmouth belongs to the crown; and an intruder on the crown may have an action of trespass against a stranger. *Johnson* v. *Barret*, Aleyn, 10.

Erection of Groyns.]—Occupiers of lands adjoining the sea may erect groyns to defend their land, although such erections may make it necessary for neighbours to erect others. *Rex* v. *Pagham Level Commissioners*, 2 Man. & Ry. 468; 8 B. & C. 353.

Gradual Encroachments.]—If the sea or an arm of the sea, by gradual and imperceptible progress, encroaches upon the land of a subject, the land thereby covered with water belongs to the crown. *Hull and Selby Ry., In re*, 5 M. & W. 327; 8 L. J., Ex. 260.

Alluvion.]—Lands formed by alluvion, that is, by gradual and imperceptible deposit on the shore of the sea, belong to the owners of the adjoining demesne lands, and not to the king jure coronæ. *Rex* v. *Yarborough (Lord)*, 2 Bligh (N.S.) 147; 1 Dow & Clark, 178; 5 Bing. 163; 4 D. & R. 790; 3 B. & C. 91; 27 R. R. 292.

Accretion.]—Where there is a gradual accretion of land, which is the result of artificial causes produced by the lawful use of the land by the owner, such accretion does not belong to the

crown. *Att.-Gen.* v. *Chambers*, 4 De G. & J. 55; 5 Jur. (N.S.) 745; 7 W. R. 404. See *S. C.*, below.

Where the accretions are of gradual and imperceptible progress, there is no distinction between accretions produced by natural and artificial causes. *Ib.*

If, however, the artificial causes can be shown to have been intended to produce the accretion, the crown would be entitled. *Ib.*

On an information an issue was raised as to the right of the crown to alluvion produced by artificial causes, the crown claiming to have the boundary of the rights of the crown defined as it would have existed but for such artificial causes. *Att.-Gen.* v. *Chambers*, 2 Eq. R. 1195; 2 W. R. 636. See *S. C.*, above.

Land formed by gradual accretion belongs to the owner of the adjacent soil. *Doe* d. *Seebkrists* v. *East India Co.*, 10 Moore, P. C. 140; 6 Moore, Ind. App. 267.

The sea leaves land dry. Quære, whether the crown or adjoining landowner shall have it. *Anon.*, Dyer, 326 b.

Clyde—Dredging.]—Held, that the Clyde Navigation Trustees, being empowered by ss. 76 and 84 of 21 & 21 Vict. c. 194, to dredge the bed of the River Clyde to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their acts of parliament: but so held without prejudice to the question of their liability to subsequent compensation for damage. *Blantyre (Lord)* v. *Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.)

Right of Access to Sea—Foreshore.]—On a petition of right against the government for damages done to the petitioner's tenement by the execution of reclamation and other works upon the foreshore in front of it:—Held, that the petitioner by virtue of his tenement had the same right of access to the sea as a riparian proprietor has in respect to a tidal river. *Att.-Gen. (Straits Settlements)* v. *Wemyss*, 57 L. J., P. C. 62; 13 App. Cas. 192; 58 L. T. 358—P. C.

Right of Bathing.]—The powers conferred upon local commissioners or local boards of health under 10 & 11 Vict. cc. 34, 89, or under any special act, for regulating the mode of bathing on the sea shore, and licensing bathing machines there, do not warrant the licensees of such machines in placing them on any part of the foreshore which is private property. *Mace* v. *Philcox*, 15 C. B. (N.S.) 600; 33 L. J., C. P. 124; 10 Jur. (N.S.) 680; 9 L. T. 766; 12 W. R. 670.

The public at large has no common-law right to bathe in the sea; and, as incident thereto, of crossing the shore on foot, or with bathing-machines for that purpose. *Blundell* v. *Catterall*, 5 B. & Ald. 268; 24 R. R. 353.

Right to Beach Boats—Toll—Local Act.]—Fishermen had immemorially been used to beach their boats upon lands near the sea, the owner of which had recently obtained an act authorising him to levy a yearly sum for each boat beached:—Held, that he could not exclude the fishermen without assigning to them other land equally suited for beaching boats. *Aiten* v. *Stephen*, 1 App. Cas. 406—H. L. (Sc.). See also *Ilchester (Earl)* v. *Raishleigh*, col. 658.

Tidal Portion of River Thames — Private Owner—Right to Dredge.]—Grantees from the crown of portions of the foreshore of the lower Thames are entitled to dredge and raise sand and gravel on their own property without previously obtaining a licence from the conservators. *Pearce* v. *Bunting*, 65 L. J., M. C. 131; [1896] 2 Q. B. 360; 75 L. T. 184; 60 J. P. 695.

"Bed and Soil."]—The expression "bed and soil" in s. 87 of the Thames Conservancy Act, 1894, does not include foreshore. *Ib.*

Parochiality of Shore.]—The portion of land on the sea shore between ordinary high-water mark and ordinary low-water mark may form part of the parish coming down to the shore, but there is no primâ facie presumption that it does so; and, in the absence of evidence that it does form part of the parish, it must be taken not to be part of it. *Reg.* v. *Musson*, 8 El. & Bl. 900; 27 L. J., M. C. 100; 4 Jur. (N.S.) 111; 6 W. R. 246.

The foreshore may form part of a parish adjoining the sea, but there is no primâ facie presumption that it does. *Ib.*

There is no presumption that any part of the sea shore is parochial, and it lies on those who assert its parochiality to prove it. *Bridgwater Trustees* v. *Bootle-cum-Linacre*, 36 L. J., Q. B. 41; L. R. 2 Q. B. 4; 15 L. T. 351; 15 W. R. 169.

Where the sea forms the boundary of a parish, the shore between high-water marks of ordinary springs and of medium tides is within the parish. *Reg.* v. *Gee*, 1 El. & El. 1068.

Evidence that lands reclaimed out of a river had been rated to the poor:—Held to outweigh evidence of perambulations which put the parish boundary at high-water mark. *Ipswich Dock Commissioners* v. *St. Peter's*, 7 B. & S. 310.

—— **Tithes of Oysters — Foreshore Intra-parochial.**]—Oyster layings, in respect of which tithes had been paid for sixty years:—Held to be intra-parochial and titheable. *Perrott* v. *Bryant*, 2 Y. & C. Ex. 61.

And see RATES AND RATING.

Offences on—Jurisdiction—County.] — That part of the sea shore which lies between high and low water mark is within and part of the adjoining county, so that the justices of the county have jurisdiction to take cognisance of offences committed thereon, whether the land is covered with water or not at the time the offences are committed. *Embleton* v. *Brown*, 3 El. & El. 234; 30 L. J., M. C. 1; 6 Jur. (N.S.) 1298. *See also* SHIPPING, vol. xiii., col. 922.

Sea Shore not a "Street, Highway, or Public Place."]—Within the Gasworks Clauses Act, 1847. *Maddock* v. *Wallasey Local Board*, 55 L. J., Q. B. 267; 50 J. P. 404.

2. SEA WALLS AND BANKS.

Right to Erect.]—Persons occupying lands adjoining the sea may erect such defences as are necessary for the preservation of their own lands, although such erections may render it necessary for their neighbours to do the like. *Rex* v. *Pagham Level Commissioners*, 2 M. & Ry. 468; 8 B. & C. 353.

Commissioners of Sewers.]—Commissioners of sewers for certain levels may erect defences for the preservation of land within those levels. *Ib.*

—— **Vesting — Jurisdiction.**]—Section 10 of the Sewers Act, 1883 (amending 23 Hen. 8, c. 5), by which all walls, banks, &c., adjoining the sea or tidal rivers are to be within the jurisdiction of the commissioners, does not vest such walls, &c., in the commissioners until they have taken them within their jurisdiction in the manner described in s. 47. *West Norfolk Farmers' Manure Co.* v. *Archdale*, 55 L J., Q. B. 230 ; 16 Q. B. D. 754 ; 54 L. T. 561 ; 34 W. R. 401 ; 50 J. P. 500—C. A.

—— **Repairs.**]—The 23 Hen. 8, c. 5, s. 17, having directed that laws, acts, decrees, and ordinances, made by commissioners of sewers, shall stand good and be put in execution so long time as their commission endureth, and no longer, except the said laws and ordinances be engrossed on parchment, and certified under the seals of the commissioners into chancery, and have the royal assent ; and 13 Eliz. c. 9, having directed oll commissions of sewers to continue in force for ten years, unless sooner determined by supersedeas or any new commission ; and that all laws, ordinances, and constitutions, made by force of such commission, being written on parchment, indented, and under seals, shall, without such certificate or royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissions ; and that all such laws, ordinances, and constitutions, written on parchment, indented, and sealed, shall, without certificate or royal assent, continue in force for one year after the expiration of such commission by lapse of ten years from its teste :—Held, first, that the laws, acts, decrees, and ordinances, mentioned in 23 Hen. 8, c. 5, s. 17, mean the same as the laws, ordinances, and constitutions mentioned in 13 Eliz. c. 9 ; and, secondly, that a decree made by commissioners under a former commission, which had expired by lapse of ten years, directing a sea wall to be refounded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it ratione tenuræ (and who did advance the money accordingly), and that a rate should be made on the level for their reimbursement (although such decree had been written on parchment, indented, and sealed, which this was not), could not be enforced by commissioners under a new commission, issued more than a year after the expiration of the former commission, as to so much of it as remained unexecuted ; though good to the extent to which it had been executed. *Rex* v. *Somerset Sewers Commissioners*, 9 East, 109 ; 3 Smith. 105.

A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of commissioners of sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain and repair the portions of this wall respectively fronting ther lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm and high tide. This part of the wall was previously in good repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms :—Held, following *Keighley's case* (10 Rep. 139) and *Rex.* v. *Somerset* (8 Term Rep. 312 ; 4 R. R. 659), that in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level. *Fobbing Sewers Commissioners* v. *Reg.*, 56 L. J., M. C. 1 ; 11 App. Cas. 449 ; 55 L. T. 493 ; 34 W. R. 721 ; 51 J. P. 227 —H. L. (E.)

Power to make order for repairs. *Reg.* v. *Warton*, 9 Jur. (N.S.) 325.

—— **Liability of Adjoining Owners for Expenses.**]—If a sea bank or a wall, which the owners of particular lands are bound to repair, is destroyed by tempest, without any default of such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected at the expense of the whole level. *Rex* v. *Somerset Commissioners of Sewers*, 8 Term Rep. 312 ; 4 R. R. 659.

A landowner may be liable, by prescription, to repair sea walls, ratione tenuræ, though destroyed by extraordinary tempest. *Reg.* v. *Leigh*, 10 A. & E. 398 ; 2 P. & D. 357.

A mortgagor, not in actual possession, but in receipt of the rents and of the profits of lands charged with repair of a sea bank, is liable for default of reparation. *Reg.* v. *Baker*, 36 L. J., Q. B. 242 ; L. R. 2 Q. B. 621 ; 15 W. R. 1144.

Notwithstanding 3 & 4 Will. 4, c. 22, s. 15, the commissioners of sewers, under 23 Hen. 8, c. 5, s. 3, have power to repair a sea bank, and fine the person whose lands are charged with the repair, without giving him any notice ; therefore, a presentment, which does not allege notice to repair, but states that the costs and charges of repairing amount to a certain sum, and a judgment thereon, ordering that payment, are good. *Ib.*

A rule obtained by the conservators of the Bedford Level, for a mandamus to parties liable, ratione tenuræ, to repair the banks of the Ouse, was discharged on a preliminary objection, that by 15 Car. 2, c. 17, the applicants were commissioners of sewers, and might therefore put in force against the parties another remedy. *Reg.* v. *Gamble*, 3 P. & D. 122 ; 11 A. & E. 69 ; 9 L. J., Q. B. 2.

The commissioners of sewers cannot maintain an action against the commissioners of a harbour, for breaking down a wall or a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as will enable them to maintain such action. *Newcastle* (*Duke*) v. *Clarke*, 2 Moore, 666 ; 8 Taunt. 602 ; 20 R. R. 583.

—— **Orders of.**]—Orders of the commissioners of sewers, requiring landowners to repair and alter sea walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon. *Reg.* v. *Leigh*, supra.

—— **Presentment by Jury of Liability of Frontager — Disqualification of Commissioner.**]—The presentment of a jury at a court of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In

1881–2 the commissioners of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm and high tide. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level:—Held, that the orders were bad and must be quashed: first, because following *Reg.* v. *Wharton* (2 B. & S. 718), s. 13 of 3 & 4 Will. 4, c. 22, which enables orders to be made upon a previous presentment, does not authorise an order upon a person who has become owner of the land since the presentment; secondly, because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm:—Held, also, that if the commissioners had made the orders under the powers of s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133) they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was disqualified by reason of interest. *Fobbing Sewers Commissioners* v. *Reg.*, supra.

Custom — Repair Ratione Tenuræ.]—Where an onerous liability has been asserted and submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support and give a legal origin to such a custom will be presumed. Therefore, a liability to repair a sea wall submitted to since 1818 ought to be presumed to have a legal origin. *L. & N. W. Ry.* v. *Fobbing Levels Commissioners*, 66 L. J., Q. B. 127; 75 L. T. 629.

Where a farm has been subject ratione tenuræ to repair a sea wall, such liability attaches to every part of the land comprising the farm, though the farm has been sold and has become vested in several different purchasers. *Ib.*

Reimbursement of Owner.]—Where the owner of marsh lands was bound by the custom of a sewage level to repair the sea walls abutting on his own land, and by an extraordinary flood tide the wall was damaged, the court refused to grant a mandamus to the commissioners of sewers to reimburse him the expense of the repairs; it appearing by affidavit that the wall had been previously presented for being in bad repair, and was out of repair at the time the accident happened; nor can the other landowners in the level be called upon to contribute to the repairs of such wall. *Rex* v. *Essex Sewers Commissioners*, 2 D. & R. 700; 1 B. & C. 477; 1 L. J. (o.s.) K. B. 169; 25 R. R. 467.

Liability of Purchaser.]—The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. *Morland* v. *Cook*, 37 L. J., Ch. 825; L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R. 777.

Proceedings by Individual who is Damnified.]—An individual who has suffered loss in consequence of a decay of sea walls, which a corporation is directed to repair under the terms of a grant from the crown, conveying a borough and pier or quay tolls to the corporation, may sue the corporation for damages. *Lyme Regis Corporation* v. *Henley*, 3 B. & Ad. 77; 5 Bing. 91. Affirmed, 1 Scott, 29; 1 Bing. (N.C.) 222; 2 Cl. & F. 331; 8 Bligh (N.S.) 690.

So, as the obligation concerns the public, an indictment will lie for the general default. *Ib.*

So, when the obligation arises from prescription. *Lynn Corporation* v. *Turner*, Cowp. 86. S. P., *Anon.*, Lofft, 556.

The owners of lands fronting the sea are under no liability at common law to repair sea walls. *Hudson* v. *Tabor*, 46 L. J., Q. B. 463; 2 Q. B. D. 298; 36 L. T. 492; 25 W. R. 740—C. A.

The fact that an owner of sea frontage has always repaired the sea wall by which his property is protected is in itself no evidence of liability to repair by prescription or ratione tenuræ. *Ib.*

A. was the occupier of land and B. the proprietor of adjoining land fronting to a creek communicating with the sea. It was necessary that each proprietor having land fronting the creek should maintain a sea bank or wall to keep out the sea, and such a sea wall had been maintained upon the creek time out of mind. The wall protecting A.'s land was continuous with that protecting B.'s land, and the level of B.'s land was higher than that of A.'s. These walls had a tendency to gradually subside, and it became necessary from time to time to raise them to the proper height by placing fresh materials on the top. Owing to an extraordinary high tide, the water flowed over B.'s wall, and spread, not only over his land, but also over the land of A., doing considerable damage. In an action to recover the amount of the damage, the jury found that the mischief had happened through B.'s neglect to keep his wall at the proper level:—Held, first, that the mere fact that each frontager had always maintained the wall in front of his own land, and that no one had thought it necessary to erect a wall or bank to protect himself from the water coming from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of B. to maintain the wall not only for his own protection but for that of the adjoining landowners. *Ib.*

Held, secondly, that by the common law, apart from prescription, no such liability was cast on B. *Ib.*

A railway was carried along an embankment upon low lands lying between a river and A.'s land. The low lands were separated from his land by a bank which, before the railway embankment was placed there, sufficed to protect his land from the flood waters of the river; but in consequence of the embankment, the flood waters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land:—Held, that although the company was not required by their act to make flood openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might by proper caution have prevented the injury sustained by A., an action was maintainable against them for such injury. *Lawrence* v. *G. N. Ry.*, 16 Q. B. 643; 20 L. J., Q. B. 293; 6 Railw. Cas. 656; 15 Jur. 652.

No obligation arises from the erection of a sea wall to erect other works for the protection of neighbours, nor to indemnify them against loss. *Rex* v. *Pagham Level Commissioners*, supra.

Rates for Repairs to.]—A parish consisting of

two districts had immemorially been assessed to the repairs of a sea bank (which was necessary for the protection of lands from the sea in both districts) by one assessment collected by one dykereeve. The commissioners of sewers, without any presentment of a jury, appointed two dykereeves, one for each district, and made a rate on one district exclusively for the repairs of the sea bank:—Held, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable for the taking of cattle under a distress warrant issued by them for arrears of such rate. *Wingate* v. *Waite*, 6 M. & W. 739; 9 L. J., Ex. 319; 4 Jur. 860.

Right of Way acquired on Sea Walls.]—There is no such inconsistency between the powers and duties of commissioners of sewers to keep up a sea or a river wall, and a right of way enjoyed by the public along such a wall, as to prevent such a right of way being acquired. *Greenwich Board of Works* v. *Maudsley*, 39 L. J., Q. B. 205; L. R. 5 Q. B. 397; 23 L. T. 121; 18 W. R. 948.

Evidence of long and uninterrupted user may establish the right of way in such a case as well as in the ordinary case of a right of way claimed and used over the land of an individual. *Ib.*

Repair of Highway swept away by Sea.]—A highway originally ran down to the sea to the water's edge. The action of the waves in process of time swept away a portion of the land, and destroyed a part of the road, so that the road ran to the edge of a cliff twenty feet high. The road up to this point was in good repair. Upon an indictment against a parish for non-repair of the highway:—Held, that the road beyond the edge of the cliff having been swept away by natural causes, there was nothing which the parish could reasonably be called on to repair. In fact, as regarded that part, there was no road in existence, and therefore nothing to repair. *Reg.* v. *Hornsea*, Dears. C. C. 291; 2 C. L. R. 596; 23 L. J., M. C. 59; 18 Jur. 315; 2 W. R. 274; 6 Cox, C. C. 299.

3. Wreck.

See also Shipping, xxvi., Admiralty Law and Practice, vol. xiii. col. 948.

What is.]—Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not wreck within 17 & 18 Vict. c. 104, s. 458, and therefore persons securing such timber cannot enforce a claim for salvage in respect of their services. *Palmer* v. *Rouse*, 3 H. & N. 505; 27 L. J., Ex. 437; 6 W. R. 674.

The term "wreck," in 3 & 4 Will. 4, c. 52, s. 50, is intended to apply to goods thrown on shore by the violence of the waves. *Legge* v. *Boyd*, 1 C. B. 92; 14 L. J., C. P. 138; 9 Jur. 307.

And it is not confined to goods that would pass to the crown or the crown's officer by virtue of the prerogative. *Barry* v. *Arnaud*, 10 A. & E. 646; 2 P. & D. 633; 9 L. J., Q. B. 226.

A ship cannot be considered wreckum maris, nor the claim of a lord of a manor to wreck sustained, unless at the time of taking possession she is either on the actual shore itself, or left high and dry on land. *The Pauline*, 2 W. Rob. 358; 9 Jur. 286.

Things floating between high and low water mark, not having touched the ground, are not wreck; if stranded there, though surrounded by water, they are wreck; if, after touching the ground there, they are again set afloat, they may or may not be wreck, according to circumstances. *Rex* v. *Two Casks of Tallow*, 3 Hag. Adm. 359; cf. *Rex* v. *Forty-nine Casks of Brandy*, 3 Hag. Adm. 357; *The Rebeckah*, 1 C. Rob. 227.

Right to Wreck.]—The grantee of wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrongdoer for taking them away, though such goods were part of a cargo of a ship from which some persons escaped alive to land, and though the owners within a year and a day claimed and identified them; and though the taking was before any seizure on behalf of the grantee. *Dunwich* (*Bailiffs*) v. *Sterry*, 1 B. & Ad. 831; 9 L. J. (O.S.) K. B. 167.

Parol evidence cannot be resorted to in order to support a prescriptive right to wreck, if it appears that the property in respect of which wreck is claimed was in the crown in the time of Charles the First, as a jury could not infer that it was in those under whom the party claims from time of legal memory. *Alcock* v. *Cooke*, 2 M. & P. 625; 5 Bing. 340; 7 L. J. (O.S.) C. P. 126; 30 R. R. 625.

If Spanish dollars, more than 100 years old, are found in the sands of a sea shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel is found near them. *Talbot* v. *Lewis*, 6 Car. & P. 603.

A log of wood found floating in the sea near the shore was drawn on a rock by a person wading into the water; another log having been cast upon the beach, and by the next tide swept out to the sea, and then taken while floating, these are both droits of admiralty, and do not belong to the grantee by patent of wreck on the coast. *Stackpole* v. *Reg.*, Ir. R. 9 Eq. 619.

The log cast on the beach having been marked by a knife, with the design of claiming property in it for the grantee of wreck before it was swept back to sea, does not prevent its becoming a droit of admiralty when afterwards found floating. *Ib.*

The owner of wreck is entitled thereto as against a grantee of wreck from the crown, though no living creature is saved. *Hamilton* v. *Davis*, 5 Burr. 2732.

—— **Wreck above Low water Mark—Foreshore Parcel of adjacent Manor.**]—Foreshore may be parcel of the adjoining manor; and wreck above low water mark appurtenant thereto. *Sir John Constable's case*, Anderson, 86; cf. *Sir Henry Constable's case*, 5 Co. Rep. 106.

—— **Office of Admiral.**]—Wreck appurtenant to a manor by prescription does not pass under a grant of the office of admiral, with wreck and profits appertaining to the office, though the manor is in the king's hands at the date of the grant. *Wiggen* or *Wiggon* v. *Branthwait*, 1 Ld. Raym. 473; Holt, 758; 12 Mod. 259.

R. G. M.

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3. *Executors and Administrators*, 705.
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10. *Auctioneers.*—*See* Auction and Auctioneer.
11. *Bankers.*—*See* Banker.
12. *Against Rent.* — *See* Landlord and Tenant.
13. *Members of Companies.*—*See* Company.
14. *Executors and Administrators.* — *See* Executor and Administrator.

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I. SINCE JUDICATURE ACTS.—*See* Practice (Pleading).

II. BEFORE JUDICATURE ACTS.

A. IN WHAT ACTIONS.

In Actions on Bonds.]—A set-off may be pleaded to an action on a bond, the condition of which is for the payment of an annuity or a growing sum. *Collins* v. *Collins*, 2 Burr. 820; 2 Ld. Ken. 530.

But to an action on a bond conditioned for replacing stock, a set-off cannot be pleaded. *Gillingham* v. *Washett*, M'Clel. 198; 13 Price, 484.

Nor to an action on a bond conditioned to indemnify generally. *Atwool* v. *Atwool*, 1 El. & Bl. 21; 1 C. L. R. 242; 22 L. J., Q. B. 287; 17 Jur. 789; 1 W. R. 325.

The plaintiff and the defendant were partners; they dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself, and to release the defendant from liability, and the defendant giving him a bond for a certain sum, payable by instalments. The plaintiff failed to pay a debt due from the firm, whereupon the creditors sued the defendant and obtained judgment, and issued a fi. fa., under which the sheriff seized and sold the defendant's goods, and out of the proceeds paid the debt:—Semble, that, in an action on the bond, the defendant was entitled to set off as money paid the sum so paid by the sheriff. *Rodgers* v. *Maw*, 15 M. & W. 444; 4 D. & L. 66; 16 L. J., Ex. 137.

If a customer borrows money from his bankers, and gives a bond to secure its repayment, and the balance from the general banking account is afterwards in favour of the customer, a right to set off such balance against the amount due on the bond exists both at law and in equity. *Cavendish* v. *Geaves*, 24 Beav. 163; 27 L. J., Ch. 314; 3 Jur. (N.S.) 1086; 5 W. R. 615.

But if the firm is altered, and the bond is assigned by the obligees to the new firm, with notice of the assignment to the obligor, and the balance upon the general banking account is afterwards in favour of the customer, no right of set-off exists at law; but in equity the customer is entitled to set off the balance due on the banking account against the amount due on the bond. *Ib.*

So, if the bond is assigned to a stranger, without notice to the obligor, the same right of set-off exists, and the assignee takes the assignment subject to all the equities which affected the assignors. *Ib.*

In Actions on Covenants.]—In an action on a covenant for unliquidated damages, damages arising from the breach of other covenants to be performed by the plaintiff cannot be pleaded by way of set-off. *Howlett* v. *Strickland*, Cowp. 56. S. P., *Oldershaw* v. *Thompson*, 5 M. & S. 164; 1 Stark. 311; 2 Chit. 388.

To an action on a covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the other covenants in the lease. *Weigall* v. *Waters*, 6 Term Rep. 488.

In an action on a covenant for not indemnifying a person against taxes, no plea of set-off can be sustained. *Cooper* v. *Robinson*, 2 Chit. 161.

In an action on a covenant, the defendant cannot set off a sum alleged to be due on a guarantee under seal. *Williams* v. *Flight*, 2 D. (N.S.) 11; 7 Jur. 197.

In Replevin.]—The statutes of set-off do not extend to replevin. *Laycock* v. *Tuffnell*, 2 Chit. 531. S. P., *Absolam* v. *King*, Bull, N. P. 181.

Therefore, a plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Ib.*

But a tenant may plead payment of groundrent in bar of an avowry for rent. *Sapsford* v. *Fletcher*, 4 Term Rep. 511.

Specific Performance.]—A defendant to a bill for specific performance of a clear contract for a specific sum, cannot resist it by way of set-off, on the ground that, on an account between him and the plaintiff in respect of antecedent transactions affecting the subject-matter, there would be a balance due to the defendant. *Phipps* v. *Child*, 3 Drew. 709.

In a suit for specific performance by the vendor (the purchaser having been in possession for ten years), a mortgage debt due to the purchaser carrying interest at 5 per cent. was set off against unpaid purchase money carrying interest at 4 per cent. *Wallis* v. *Bastard*, 2 Eq. Rep. 508; 4 De G. M. & G. 251; 17 Jur. 1107; 2 W. R. 47.

In Admiralty Court.]—No set-off is allowed in this court, save in the exceptional case of suits for mariners' wages. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 14; 5 L. T. 460.

In County Court.]—*See* County Court.

B. AGREEMENTS AS TO SET-OFF.

Express or Implied.]—The court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreement will not be presumed without some circumstances from which it might be inferred, semble. *Freeman* v. *Lomas*, 9 Hare, 113; 20 L. J., Ch. 564; 15 Jur. 648.

The right of set-off can only arise out of some contract, express or implied, between the parties, to pay and receive money, or other persons standing in their shoes. *Smee* v. *Baines*, 7 Jur. (N.S.) 902; 4 L. T. 573; 9 W. R. 802.

Creditor Borrowing from Debtor.]—If a creditor borrows money of his debtor on the security of a note, even under an express promise of repayment, he may nevertheless set off the amount of his original debt. *Lechmere* v. *Hawkins*, 2 Esp. 626. And see *Preston* v. *Strutton*, 1 Anst. 50.

A set-off was allowed in equity where a creditor had borrowed from the debtor under an express promise to pay. *Taylor* v. *Okey*, 13 Ves. 180.

In Writing.]—If a creditor consents that his debtor shall set off the debt against a debt due from the creditor to another person, it seems that the agreement, although not in writing, is valid. *Coxen* v. *Chadley*, 5 D. & R. 417; 3 B. & C. 596; 1 Car. & P. 174, 478.

Delivery of Goods.]—If A. agrees to make a waggon for B., and makes it accordingly, but refuses to deliver it unless the money is paid on delivery, the money which was to be paid for the waggon may be set off against any demand of B. against A. for goods bargained and sold. *Dunmore* v. *Taylor*, Peake, 41.

B., a creditor of A., employed A. to repair a carriage, undertaking to pay ready money for the repairs:—Held, that B. could not, upon offering to set off an adequate portion of the debt, require the redelivery of the carriage without payment of the repairs. *Clarke* v. *Fell*, 1 N. & M. 244; 4 B. & Ad. 404; 2 L. J., K. B. 84.

Made by Broker.]—An agreement by a broker that he will sell goods for his principals, and pay over the proceeds, without setting off a debt then due from the principals to him, is not binding on the broker so as to deprive him of his legal right of lien or set-off. *M'Gillivray* v. *Simpson*, 9 D. & R. 35; 2 Car. & P. 320; 5 L. J. (o.s.) K. B. 53.

But if he also agrees not to set off a debt due from a prior firm, which by a previous letter the principals had agreed to pay him, the principals having assumed the funds of that firm; the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods. *Ib.*

Proof of.]—An allegation of an agreement to set off a specific joint debt against specific separate debts previously accrued, is in substance proved by evidence of an agreement, prior to the debts accruing, to set off all joint debts that should thereafter arise against all separate debts. *Kinnerley* v. *Hossack*, 2 Taunt. 170.

C. SUBJECT-MATTER OF SET-OFF.

1. Generally.

Enforceable by Action.]—The right of a defendant in an action to set off a debt due from the plaintiff to him, under 2 Geo. 2, c. 22, s. 13, exists only where the debt sought to be set off is enforceable by action. *Rawley* v. *Rawley*, 45 L. J., Q. B. 675; 1 Q. B. D. 460; 35 L. T. 191; 24 W. R. 995—C. A.

Where a defendant sought to set off a debt, arising upon the promise of an infant, such promise not having been ratified in accordance with 9 Geo. 4, c. 14, s. 5:—Held, that the replication of infancy to the plea of set-off was a sufficient answer, and that the plaintiff was entitled to recover. *Ib.*

The words in 9 Geo. 4, c. 14, s. 5, "no action shall be maintained," extend to cases of set-off; so that a defendant may not set off a promise of an infant supported merely by a parol ratification after full age in an action brought against him by the infant, any more than he might sue the infant upon such promise, both being equally precluded by the above section. *Ib.*

A master who, without any agreement, takes a boy on trial, with a view to his becoming an apprentice, cannot charge for board and lodging, and consequently cannot set off the amount therefor. *Wilkins* v. *Wells*, 2 Car. & P. 231.

Debt Due at Time of Action brought, and of Plea.]—A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded. *Braithwaite* v. *Coleman*, 4 N. & M. 654.

There can be no set-off in an action brought upon a contract for the sale of goods on credit for a bill at a certain time, when the action is brought before the expiration of the time which the bill had to run. *Hutchinson* v. *Reid*, 3 Camp. 329.

A. remitted a bill of exchange to B., to be paid to a third person on A.'s account. B. discounted the bill, but did not pay over the proceeds, upon which A. sued him for money had and received:—Held, that a set-off was admissible. *Thorpe* v. *Thorpe*, 2 B. & Ad. 580; 1 L. J., K. B. 170.

A defendant cannot set off, by plea to the further maintenance of the action, a debt which accrued after action, and before plea. *Richards* v. *Jones or James*, 2 Ex. 471; 6 D. & L. 52; 17 L. J., Ex. 277.

A plea of set-off, that the plaintiff was indebted to the defendant "at the time of the plea pleaded," is bad; it should state that he was indebted "at the commencement of the action." *Evans* v. *Prosser*, 3 Term Rep. 186.

A plea which states that "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," without inserting the words "and still is indebted," is bad. *Dendy* v. *Powell*, 3 M. & W. 442; 6 D. P. C. 577; 7 L. J., Ex. 154.

Set-off Accruing after Cause of Action.]—To an action on a bond, conditioned for payment of interest half-yearly, and the principal sum six months after notice, the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable, with an allegation that notice to pay the principal had not been given:—Held, that the plea was an answer to the action. *Lee* v. *Lester*, 7 C. B. 1008; 7 D. & L. 137; 18 L. J., C. P. 312.

Debt must be Due at Trial.]—A debt sought to be set off must continue due up to the time of trial. *Eyton or Eaton* v. *Littledale*, 7 D. & L. 55; 4 Ex. 159; 18 L. J., Ex. 369.

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract, on the ground of fraud, and was repaid the purchase money. In an action by the plaintiff for the keep of the horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray* v.

Mann, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

Where Estoppel Operates.]—Where the paymaster of a regiment gave credit in a running account with an officer on a foreign station, for sums of money as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprised by the board of ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years:—Held, in an action by the officer's personal representatives, for pay remaining due, that the paymaster was concluded by the account in which he had erroneously given credit for the increased allowance, and was not at liberty to set off the latter against the demand. *Skyring* v. *Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 Car. & P. 517; 28 R. R. 264.

Payment into Court in another Action.]—It is no objection to a plea of set-off, that the defendant has brought an action against the plaintiff for the same sum, in which the plaintiff has paid the amount of the demand into court. *Evans* v. *Prosser*, 3 Term Rep. 186.

Goods sold for Ready Money.]—In an action for goods sold and delivered, the defendant pleaded a set-off of more money due to him from the plaintiff; replication, that the goods were agreed to be paid for in ready money, which replication was holden bad, being no answer to the plea. *Eland* v. *Karr*, 1 East, 375. S. P., *M'Gillivray* v. *Simson*, 9 D. & R. 35; 5 L. J., (O.S.) K. B. 53.

Security for Debt Returned.]—A debtor who, for money advanced, had given to his creditor his promissory note, and, as a collateral security, had deposited with him a policy of assurance, and who had, on the other hand, a right of set-off in respect of goods sold, applied to the creditor to have the policy delivered up, for a purpose unconnected with the debt, and replaced by another security. The policy was accordingly delivered:—Held, that the debtor's right of set-off was not thereby displaced. *Moore* v. *Jervis*, 2 Coll. 60.

Assignment—Notice.]—If A. assigns a debt to B. with notice to the debtor, and B. assigns to C. without such notice, and afterwards becomes bankrupt, the debtor may set off against C. any other debt due to him from B. *Cavendish* v. *Geaves*, 24 Beav. 163; 27 L. J., Ch. 314; 3 Jur. (N.S.) 1086; 5 W. R. 615.

Discharge—Insolvent Debtor.]—A discharge under the Insolvent Debtors Act (1 & 2 Vict. c. 110), s. 91, is a legal answer to a plea of set-off. *Francis* v. *Dodsworth*, 4 C. B. 202; 17 L. J., C. P. 185.

2. Debts in same Right.

Rule must be Complied With.]—One debt cannot be set off against another if due in different rights. *Whitaker* v. *Rush*, Ambl. 407. S. P., *Medlicot* v. *Bowes*, 1 Ves. 207.

There can be no set-off, either at law or in equity, where either of the debts is a debt in autre droit. *Gale* v. *Luttrell*, 1 Y. & J. 180. S. P., *Harvey* v. *Wood*, 5 Madd. 459.

Debts due in different rights cannot be set off, and 2 Geo. 2 does not comprehend it. *Bishop* v. *Church*, 3 Atk. 691; 2 Ves. 100, 371.

Cross Demands.]—Cross demands existing in separate rights cannot be set off one against the other, in equity, except under special circumstances. *Stammers* v. *Elliott*, 37 L. J., Ch. 353; L. R. 3 Ch. 195; 18 L. T. 1; 16 W. R. 489.

Where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction the set-off will be enforced in equity. *Clark* v. *Cort*, Cr. & Ph. 154; 10 L. J., Ch. 113.

Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient. Still less will the court interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject-matter of the account consists of dealings and transactions arising out of the contract, the breach of which is the subject of the action. *Ib.* See *Middleton* v. *Pollock, Nugee, Ex parte*, 44 L. J., Ch. 584; L. R. 20 Eq. 29; 33 L. T. 240; 23 W. R. 766.

Devisee of equity of redemption is not entitled to have an arrear of interest upon legacy from mortgagee to mortgagor set off against the interest due upon mortgage. *Pettat* v. *Ellis*, 9 Ves. 563.

A printer undertook to insure for a publisher the paper sent to him for printing a work. He afterwards effected an insurance in his own name, and on a loss by fire recovered the amount of his insurance, but which was considerably short of his own loss:—Held, that it could not be set off as money received on account of the publisher for the printing. *Gillett* v. *Mawman*, 1 Taunt. 137.

Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other. *Freeman* v. *Lomas*, 9 Hare, 109; 20 L. J., Ch. 564; 15 Jur. 648.

Therefore an executor and trustee of a legacy, who was also residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife, the legatee) was, as such administrator, entitled. *Ib.*

Cross demands are not alone a sufficient foundation for equitable set-off. *Fisher* v. *Baldwin*, 11 Hare, 352.

The mere existence of cross demands is not a sufficient ground for the interference of equity to set off one against the other; there must be some equity attaching to the demand which is sought to be enforced at law (and not merely arising out of the same subject-matter), as that it is an item of a complicated account which can only be taken in equity, or that there has been a breach of contract by plaintiff at law, relating to the subject-matter on his action. In this case, where an action was brought at law for

non-acceptance of bills of exchange at stated times, being the mode of payment agreed upon between the parties in a course of dealing between them, the defendant at law was not allowed to set off in equity what appeared to the court an uncertain balance alleged to be due upon a complicated state of accounts. *Rawson* v. *Samuel*, Cr. & Ph. 161; 10 L. J., Ch. 214; 3 Jur. 947.

A guarantee to the amount of a certain sum of money given for a third person cannot be set off. *Crawford* v. *Stirling*, 4 Esp. 207.

The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against the stake of another race won by the plaintiff's horse. *Charlton* v. *Hill*, 5 Car. & P. 147.

The plaintiff, in payment of bets on horse races, gave the defendant three cheques on the plaintiff's bankers payable to bearer on demand, which were indorsed by the defendant to third persons, to whom they were paid by the plaintiff's bankers; in an action to recover back the sums so paid, the defendant sought to set off the amount of a cheque drawn by M., payable to bearer on demand, which was given by the defendant to the plaintiff in payment of a bet and was cashed by him:—Held, that the payment of the cheques by the plaintiff's bankers, being a payment by his direction, on his account, and in discharge of his liability, was a payment by the drawer of the cheque to the indorsee thereof, and that, therefore, the plea of set-off could not be sustained, inasmuch as M., and not the defendant himself, paid the amount. *Lynn* v. *Bell*, Ir. R. 10 C. L. 487.

Two sons had, as against their father, a lien on his estate, for an outlay made thereon by them; on the other hand, the father had a claim against the sons in respect of a suretyship entered into by him for them:—Held, that these demands might be set off in equity. *Unity Joint-Stock Mutual Banking Association* v. *King*, 25 Beav. 72; 27 L. J., Ch. 585; 4 Jur. (N.S.) 1257; 6 W. R. 264.

Upon the marriage of A., the grandson of W., from whom A. had large expectations, a house and lands were settled upon A., and it was agreed that the grandfather should occupy the house and lands, and also some glebe-lands belonging to A. There was evidence as to the rent that was to be paid, which was about the actual value. A. never enforced the rent during the eight years of his grandfather's occupancy, which ceased with his death, but had received sums in money and goods equal to about half the alleged rent:—Held, that there was either an express contract to pay the rent, or an agreement to occupy as any other tenant, and pay a quantum meruit; the sums and goods paid to go towards the rent. *Alington* v. *Booth*, 3 Jur. (N.S.) 50.

A corporation, in addition to the ordinary functions of a municipal corporation, performed those of managers of baths and washhouses, and also those of a local board of health, and kept at a bank three separate accounts, corresponding to these three classes of transactions. At the time of the bank suspending payment, there was due to it on the account of the municipal affairs of the corporation a large sum of money, and there was due from the bank to the corporation, in respect of the local board of health account, a similar sum:—Held, that the corporation might set off these claims one against the other, inasmuch as, though the accounts were separate, the corporation was a debtor in the one, and creditor in the other, and in the same right. *Pedder* v. *Preston Corporation*, 12 C. B. (N.S.) 535; 31 L. J., C. P. 291; 9 Jur. (N.S.) 496; 6 L. T. 540; 10 W. R. 773.

B. and M. had various transactions in negotiating bills, and M. had paid for B. 3,000*l*. During these transactions M. committed a secret act of bankruptcy. The assignees recovered a verdict for 3,000*l*. against B., who insisted on being allowed 712*l*. which he paid for the bankrupt. An equitable set-off was allowed under circumstances. *Billon* v. *Hyde*, 1 Atk. 126; 1 Ves. 326.

T. improperly allowed part of the trust fund to be received by B., the tenant for life. S., one of the reversioners, borrowed money from C., and mortgaged to him her share in the trust funds. B. at the same time gave C. a bond and a mortgage of other property for the same debt, B. being a surety for S. in this transaction. The defendant having been paid out of B.'s estate:—Held, that T.'s representative could not claim to have this payment set off against the claim of S. in respect of the misapplied part of the trust fund. *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; 7 Jur. (N.S.) 785; 4 L. T. 311; 9 W. R. 541.

I., a consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. I. was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by I. for the estate. I. becoming embarrassed, was declared bankrupt, and assignees were appointed:—Held, on a bill filed by B. and the other owners of the estate, to remove I. from the possession and management, that a sum found due from I. to B., on their private dealings, might be set off against a sum found due to I. in respect of his advances and payments for the estate. *Baillie* v. *Edwards*, 2 H. L. Cas. 74.

A mercantile firm, being indebted to the plaintiffs, assigned their property and business to trustees by a deed containing a proviso that, if the firm became bankrupt before a certain day, the deed should be void. The trustees carried on the business, and the plaintiffs became indebted to them in the course of trade. Before the day specified in the deed the firm became bankrupt, and afterwards the trustees brought an action against the plaintiffs for the debt due to them:—Held, in a suit by the plaintiffs to establish an equitable set-off, that the plaintiffs could not set off the debt due to them from the firm against the debt due from them to the trustees. *Hunt* v. *Jessell*, 18 Beav. 100; 2 W. R. 219.

A plaintiff having given a guarantee for the payment of 1,600*l*., and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantee is not the subject of a set-off. *Morley* v. *Inglis*, 6 D. P. C. 202; 5 Scott, 314; 4 Bing. (N.C.) 58; 3 Hodges, 270; 7 L. J., C. P. 11.

Joint and Separate Debts.]—Joint and separate debts cannot be set off against each other at law. *Twogood, Ex parte*, 11 Ves. 519.

A joint debt cannot be set off against a separate debt at law; but may in equity, under particular circumstances, as where there is a clear

series of transactions in which joint credit has been given. *Vulliamy* v. *Noble*, 3 Mer. 618; 17 R. R. 143.

A. has a joint demand against B. and C., who are also creditors of A. B. by letter having made himself separately liable to A. on account of the demand originally joint, cannot, either at law or in equity, set off the joint debt due from A. to himself and C. *Ross, Ex parte*, Buck, 125.

In an action of contract by A. against B., a joint and several promissory note, made to B. by A., C., D. and E., may properly be set off. *Owen* v. *Wilkinson*, 5 C. B. (N.S.) 526; 28 L. J., C. P. 3; 5 Jur. (N.S.) 102.

Bankers stopped payment, being indebted to A. on his separate account, and creditors of A. and B. on the joint account. A. assigned the credit to A. and B., and gave notice to the bankers to transfer it accordingly, which they neglected to do. Afterwards the bankers committed an act of bankruptcy, and were declared bankrupts:—Held, that, in equity, A. and B. were not entitled to set off the two debts. *Watts* v. *Christie*, 11 Beav. 546; 18 L. J., Ch. 173; 13 Jur. 244, 345.

A. and B., executors under a will under which A. was also residuary legatee, kept an executorship account with a bank, at which A. kept also a private separate account. The bankers stopped payment, and filed a liquidation petition, and a trustee was appointed. Previously to the stoppage the executors had paid all the debts, and funeral and testamentary expenses, and set apart securities to answer the annuities bequeathed by the will; but the executors were jointly liable for two small sums for rates and taxes, and their solicitor's bill of costs in relation to the estate. At the date of the stoppage a sum of 1,400*l.* was due from the bank on the executorship account, while a sum of 1,200*l.* was owing by A. on his separate account. A. claimed to prove in the liquidation for the difference between the two sums, as having a right to set off as against the debt due from him the money owing from the bank on the executorship account, on the ground that the money on that account constituted in fact a clear net residue in which he was absolutely interested:—Held, that the one account could not be set off against the other, the rules of equitable set-off or mutual credit not applying unless A. was so much the person solely beneficially interested in the balance of the joint account that a court of equity would without any terms or further inquiry have obliged B. to transfer the account into the name of A. alone. *Morier, Ex parte, Willis, In re*, 49 L. J., Bk. 9; 12 Ch. D. 491; 40 L. T. 792; 28 W. R. 235.

The plaintiff drew a bill nominally for a particular use, which he was authorised to do, and discounted it with some bankers, who held the joint guarantee of both the defendants for those particular bills; the plaintiff then used the money for the purpose of releasing one of the defendants from arrest; the other defendant was obliged to pay the bill under the guarantee. In an action for wages, one of the defendants set off this payment:—Held, that he could not do so. *Jones* v. *Fleming*, 7 B. & C. 217; 6 L. J. (o.s.) K. B. 113.

There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors. *Middleton* v. *Pollock, Knight and Raymond, Ex parte*, 44 L. J., Ch. 618; L. R. 20 Eq. 515.

P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf 4,000*l.*, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of 2,200*l.* and 850*l.*, part thereof; but he never invested the balance of 950*l.* The debt of 2,200*l.* was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:—Held, that neither of the sums of 2,200*l.* and 950*l.* due from his estate could be set off against a separate debt due to the estate from K. *Ib.*

See further, infra, PARTNERS, col. 709.

3. MUTUAL DEBTS.

What are.]—The 8 Geo. 2, c. 24, s. 5, applies only where the debts between the parties are mutual legal debts, the object of the statute being to prevent cross actions between the same parties. *Isberg* v. *Bowden*, 8 Ex. 852; 1 C. L. R. 722; 22 L. J., Ex. 322. See *Williams* v. *Cooke*, 10 Moore, 321; 3 L. J. (o.s.) C. P. 143.

To an action for freight due upon a charterparty, the defendant pleaded that the plaintiff entered into the charterparty as master of the vessel, and for and on behalf of and as agent for the vessel: that the plaintiff never had any beneficial interest in the charterparty, nor had he any lien whatever on the freight, and that he brought the action solely as agent and trustee for the owner. The plea proceeded to state that the owner was indebted in a sum of money to the defendant, which he offered to set off against the plaintiff's claim:—Held, that such debt was not a mutual debt within 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5, and therefore that the plea was bad. *Atwool* v. *Atwool*, 1 El. & Bl. 21; 1 C. L. R. 242; 22 L. J., Q. B. 287; 17 Jur. 789; 1 W. R. 325.

Equitable set-off upon mutual credit; though no mutual debts upon which a set-off could be sustained at law. *James* v. *Kynnier*, 5 Ves. 106.

4. PAYMENT OR SET-OFF.

In what Cases.]—The defendant being indebted to the plaintiff on a bill of exchange for 25*l.*, and being unable to pay the full amount, left 9*l.* 10*s.* in cash, and a bill for 17*l.* in renewal of the balance, at the plaintiff's house in discharge of the debt. A few days afterwards he met the plaintiff, who then refused to take the bill in renewal, and stated he should retain the cash as payment of another debt, which he said was due. The defendant then demanded back the money in addition to the bill; but the plaintiff refused to return it. The plaintiff shortly afterwards sued the defendant on the original bill:—Held, per Pollock, C.B., and Platt, B., that, under the circumstances, the receipt and retainer of the money by the plaintiff were evidence of payment. Per Parke, B., and Martin, B., that they did not amount to a payment, but to a set-off. *Thomas* v. *Cross*, 7 Ex. 728; 21 L. J., Ex. 251.

On a settlement of accounts between the plaintiff and the defendant, the plaintiff was found to have been overpaid by 1*l.* 11*s.* 5*d.*, which sum (as the jury found) it was agreed should go to the defendant's credit in their future dealings. This

claim, however, was barred by the Statute of Limitations. The plaintiff afterwards did work for the defendant, to the amount of 5*l.* 6*s.* 6*d.*, and brought an action to recover that sum. The defendant paid 4*l.* into court:—Held, that he had a good answer to the balance of 1*l.* 6*s.* 6*d.* under never indebted. *Smith* v. *Winter*, 12 C. B. 487; 21 L. J., C. P. 158; 16 Jur. 908.

If A. agrees to do work for a certaim sum of money, and afterwards B. purchases some of the materials which are worked up by A., the money expended on that account must be set off. *Allinson* v. *Davies*, Peake's Add. Cas. 82.

If a landlord directs a tenant, who is overseer of the poor, to pay on the landlord's account rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation. *Roper* v. *Bumford*, 3 Taunt. 76.

5. Unliquidated or Liquidated Claims.

Ascertained Amount necessary so as to be Set off.]—Damages cannot be recovered by set-off. *Freeman* v. *Hegett*, 1 W. Bl. 394. S. P., *Howlett* v. *Strickland*, Cowp. 56.

Where damages are unliquidated and there is not a mutuality, there cannot be a set-off. *Grant* v. *Royal Exchange Assurance Co.*, 5 M. & S. 439.

A sum of money given under an agreement by way of penalty cannot be pleaded as a set-off. *Davis* v. *Penton*, 6 B. & C. 216; 5 L. J. (O.S.) K. B. 112.

—— **Illustrations.**]—By a charterparty A. agreed to pay B., the master of a vessel, one-third of the freight at the final sailing of the vessel, the same to be returned to A. if the cargo should not be delivered at the port of destination, A. insuring at the owner's expense and deducting the costs out of the first payment. A. paid the one-third freight, deducting the costs of insurance. The ship and cargo were lost; and A. brought an action to recover back the one-third freight. B. pleaded that the loss of the one-third freight was a loss which A. was to be insured against; that A. insured so negligently, that the insurance was useless; and that by such negligence A. became liable to B. for the same amount which he claimed from B., and to make good the same to B.:—Held, that the plea was bad; that the conclusion of law as to A.'s liability was not warranted by the facts stated, as the amount to be recovered by B., as damages for A.'s negligence, was not necessarily identical with that sued for by A. *Charles* v. *Altin*, 15 C. B. 46; 23 L. J., C. P. 197; 18 Jur. 1105; 2 W. R. 595.

The defendant at the plaintiff's request became a shareholder and director of a company on receiving from the latter the following guarantee: "In consideration of your having at my request agreed to become a shareholder of the Surrey Gas Company, and to be and act as a director, I hereby undertake to and agree to guarantee, indemnify, and save you harmless from and against all losses, costs, charges, damages and expenses which you may bear, incur, sustain or be put to by reason thereof, or on account of your acting as such director":—Held, in an action against the defendant, that he was entitled to set off as money paid his expenses of travelling from the country to London to attend the meetings of the company as director. *Hutchinson* v. *Sidney*, 10 Ex. 438; 3 C. L. R. 175; 24 L. J., Ex. 25; 3 W. R. 65.

Where a declaration stated that in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate them for his own benefit, he undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff for any loss or damage by reason of the acceptance thereof; and assigned for breach, that he did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof he, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses:—Held, that, as the plaintiff might be entitled on this declaration to recover special damage, a set-off was not a good plea. *Hardcastle* v. *Netherwood*, 5 B. & Ald. 93.

A declaration stated that, in consideration that the plaintiff would accept, for the defendant's accommodation, a bill of exchange drawn by him on the plaintiff, and would deliver it to the defendant in order that he might negotiate it for his own use, he promised the plaintiff to indemnify and save him harmless from any consequent loss or damage; and that the plaintiff accepted the bill and delivered it to the defendant. Breach, that he did not indemnify or save harmless the plaintiff from loss or damage; and the plaintiff, as acceptor, was obliged to and did pay W., the holder, the amount of the bill and interest, and costs of an action on the bill by W. against the plaintiff, as acceptor; and the plaintiff also incurred costs and expenses in defending and settling the action. Plea, first, to so much of the declaration as related to the claim in respect of the payment to W. of the amount of the bill and interest, a set-off; and a plea, secondly, to so much of the claim as related to the costs of the action brought by W. against the plaintiff and the costs and expenses incurred in defending and settling the action, that the whole of the costs and expenses was incurred by the plaintiff at the defendant's request; concluding with a set-off:—Held, that the first plea was good, for that the plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading, and was separated from the rest of the claim, though mixed up with it in one count, but that the second plea was bad, being pleaded to costs and expenses incurred by the plaintiff, but not paid, and therefore not constituting a liquidated demand to which a set-off could be pleaded. *Crampton* v. *Walker*, 3 El. & El. 321; 30 L. J., Q. B. 19; 7 Jur. (N.S.) 43; 9 W. R. 98.

So where under a declaration on an agreement to indemnify the plaintiff against the costs which he might be obliged to pay in an action conducted by the defendant as the attorney of the plaintiff, with an allegation that he was compelled to pay in such action a certain sum for costs; and breach, that the defendant had not indemnified the plaintiff, or paid such sum:—Held, that a plea of set-off, pleaded to so much of the declaration as related to the plaintiff's claim in respect of the payment of the sum for costs, was good. *Brown* v. *Tibbits*, 11 C. B. (N.S.) 855; 31 L. J., C. P. 206; 6 L. T. 385; 10 W. R. 465. *See also cases*, post, col. 708.

Equitable Set-off.]—In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt, the court allowed the defendant to plead an equitable set-off for unliquidated damages arising out of the same contract. *Makeham* v. *Crow*, 15 C. B. (N.S.) 847.

To a declaration for money lent and paid and commission the defendant pleaded for a defence on equitable grounds, that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiff's firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and was insufficient to satisfy the advances, expenses, and commission, whereas it would, but for their negligence and misconduct, have realised sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct: —Held, a bad plea. *Best* v. *Hill*, 42 L. J., C. P. 10; L. R. 8 C. P. 10; 27 L. T. 490; 21 W. R. 147.

6. Ground of Cross Action.

Whether Right Enforceable by Cross Action or Set-off.]—To an action for freight, the defendant pleaded, by way of an equitable defence, that the plaintiff, in the course of his employment by the defendant, undertook to carry coal of the defendant, and by his negligence and unskilfulness the coal was lost, and that the cost price of the coal was equal to the plaintiff's demand, and claiming equitably to set off the one against the other:—Held, that the plea was bad, as it only afforded ground for a cross action for negligence. *Stimson* v. *Hall*, 1 H. & N. 831; 26 L. J., Ex. 212; 5 W. R. 367.

A consignee of goods under a bill of lading has no right to deduct from the freight the value of goods contained in the bill of lading, but not delivered to him; his remedy is by cross action. *Meyer* v. *Dresser*, 16 C. B. (N.S.) 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

Consignments of oil were made from Colombo to parties resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together and sold in one mass by the captain in the course of the voyage for 750*l*. The consignees then agreed to share the proceeds in proportion to their respective losses:—Held, that in an action brought by the shipowners against an individual consignee for freight and average, the latter could not set off his share (as ascertained by the agreement) of the moneys arising from the oil sold. *Jones* v. *Moore*, 4 Y. & C. 351.

To an action for money lent, the court refused to allow a defendant to plead: first, that the claim was for moneys advanced by the plaintiffs to the defendant upon security on goods consigned by the defendant to them; that it was agreed that they should cause the goods so consigned to be sold on account of the defendant for the best prices which could be got for the same, and out of the proceeds to retain the moneys advanced; that the plaintiffs might have sold the goods for prices more than sufficient to reimburse them the moneys advanced, but they wrongfully and in violation of the agreement sold the goods for prices less than the best prices which might have been got, and by reason of such wrongful act they were prevented from reimbursing themselves the moneys advanced out of the proceeds of the sale; secondly, that the defendant consigned to the plaintiffs goods, to be by them sold at New York for commission at prices not less than the best market price; that they, not regarding their duty, wrongfully sold the goods for prices less than the best market price, whereby the defendant sustained losses; that afterwards it was agreed that they should set off such losses against so much money as might be due from the defendant to the plaintiffs; and that the amount of such losses was equal to the claim of the plaintiffs. *Atterbury* v. *Jarvie*, 2 H. & N. 114; 26 L. J., Ex. 178.

In an action to recover a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by the defendant in order to reduce the amount of the bill, such a collateral breach being the subject of a cross action and not of set-off. *Hennequin* v. *O'Dowd*, 21 L. T. 802.

7. Bills and Notes.

When not Due.]—In an action for goods sold and delivered, the defendant may set off money due upon the plaintiff's acceptance, of which the defendant has become holder since the sale and before delivery of the goods, though he has agreed to give the plaintiff ready money for them. *Cornforth* v. *Rivett*, 2 M. & S. 510.

Where A., two months before his death, accepted a bill payable at his bankers in London, which was discounted by them for a customer, who did not indorse it, and they were the holders on the day it became due, on the morning of which they wrote it off, and an hour afterwards received intelligence by post of the death of A.: —Held, that they were entitled to reimburse themselves out of the funds of A., and pass the amount of the bill to their own account; but the bankers having been in the habit of advancing 1,000*l*. to A. by way of loan, for which sum he gave his promissory note, which was renewed every three months, when they debited him with the full discount:—Held, in an action brought against them by the executors of A. for money had and received, that they could not set off the amount of such note before it became due, upon allowing a rebate of discount for the time it had to run, on the ground that such advance was to be considered as a separate transaction, and not one continued loan; and that no action could be maintained on the note until it became due. *Rogerson* v. *Ladbroke*, 7 Moore, 412; 1 Bing. 93; 1 L. J. (O.S.) C. P. 6.

On the 2nd of January, 1832, the defendants, who were bankers, received from B. C. a bill of exchange for 760*l*., drawn by M. on his partners,

indorsed by him to B. C., and by B. C. to the defendants. On the 6th the bill became due, and M. having failed the same day, the bill was dishonoured. On the 7th, the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C. with a receipt for the amount indorsed on it, and having on the 2nd entered the bill to the credit of B. C., now entered it as a debit. The defendants were also the acceptors of a bill for 1,000*l.*, drawn by B. C., indorsed to M., and due on the 12th of January. On the 9th, B. C. sent back the 760*l.* bill to the defendants, with instructions to carry into effect views expressed by B. C. in a letter addressed to the defendants on the 6th, in anticipation of M.'s failure. That letter was as follows:—"We think that you would be entitled to retain the 1,000*l.* as a set-off for the 760*l.*; at all events we will trust to your doing the best for us in this matter." In an action brought against the defendants by the assignees of M. on the 1,000*l.* bill, the jury having found that the transaction between the defendants and B. C. on the 760*l.* bill was closed on the 7th:—Held, that they could not set-off that bill against the 1,000*l.* *Belcher* v. *Jones*, 10 Bing. 310; 3 M. & Scott, 822; 3 L. J., C. P. 39.

Collusive Possession of.]—When the plaintiff claimed to set off certain bills of exchange against the proceeds of a promissory note, which were claimed to be retained by A., and he was not the bonâ fide holder of the bills, but had got possession of them for the purpose of establishing the set-off, and was under an engagement to re-deliver them to the real holders in case the claim to set off failed, the bill was dismissed. *London, Bombay and Mediterranean Bank* v. *Narraway*, 42 L. J., Ch. 329; L. R. 15 Eq. 93; 27 L. T. 572; 21 W. R. 318.

When Overdue.]—An indorsee of an overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by an indorsee of an overdue note against the payee a distinct debt due to the payee from a former indorsee cannot be set off. *Whitehead* v. *Walker*, 10 M. & W. 696; 12 L. J., Ex. 28. See *Cripps* v. *Davis*, 12 M. & W. 159; 13 L. J., Ex. 217.

The right of an indorsee of an overdue bill of exchange to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer before indorsement of his election to set off the amount against the bill; nor is the indorsee of such overdue bill of exchange affected by the existence of a right to set off as between the acceptor and the drawer, although the bill was indorsed without value and for the purpose of defeating the set-off. *Oulds* v. *Harrison*, 10 Ex. 572; 3 C. L. R. 353; 24 L. J., Ex. 66; 3 W. R. 160.

To an action on a bill of exchange it is a good answer to plead that the defendant accepted the bill, and deposited it with the drawer, along with some canvas, in consideration of a loan, upon the terms that the drawer should have the option of selling the canvas and applying the proceeds to the payment of the bill; and that after the bill was due the drawer sold the canvas for a sum equal to the amount of the bill which he still retained, and indorsed the bill to the plaintiff, who took it, overdue, and without value. *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J., Ex. 112; 5 Jur. (N.S.) 295; 7 W. R. 108—Ex. Ch.

To an action by indorsees against the acceptor of a bill for 3,000*l.*, he pleaded that the bill was accepted for the price of goods, and on the faith of their being shipped for the defendant by the drawer; that the drawer shipped certain of the goods, a portion only of which the defendant received and accepted, amounting in price to 1,200*l.*; that by reason of the non-completion of the shipment the goods actually shipped became useless, and that there never was any value or consideration for the acceptance or payment of the bill; that the drawer paid the full amount of the bill to the plaintiffs; and that the drawer was indebted to the defendant in 1,200*l.*, which he was willing to set off against the plaintiffs' claim:—Held, that the plea was good, since it showed a failure of consideration except as to 1,200*l.*; and as the plaintiffs had been paid the full amount of the bill by the drawer, and sued as trustees for him, the defendant was entitled to set off the debt due to him from their cestui que trust. *Agra and Masterman's Bank* v. *Leighton*, 4 H. & C. 656; 36 L. J., Ex. 33; L. R. 2 Ex. 56.

8. Penalty or Liquidated Damages.

Liquidated Damages but not Penalty may be Set off.]—If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action against him by the obligor who executed. *Fletcher* v. *Dyche*, 2 Term Rep. 32; 1 R. R. 414.

The whole penalty incurred by the non-performance of articles of agreement cannot be pleaded by way of set-off. *Nedriffe* v. *Hogan*, 2 Burr. 1024.

A. and B. entered into an agreement, for the true performance of which each party bound himself to the other in the penal sum of 500*l.*, to be recoverable on breach of the agreement in a court of law as and by way of liquidated damages:—Held, in an action against A. by B., for a breach of the agreement, that the 500*l.* was a penalty, and that A. could not plead it by way of set-off as liquidated damages. *Davis* v. *Penton*, 9 D. & R. 369; 6 B. & C. 216; 5 L. J. (O.S.) K. B. 112.

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated, that in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work, 5*l.* weekly and every week, such penalty to be deducted from the amount which might remain due on the completion of the work:—Held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or recover it. *Duckworth* v. *Alison*, 1 M. & W. 412; 2 Gale, 11; 1 Tyr. & G. 742; 5 L. J., Ex. 171.

A declaration stated a contract, by which the

plaintiff covenanted to complete buildings by 23rd October, and the defendant to pay him 418*l.* on the completion; and if the defendant should order any extra work, he should pay to the plaintiff its value; or if he ordered any diminution or omission the plaintiff should allow the value out of the 418*l.* Also, that if the buildings should not be finished on the 23rd October, the plaintiff should pay the penalty of 1*l.* per day for every subsequent day employed, as liquidated damages, provided that if the defendant should require any additional work the plaintiff should be allowed so much extra time beyond 23rd October as might be necessary for completing the same. The plaintiff averred that the defendant ordered extra work, which required thirty-one days of additional time, and the value of which was 84*l.*, and that the contract would have been fulfilled by October 23rd but for such orders. And he demanded the 418*l.* (minus a sum for diminution), and 84*l.* for the extra work. The defendant pleaded, as to 22*l.*, parcel of the debt, that the extra time necessary for completing the additional work was nine days only, but that the plaintiff had exceeded the time ending on 23rd October by thirty-one days, whereby he became liable to pay the defendant 22*l.*, according to the deed; which he offered to set off:—Held, that the clause for payment of 1*l.* per day applied to the covenant for extra time in respect of extra work, as well as to the clause which fixed a day for completing the contract as originally defined; and that the defendant might deduct, in the form of set-off, 1*l.* per day for the number of days by which the plaintiff had exceeded the necessary time for completing the extra work. *Legge* v. *Harlock*, 12 Q. B. 1015; 18 L. J., Q. B. 45; 13 Jur. 229.

The plaintiffs contracted to complete the erection of certain buildings for the defendants within a fixed time, and in default to pay to the defendants as liquidated damages, 3*l.* for every day from the time fixed for completion, until the work should be completed; and also within the same time, unless an extension of time was granted, to complete all alterations, additions, &c., which might be ordered by the defendants' agents:—Held, that the plaintiffs were bound to pay the 3*l.* for each day that elapsed from the time fixed for completion until the works were completed, even where the alterations and additions, ordered by the defendants' agents, were so mixed up with the building to be erected, that performance of the contract within the prescribed time became impossible. *Jones* v. *St. John's College, Oxford*, 40 L. J., Q. B. 80; L. R. 6 Q. B. 115; 23 L. T. 803; 19 W. R. 276.

See PENALTY—WORK AND LABOUR.

Ascertainment by Arbitrator.]—To a declaration stating that the defendant covenanted that he or A. would pay the plaintiff 6,800*l.*, by instalments, with interest at 4*l.* per cent., with a proviso that, in a certain event, there should be deducted from the five last instalments, sums not exceeding 4,800*l.*, and that, in that event, the plaintiff should repay to the defendant and A. all interest which should have been paid in respect of the sums deducted, and that, in default of payment of any of the instalments, the whole should be recoverable, and averring that default had been made, and that no sum was deductible under the proviso; the defendant set out the deed, which contained a mutual covenant between the plaintiff, the defendant, and A., that if any differences should arise touching the sums which should be deductible under the proviso, it should be referred to an arbitrator, and that the parties should abide by his award; the defendant then pleaded to the five last instalments, and interest, that differences had arisen between the parties to the deed, touching the sums deductible from the five last instalments; and that the plaintiff, the defendant, and A., in pursuance of the covenant in the deed, referred the differences to the arbitrator, to determine what sum (if any), not exceeding 4,800*l.*, should be deducted by the defendant and A., or either of them, from the five last instalments; that the arbitrator awarded that the whole of the 4,800*l.*, being the total amount of the five instalments, should be deducted from the five last instalments; and that the defendant, therefore, claimed to deduct, and deducted, the 4,800*l.* from the five instalments:—Held, a good plea in bar, as to the 4,800*l.*, and interest. *Parkes* v. *Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405; 14 Jur. 761.

9. BY WAY OF DEDUCTION FROM CONTRACT PRICE.

When Deduction may be Made without Set-off.]—Where a person is employed to do work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter not of set-off but of deduction. *Turner* v. *Diaper*, 2 Man. & G. 241; 2 Scott (N.R.) 447.

The plaintiff contracted in writing to do work for the defendant, and to find the materials for it, for a fixed sum. The defendant afterwards supplied a portion of the materials, which the plaintiff accepted, and used up in the work. In an action for the work done by the plaintiff:—Held, that the defendant was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set-off. *Newton* v. *Forster*, 12 M. & W. 772.

If A. employs B. to make bricks for him at a stipulated price per thousand, and B. does so, and some of the bricks are so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly-made bricks out of the stipulated price, and may make such deduction in an action by B. for the stipulated price; but if the bricks are badly made in a trifling degree only, so as merely to be less valuable than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account. *Pardow* v. *Webb*, Car. & M. 531.

In all actions for goods sold and delivered with a warranty, or for work done, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action is worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more. *Mondel* v. *Steel*, 8 M. & W. 858; 1 D. (N.S.) 1; 10 L. J., Ex. 426.

Where, by the custom of the hat trade, the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought

by the dyer, without giving any notice of set-off, although there has not been any previous adjustment of the amount of the damage. *Bamford* v. *Harris*, 1 Stark. 343.

A. contracted to build a shed for B. Terms, everything to be completed to the satisfaction of B.'s engineers, payment 90 per cent. on completion of works, 10 per. cent. to be held over for six months to answer defects in work. A. sent in his bill in February as for a completed shed with a letter containing these words, "as the shed will be completed before the close of the month," and was paid 90 per cent. of the price. In October B., who had done repairs to the shed, which A. declined to do, offered to pay the residue, after deducting the cost of such repairs. In an action by A. for the whole of the residue:—Held, that the defendants were not estopped by the payment in February from showing that the work was not completed, nor from going into the amount of the defective work; that the amount paid by the defendants for repairs was not the subject of a set-off; that there was evidence to go to a jury of work done by A. since February, and that till October six months had not elapsed since the completion of the work. *Moss* v. *L. & N. W. Ry.*, 22 W. R. 532. *Compare cases*, ante, cols. 692, 693.

10. JUDGMENTS.

In what Cases Allowed.]—B. cannot in an action brought against him by A. set off a judgment recovered by him against A. for which A. is charged in execution. *Taylor* v. *Waters*, 2 Chit. 303; 5 M. & S. 103.

In a cross action, the defendant may set off the debt against a judgment for a greater sum, and the court will stay proceedings thereon. *Peacock* v. *Jeffery*, 1 Taunt. 426. *See preceding case.*

No set-off against a judgment in one suit can be allowed of a claim arising out of another separated and distinct suit. *Thompson* v. *Parish*, 5 C. B. (N.S.) 685; 28 L. J., C. P. 153; 5 Jur. (N.S.) 986; 7 W. R. 210.

The plaintiff, a landlord, was liable to the defendant, his tenant, for the costs of an injunction suit for an alleged breach of covenant, which suit had been dismissed. He had subsequently recovered judgment against the defendant in an action for rent. He then became liable to the defendant for damages which had been assessed in chambers, in respect of the wrongful injunction. He was further entitled to his costs of a summons to vary the certificate for damages taken out by the defendant, which had failed:—Held, that he was entitled to set off the judgment debt against the damages but not against the costs of the suit; and that he was also at liberty to set off his costs of the defendant's summons to vary against the costs of the suit. *Throckmorton* v. *Crowley*, L. R. 3 Eq. 196.

A verdict against a plaintiff in a prior action may be set off against a present demand. *Baskerville* v. *Brown*, 2 Burr. 1229; 1 W. Bl. 293. S. P., *Hawkins* v. *Baynes*, 1 L. J. (O.S.) K. B. 167; *Russell* v. *May*, 7 L. J. (O.S) K. B. 88.

By order of nisi prius, a verdict having been entered for the plaintiff, and the plaintiff having by the order agreed to pay the defendant 70*l.*, the court allowed that sum to be set off against the plaintiff's judgment. *Newton* v. *Newton*, 8 Bing. 202; 1 M. & Scott, 366; 1 D. P. C. 264; 1 L. J., C. P. 79.

After verdict for the plaintiff in trover, the goods were seized in the hands of the defendant for rent due to A., which the plaintiff was liable to pay; the defendant having paid the rent, the court allowed him to deduct the amount from the verdict found for plaintiff. *Plevin* v. *Henshall*, 10 Bing. 24; 3 M. & Scott, 403; 2 L. J., C. P. 253.

Cross demand acquired after verdict is not ground for injunction here, to stay proceedings under verdict. *Whyte* v. *O'Brien*, 1 Sim. & S. 551.

Equitable right of set-off enforced after a judgment at law. *Smith* v. *Parkes*, 16 Beav. 115.

Where money, to be set off against a judgment debt, becomes due before the judgment, the judgment is treated in equity as obtained for the difference only. Where such money becomes due at any time after the judgment, it is to be set off firstly against the interest up to that time, and then in diminution of the capital at the same time. Such set-off is not a charge upon the judgment debt, but a satisfaction of it pro tanto. *Jenner* v. *Morris*, 2 N. R. 479; 11 W. R. 943.

A. is a debtor to B. on a judgment, and succeeds in establishing a set-off in equity for moneys advanced to B.'s wife for necessaries. B. has a charge upon estates in which A. has a life interest, such charge, when raised, being payable to the trustees of B.'s settlement. A. cannot claim the same set-off against B. in respect of the charge, because it is not a personal demand on both sides as in the other case. *S. C.*, 1 Dr. & Sim. 334, 218; 30 L. J., Ch. 361; 7 Jur. (N.S.) 375; 3 L. T. 871; 9 W. R. 29, 391.

Where Parties not the Same.]—Although where one of the parties in two cross actions has assigned his interest to a third party, there may be no right to set off the judgment; yet where the assignee being the real plaintiff in one action is also the real defendant in the other, there is such right of set-off. *Standeven* v. *Murgatroyd*, 27 L. J., Ex. 425.

The plaintiff sued out a fi. fa. against E.'s effects. E. having previously assigned all his effects to trustees, for the benefit of his creditors, the sheriff (under an indemnity from the trustees) returned nulla bona. The plaintiff sued the sheriff for a false return. The sheriff obtained a verdict. The court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff. *Hewitt* v. *Pigott*, 1 D. P. C. 250; 1 M. & Scott, 122; 8 Bing. 61; 1 L. J., C. P. 43.

The court allowed one of the defendants, who was chiefly concerned and bound to indemnify his co-defendants, to set off a debt due by the plaintiff to him on a cognovit against a judgment due in an action of trespass against several defendants. *Bourne* v. *Bennett*, 1 M. & P. 141; 4 Bing. 423.

The court will permit the defendants to set off a judgment recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them, notwithstanding the plaintiff may also have a separate demand on one of the defendants. *Glaister* v. *Hewer*, 8 Term Rep. 69.

Third Party's Interests Intervening.]—A judgment recovered by A. against B. and C. will not be set off on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B., under an insolvent debtors act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe* v. *Dainton*, 3 East, 149.

A. having obtained a verdict against B. & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his cheque, and B. & Co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & Co.'s actions in the meantime ripened into judgments. The court allowed the judgments to be set off against each other (subject to the lien, if any, of A.'s attorney) notwithstanding A. had in the meantime become bankrupt, and thus the interests of third parties had intervened. *Alliance Bank* v. *Holford*, 16 C. B. (N.S.) 460.

Effect of Solicitor's Lien.]—The lien of an attorney does not constitute the relation of trustee and cestui que trust between him and his client so as to prevent the defendant in a cross action pleading a set-off, but is at most only a ground for the summary interference of the court on an application to set off cross judgments. *Mercer* v. *Graves*, 41 L. J., Q. B. 212; L. R. 7 Q. B. 499; 26 L. T. 551; 20 W. R. 605. See *Alliance Bank* v. *Holford*, supra, and cases sub-tit. SOLICITOR.

Judgment obtained after Declaration.]—A judgment obtained by a defendant against the plaintiff, after the declaration, and before plea, may be pleaded as a set-off. *Reynolds* v. *Beerling*, 1 Dougl. 112; 4 Dougl. 181.

Error depending.]—A judgment may be pleaded by way of set-off, although a writ of error is depending thereon. *Ib.*

Judgment against some by Default.]—Where there are many defendants, and some go to trial and obtain a verdict, but others suffer judgment by default, the court will permit the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those defendants who had a verdict. *Schoole* v. *Noble*, 1 H. Bl. 23.

New Trial.]—Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages, the court refused to stay proceedings in the first action until a motion for a new trial in the other was disposed of, in order that the damages and costs in the action might be set off against the costs of the other. *Johnson* v. *Lakeman*, 2 D. P. C. 646.

Execution Issued.]—A tenant having obtained judgment, and issued execution against his landlord, afterwards became indebted to him for arrears of rent and dilapidations:—Held, that the landlord was not entitled in equity to restrain proceedings upon the judgment on the ground of set-off. *Maw* v. *Ulyatt*, 31 L. J., Ch. 33; 7 Jur. (N.S.) 1300; 5 L. T. 251; 10 W. R. 4.

Payment into Court.]—In an action for freight, and cross action for unliquidated damages against a foreign seaman, the court refused to permit the freight to be paid into court, as a fund liable to payment of the damages when ascertained. *Sherborne* v. *Siffkin*, 3 Taunt. 525.

Verdict recovered merely.]—The amount of a verdict recovered cannot be set off against the amount of a judgment. *Garrick* v. *Jones*, 2 D. P. C. 157.

Defendant in Execution.]—The taking a debtor in execution on a judgment may be replied to a plea of set-off on such judgment. *Taylor* v. *Waters*, 2 Chit. 303; 5 M. & S. 103.

Taking the defendant in execution is not an absolute extinguishment of the debt so as to preclude the plaintiff applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the same suit. *Thompson* v. *Parish*, 5 C. B. (N.S.) 685; 28 L. J., C. P. 153; 5 Jur. (N.S.) 986; 7 W. R. 210.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques* v. *Whitby*, 1 Term Rep. 557.

Judgments in Different Courts.]—It is no objection to an application to set off two judgments against each other, that they are in different courts in this country, provided the parties are respectively beneficially, as well as legally, interested in such judgments. *Bristowe* v. *Needham*, 8 Scott (N.R.) 366; 7 Man. & G. 648.

A judgment in king's bench might have been set off against a judgment in common pleas so as to narrow the execution to the balance due. *Barker* v. *Braham*, 2 W. Bl. 869; 3 Wils. 396.

The defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in king's bench on his acknowledging satisfaction for the amount upon a judgment obtained by him in common pleas against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment. *Simpson* v. *Hadley*, 1 M. & S. 696. Overruled by *Taylor* v. *Waters*, supra.

A judgment for the plaintiff in common pleas may be set off against a judgment for the defendant in king's bench although plaintiff is dead, and the judgment assets in the hands of her administrator. *Bridges* v. *Smith*, 8 Bing. 29; 1 M. & Sc. 93; 1 D. P. C. 242; 1 L. J., C. P. 33.

In December, 1854, A., as attorney for the plaintiffs, commenced an action at their suit in the queen's bench against the defendant, in which they had a verdict for 50*l.*, and on the 28th March, 1855, judgment was signed for the damages and costs, together amounting to 85*l.* 4*s.* All the proceedings, down to final judgment inclusive, were carried on in the name of A., as attorney for the plaintiffs, but before the trial an arrangement was made between A. and B., another attorney, by which the proceedings were carried on by B. in the name of A. until the 26th February, 1856, when an order to change the attorneys was made, and B. was substituted for A. as the plaintiffs' attorney. On the day after the trial B. purchased the interests of the plaintiffs in the verdict for 50*l.*, and gave notice to the defendants' attorney. In July, 1855, the plaintiffs were nonsuited in another action which they brought in the common pleas against the defendant, and on the 21st January, 1856, judgment of nonsuit, with 71*l.* 1*s.* 6*d.* costs, was signed against the plaintiffs. Upon an application by the defendant to set off that sum against the damages and costs in the action in the queen's bench:—Held, that there was no absolute

right to have one judgment set off against the other. *Simpson* v. *Lamb*, 7 El. & El. 84; 26 L. J., Q. B. 121; 3 Jur. (N.S.) 412; 5 W. R. 227.

D. BY AND AGAINST WHOM.

1. Agents, Factors, and Brokers.

Broker—No Authority to Sell as Principal.]—The character of broker is materially different from that of factor; and, therefore, where a broker sells goods, without disclosing the name of his principal, in so doing he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand for goods made by the principal. *Baring* v. *Corrie*, 2 B. & Ald. 137; 20 R. R. 383. See *Wynen* v. *Brown*, 4 L. J. (O.S.) K. B. 203.

—— **Del credere.**]—A broker, who pays to A. the price of goods sold by him for A. under a del credere commission, is entitled to set off the amount against the assignees of B., for whom he bought the goods. *Morris* v. *Cleasby*, 1 M. & S. 576; 14 R. R. 531.

Where a person purchased, as broker for B., the goods of A., for whom he sold them under a del credere commission, and did not disclose at the time the name of A., but disclosed it soon after, and afterwards paid A. the price:—Held, that, in an action by the assignees of B. to recover the balance due upon a resale of the goods made by the broker on account of B., he was not entitled to set off, either under 2 Geo. 2, c. 22, s. 13, or 5 Geo. 2, c. 30, s. 28, the payment made to A. *Morris* v. *Cleasby*, 4 M. & S. 566; 16 R. R. 544.

And where a broker has effected policies in the name of his principal under a del credere commission, he cannot set off losses which have happened on those policies, although those claimed are total, and he has accounted for them with his principal. *Cumming* v. *Forrester*, 1 M. & S. 494; 14 R. R. 511.

But where the broker has guaranteed the payment of an average loss adjusted by an underwriter, to the persons insured under a del credere commission, he may set it off. *Wienholt* v. *Roberts*, 2 Camp. 586.

In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to bankrupt, semble, that the broker cannot set off a loss on policy effected by him as agent, without a commission del credere, where there has been no adjustment, though the loss take place before the bankruptcy. *Baker* v. *Langhorn*, 6 Taunt. 519; 2 Marsh. 215; 4 Camp. 396; 16 R. R. 662.

—— **Money Advanced by.**]—A defendant cannot set off a debt due from a principal against a claim by a broker who had advanced money on goods, and declared on a special contract respecting the sale of them as his own goods, though the sale-note mentioned the name of the principal. *Atkyns* v. *Amber*, 2 Esp. 493.

Agent Acting beyond Authority.]—A ship's husband and part owner in this country employed an agent in Quebec to obtain freight. The agent did so, made it payable to himself at Quebec, and set it off against a debt due to him by the ship's husband:—Held, that the agent was liable, and that he had no right either to make the freight so payable or so to set it off. *Walshe* v. *Provan*, 1 C. L. R. 823; 8 Ex. 843; 22 L. J., Ex. 355.

Agent from Necessity.]—The plaintiffs, who were merchants at Dieppe, sold to the defendant, a merchant at Wisbeach, a cargo of oil-cake, and delivered the same at Wisbeach, in December, 1841. The defendant paid for the cargo; but afterwards, considering that it did not answer the sample, landed a portion of it for the purpose of examination, and afterwards landed the whole, and lodged it in the public granaries. He then informed the plaintiffs that it lay there at their risk and costs, and required them to take it back. This the plaintiffs refused to do. After some negotiation, the defendant, in May, 1842, gave notice to the plaintiffs that the cargo was lying at the granaries at their disposal, and if no directions were given by them would be sold, and the proceeds applied in part payment of the defendant's damages; the plaintiffs answered, that they considered the transaction at an end, and demanded payment of the price, whereupon the defendant offered the cargo for sale in his own name, and afterwards sold it in his own name to a third party:—Held, that the defendant had accepted the goods, and was not to be considered an agent of the plaintiffs from necessity; and, therefore, that he could not, in an action against him for the price of the goods, set off the money paid by him for the goods as money received by the plaintiffs for his use. *Chapman* v. *Morton*, 11 M. & W. 534; 12 L. J., Ex. 292.

Auctioneer.]—An auctioneer suing B. for the price of goods sold by him as such:—Held, that B. might set off a debt due to him from the principal vendor. *Jarvis* v. *Chapple*, 2 Chit. 387.

And see Auction and Auctioneer.

After Notice of Assignment.]—A., a firm in Calcutta, having, as such, dealings with B., a firm in London, who acted as their agents, employ them to receive for them the dividends of stock in England, which had been bequeathed to them by their father (whom they succeeded in the firm, and who had also employed B. as his agents), and they request B. to carry the dividends to a separate account in their different names. The dividends were accordingly received by B., one of the partners taking out administration for the purpose, and in their correspondence with A. they treat them as a separate item of account, but it did not appear clearly from the correspondence what was the understanding as to these moneys being or not being applicable to the general account. The house of A., which did not then include all who were beneficially included in the stock, becoming afterwards indebted, assigned all their property to trustees for their creditors:—Held, that all the interest of the then firm in the stock passed by the assignment, and that B. had no right to retain in payment of a debt to them any part of the dividends received after notice of the assignment. *Colvin* v. *Hartwell*, 5 Cl. & F. 484.

Payment by Agent—Ratification.]—It is a good answer to a plea of set-off, that the amount has been paid by a person professing to act as agent for and on account of the plaintiff, though without his authority, and that the latter ratified the act at the time of the trial. *Simpson* v. *Eggington*, 10 Ex. 845; 24 L. J., Ex. 312.

The treasurer of a corporation paid their clerk

the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corporation to make such payment; but the treasurer had no such authority, and the corporation afterwards repudiated the payment and dismissed the clerk from their services. In an action against him for the recovery of incomes paid to him on account of the corporation:—Held, that the corporation was entitled, at the trial, to ratify the act of their treasurer, and consequently that the clerk could not set off the amount of his salary as due to him from the corporation. *Ib.*

Sale without Notice that it is for Principal.]—If a factor, who sells under a del credere commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal. *George* v. *Clagett*, 7 Term Rep. 359; 2 Esp. 557; Peake's Add. Cas. 131; 4 R. R. 462.

When a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set-off any claim he may have against the factor in answer to the demand of the principal. *Rabone* v. *Williams*, 7 Term Rep. 360, n; 4 R. R. 463, n.

Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account. *Cooke* v. *Eshelby*, 56 L. J., Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629—H. L. (E.)

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief on the subject whether they made this contract on their own account or for a principal:—Held, that C. could not in an action brought by the principal for the price of the cotton set off a debt due from L. & Co. *Ib.*

Where the plaintiff employed an agent to sell an estate, which he accordingly sold to the defendant, and on the settlement of the purchase money the defendant set off a debt due to him from the agent and paid over the balance:—Held, that the plaintiff was not precluded, by having executed the conveyance in ignorance of the arrangement by his agent, from recovering from the defendant the sum so set off. *Young* v. *White*, 7 Beav. 506; 13 L. J., Ch. 418; 8 Jur. 654.

And where the broker does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, and is still liable to the vendor. *Waring* v. *Favenck*, 1 Camp. 85.

The plaintiffs, who were bankers, employed a firm of merchants in London, in whose name certain policies of marine insurance were taken out, to collect from the underwriters contributions in respect of general average losses. The merchants sent the policies to the defendants, who were insurance brokers, and instructed them to collect the moneys from the underwriters. The defendants, when they collected the moneys, did not know, nor had they any reason to believe, that the merchants were only acting as agents in the matter. In an action by the plaintiffs to recover the moneys so collected:—Held, that the defendants could set off against the claim of the plaintiffs a debt due from the merchants to them at the time when they collected the moneys. *Montagu* v. *Forward*, [1893] 2 Q. B. 350; 4 R. 579; 69 L. T. 371; 42 W. R. 124—C. A.

In order to constitute a valid defence within the rule in *George* v. *Clagett* (7 Term Rep. 359), the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued. It is not necessary, in such a plea, to negative "means of knowledge" that the seller was dealing as an agent. *Borries* v. *Imperial Ottoman Bank*, 43 L. J., C. P. 3; L. R. 9 C. P. 38; 29 L. T. 689; 22 W. R. 92.

Plea to an action for goods sold and delivered, that the goods were, with the privity of the plaintiff, sold and delivered to the defendant by S., the agent of the plaintiff, in the name and as the goods of S., and that the defendant never knew the plaintiff as the owner; that at the time of the sale and delivery S. was and still is indebted to the defendant in a sum exceeding the price of the goods, and that the defendant is ready and willing to set off and allow to the plaintiff the price of the goods out of the money so due and owing from S.:—Held, good. *Carr* v. *Hinchliffe*, 7 D. & R. 42; 4 B. & C. 547; 4 L. J. (O.S.) K. B. 5. S. P., *Purchell* v. *Salter*, 1 Q. B. 197, 209; 1 G. & D. 682; 10 L. J., Q. B. 81; 11 L. J., Ex. 433.

It being within the ordinary scope of a factor's authority to sell his principal's goods in his own name, a purchaser who has no knowledge of the agency is entitled to set off against the price of the goods a debt due to him from the factor personally. *Dixon, Ex parte, Henley, In re*, 46 L. J., Bk. 20; 4 Ch. D. 133; 35 L. T. 644; 25 W. R. 105—C. A.

—— Custom of Stock Exchange.]—A country stockbroker, acting on behalf of an undisclosed principal, instructed the defendants, members of the London stock exchange, to sell certain shares. The defendants sold the shares, and deducted from the purchase money the amount which the country broker owed them in respect of prior transactions. In an action by the undisclosed principal to recover the amount so deducted, the defendants set up a custom of the London stock exchange that they were entitled to treat the country broker as the principal, and to set off against the purchase money the amount of their claims against him:—Held, that the alleged custom was unreasonable, and that the defendants must show that the undisclosed principal knew of the custom before the sale, and agreed to be bound by it. *Blackburn* v. *Mason*, 4 R. 297; 68 L. T. 510—C. A.

Notice as to Principal—Time for—Sufficiency.]—A principal had stipulated with his factor that bills of exchange for the price of goods sold should be made payable in such a manner as to show the factor's connection with the principal,

and they were, in fact, stamped, "Agent for W. Dixon (Lim.), Calder and Govan Ironworks, Glasgow," in pale blue ink, but so that the stamp was concealed or obscured by the agent's signature:—Held, that the purchase being from a factor, and not a mere agent, the stipulation was immaterial as regarded the purchaser, unless he was affected with notice, and that the stamping of the bills was not sufficient evidence of notice against the purchaser's uncontradicted oath that he was unaware of any agency. *Dixon, Ex parte, Henley, In re*, supra.

Where before goods are all delivered, or any part of them paid for, the purchaser is informed that they belong to a third person, he has a right of set-off against the principal. *Moore* v. *Clementson*, 2 Camp. 22. See also *New Zealand Land Co.* v. *Watson*, 50 L. J., Q. B. 433; 7 Q. B. D. 374; 44 L. T. 675; 29 W. R. 694—C. A.

A factor was employed to sell a cargo of goods consigned to him, and on the 6th February sold to A. one parcel of the goods, and delivered to him an invoice in his own name. On the 13th A. applied to purchase another parcel, but some difference occurring as to the price, the factor said he must write to his principals. He did so, and on the 20th informed A. of their answer. A. bought the goods at the price named by the principals, and the factor delivered to him an invoice and a bought note in the name of the principals; the payment to be at four months in cash. On the same day, and on other occasions within that period, A. made payments to the factor, not expressly on account of these goods. It appeared that it was the factor's practice, when he sold goods on his own account to pay himself advances, to deliver an invoice in his own name; when he sold merely as a broker, to deliver a bought note. In an action by the owners of the goods against A., for the price of the parcel sold on the 6th February, the jury found that the factor communicated to A. that he sold the goods for other persons as principals, but that A., until the 20th February, bonâ fide believed that he sold to pay himself advances; and that, using the ordinary precaution of merchants, A. was not bound to make further inquiry:—Held, that A. was entitled to set off the payment made by him to the factor. *Warner* v. *M'Kay*, 1 M. & W. 591; 2 Gale, 86; 1 Tyr. & G. 965; 5 L. J., Ex. 276.

Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants, before effecting the policies, had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of the general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything, except the premiums, stamps, and commission in respect of the insurance. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33: 8 App. Cas. 874; 32 W. R. 125—H. L. (E.) Affirming 47 L. T. 318—C. A.

If a buyer purchases goods of a factor, with the knowledge that he sells as factor and not as principal, the buyer cannot set off a debt due to him from the factor, in an action for the price of the goods bought by the principal. *Fish* v. *Kempton*, 7 C. B. 687; 18 L. J., C. P. 206; 13 Jur. 750.

One who buys goods of a person whom he knows to be selling them as an agent, cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know and had not the means of knowing who was the real owner. *Semenza* v. *Brinsley*, 18 C. B. (N.S.) 467; 34 L. J., C. P. 161; 11 Jur. (N.S.) 409; 12 L. T. 265; 13 W. R. 634.

A. placed timber in the hands of H., a factor, for sale on a del credere commission. B. bought it through the agency of C., a broker, who (as H. was aware) had prior knowledge of the fact that the timber was the property of A., and that H. was selling as factor only. C.'s knowledge of the relative position of A. and H., however, was not communicated to B., who made the purchase bonâ fide, although he was aware that H. was in the habit of selling timber as factor:—Held, in an action by A. against B. for the price of the timber, that B. was affected by the knowledge of his broker, C., and therefore could not set off against the price of the timber so bought for him a debt due to him from H. *Dresser* v. *Norwood*, 17 C. B. (N.S.) 466; 34 L. J., C. P. 48; 10 Jur. (N.S.) 851; 11 L. T. 111; 12 W. R. 1030—Ex. Ch.

To an action for money received, the defendants pleaded that they, at the request and with the consent of the plaintiff, dealt with and treated F. as the principal in the transaction in respect of which the moneys were received by the defendants, and as the party with whom alone they were dealing; that the plaintiff authorised and requested the defendants to receive any moneys resulting from the transaction on account of and as the moneys of F., and on the terms that they might deal with such moneys as his moneys; averment, that the moneys, being the moneys resulting from the transaction, were afterwards, in pursuance of the request, authority, and consent of the plaintiff, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of F.; that, upon the faith, and in consequence of the request, authority, and consent of the plaintiff, the defendants afterwards gave credit to F. in respect of divers other transactions, and were induced to allow F. to incur debts to them which were still due; and that, before and at the time when the moneys were so received by the defendants, on account of and as the moneys of F., he, F., was and still remained indebted to the defendants for and in respect of the debts thereinbefore mentioned in an amount equal to the plaintiff's claim, which amount the defendants were willing to set off:—Held, bad. *Ferrand* v. *Bischoffsheim*, 4 C. B. (N.S.) 710; 27 L. J., C. P. 302.

When an agent is permitted to, and does, sell goods, as if he is a principal, and becomes bankrupt, it is no defence to an action by the principal against the vendee for not accepting the goods, that there were mutual credits, not alleged to be the subject of an ordinary set-off, between

the agent and vendee, resulting in a balance in favour of the latter. *Turner* v. *Thomas*, 40 L. J., C. P. 271 ; L. R. 6 C. P. 610 ; 24 L. T. 879 ; 19 W. R. 1170.

Compare cases, sub tit., PRINCIPAL AND AGENT.

2. SOLICITORS.

Costs—No Bill Delivered.]—An attorney may set off the amount of his costs, although he has not delivered a bill one month before the action. *Brown* v. *Tibbits*, 11 C. B. (N.S.) 855 ; 31 L. J., C. P. 206 ; 6 L. T. 385 ; 10 W. R. 465.

The defendant, under a plea of set-off, put in an account rendered to him by the plaintiff, by which he charged himself with items due to the defendant. On the other side of the account were items due to the plaintiff for costs as an attorney, but for which no signed bill was proved to have been delivered ; and which left a balance due to the plaintiff :—Held, that the plaintiff was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it. *Harrison* v. *Turner*, 10 Q. B. 482 ; 16 L. J., Q. B. 295 ; 11 Jur. 817.

Money out of Pocket—Negligence.]—An attorney undertook to conduct a cause, charging his client only money out of pocket. The client advanced money to the attorney during the progress of the cause, which was properly expended in carrying it on. By subsequent negligence in the attorney the cause failed :—Held, first, that attorney was not entitled to recover money out of pocket, paid by him subsequently to the negligence of which he had been guilty ; and, secondly, that the client was not entitled to set off the money advanced and expended previously to such negligence. *Lewis* v. *Samuel*, 8 Q. B. 685 ; 15 L. J., Q. B. 218 ; 10 Jur. 429.

3. EXECUTORS AND ADMINISTRATORS.

Debt due from or to—Debt to or from Testator.]—A debt from the testator cannot be set off in an action for money had and received to the use of the plaintiff as executor. *Schofield* v. *Corbett*, 6 N. & M. 527 ; 11 Q. B. 779, n.

A set-off for money due from the plaintiff to a testator in his lifetime may be pleaded in answer to a declaration on a cause of action which accrued to the plaintiff from the defendant, as executor, after the death of the testator. *Blakesley* v. *Smallwood*, 8 Q. B. 538 ; 15 L. J., Q. B. 185 ; 10 Jur. 470.

In an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants sought to avail themselves of a debt due to them from the intestate as one of the several makers of a promissory note which did not become due until after the intestate's death :—Held, that the claim could not be relied on as a set-off. *Newell* v. *National Provincial Bank of England*, 45 L. J., C. P. 285 ; 1 C. P. D. 496 ; 34 L. T. 533 ; 24 W. R. 458.

To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Rees* v. *Watts*, 11 Ex. 410 ; 25 L. J., Ex. 30 ; 1 Jur. (N.S.) 1023 ; 3 W. R. 575—Ex. Ch.

An executor, sued as such for a debt which accrued to the plaintiff from the testator in his lifetime, cannot set off a debt for money had and received to the defendant's use, as executor, and money due on an account stated with him as executor since the death of the testator, the debt sued for, and the debt sought to be set off, not being mutual. *Wardall* v. *Thellusson*, 6 El. & Bl. 976 ; 3 Jur. (N.S.) 314 ; 5 W. R. 25.—Ex. Ch.

A creditor of an intestate purchased part of the intestate's goods of his administrator :—Held, that he could not set off the amount against a debt due to him from the intestate at his decease. *Lambarde* v. *Older*, 17 Beav. 542 ; 23 L. J., Ch. 18 ; 17 Jur. 1110 ; 2 W. R. 32.

To an action against an executor for a debt due by his testator, he pleaded that, at the death of the testator, the plaintiff was indebted to him in an equal amount, which being still due, the defendant was willing to set off against the plaintiff's claim. The plaintiff replied on equitable grounds, that the testator devised and bequeathed to him a freehold estate and a sum of money, and devised and bequeathed other property, real and personal, to his other children, and declared that the money and other effects already advanced and delivered by him to his children should be deemed advancements, and that they should not be required to account for the same ; averring that the matters of set-off were money and effects so advanced :—Held, a bad replication. *Gulliver* v. *Gulliver*, 1 H. & N. 174 ; 25 L. J., Ex. 341 ; 2 Jur. (N.S.) 1051.

To a declaration in an action on a covenant by husband and wife as administratrix, a set-off of money due to the intestate cannot be supported. *Warn* v. *Bickford*, 7 Price, 550.

The trustee in bankruptcy of bankers sued their customer for the balance due upon his private account. The customer had another account with the bank as executor, and at the time of the bankruptcy the balance on this account was in his favour. Under the will of his testator the customer was both executor and residuary legatee, and at the time of the bankruptcy he had assets in his hands, exclusive of the balance in the bank, more than sufficient to provide for all bequests which remained unpaid, and to leave a balance due to him as residuary legatee :—Held, that he was entitled to set off the balance due to him on the executorship account, since the bank might have sued him in his own name if he had overdrawn it, the only effect of opening the account as executor being to give notice that there might be equitable rights. *Bailey* v. *Finch*, 41 L. J., Q. B. 83 ; L. R. 7 Q. B. 34 ; 25 L. T. 871 ; 20 W. R. 294.

In an action by the executors of an underwriter against a broker, for premiums due on policies subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death. *Houston* v. *Robertson*, 2 Marsh. 138 ; 6 Taunt. 448 ; 4 Camp. 342 ; Holt, 88 ; 16 R. R. 655.

Even though the policies were effected under a del credere commission. *Houston* v. *Bordenave*, 2 Marsh. 141 ; 6 Taunt. 451 ; 16 R. R. 657.

See also EXECUTOR AND ADMINISTRATOR.

4. Husband and Wife.

Action by or against—Debt due from or to.]—A debt due to a man in right of his wife cannot be set off in an action against him on his own bond. *Paynter* v. *Walker*, Bull. N. P. 179.

Nor can a debt, due from a wife dum sola, be set off in an action by the husband alone. *Wood* v. *Akers*, 2 Esp. 594.

Unless he has promised to pay the debt after marriage, and thereby made it his own. *Ib.*

A debt from a bankrupt to a married woman dum sola, cannot be set off against a debt from her husband to the bankrupt. *Blagden, Ex parte*, 19 Ves. 465 ; 2 Rose, 249.

Where a promissory note is given to a married woman, the husband may sue on it in his own name only, and then a debt due to the maker from the wife dum sola cannot be set off. *Burrough* v. *Moss*, 10 B. & C. 558 ; 5 M. & Ry. 296 ; 8 L. J. (O.S.) K. B. 287.

In an action by assignees of a bankrupt on a promissory note given to his wife before marriage, the maker cannot set off a debt due to him from the bankrupt. *Yates* v. *Sherrington*, 11 M. & W. 42 ; 2 D. (N.S.) 803 ; 12 L. J., Ex. 216.

Upon the bill of a married woman entitled to a share of the personal estate as one of the next of kin of the intestate against her husband and administrator, the latter claiming to retain toward satisfaction of a debt by bond from the husband to him, it was declared he was not entitled to retain. *Elibank* (*Lady*) v. *Montolieu*, 5 Ves. 737 ; 5 R. R. 151.

A person advancing to a married woman, deserted by her husband, and left wholly without provision, sums of money which have been actually laid out in the purchase of necessaries for her, is, in a court of equity, entitled to stand in the place of the tradespeople supplying those necessaries, and the sums so advanced and so laid out, constitute an equitable set-off against a legal debt due to the husband from the person making those advances. *Jenner* v. *Morris*, 1 Dr. & Sm. 218. Affirmed 30 L. J., Ch. 361 ; 7 Jur. (N.S.) 375 ; 3 L. T. 871 ; 9 W. R. 391.

A. and his wife and children were entitled under a settlement to 1,500*l.* charged on real estate of which B. was tenant for life ; the 1,500*l.* was the wife's property vested in trustees for the husband for life, with usual remainders. A. was indebted to B. for money advanced for the wife :—Held, that on raising the charge, B. could not set off his claim against A.'s life interest. *Jenner* v. *Morris*, 2 N. R. 479 ; 11 W. R. 943.

5. Insurance Cases.

Underwriter and Broker—Fraudulent Loss.]—Three underwriters, on a representation of a loss, paid their subscriptions, amounting to 600*l.*, into the hands of the broker, who, by their joint authority, paid over 300*l.* The loss turned out to be fraudulent, and one of the underwriters brought an action against the broker to recover back his 200*l.* :—Held, that the broker was entitled to set off the 300*l.* paid over against this demand, and that the court could not enter into the account to see what each party was entitled to respectively. *Silva* v. *Linder*, 2 Marsh. 437.

—— **Premiums.**]—An insurance broker, being sued for premiums received by him on policies subscribed by the plaintiff, was allowed to set off a loss on one of those policies effected in the name of the broker, at the request of a third person, on goods in which such third person was interested, but on which the broker had a lien to a greater amount than the set-off claimed. *Davies* v. *Wilkinson*, 4 Bing. 573 ; 1 M. & P. 502 ; 6 L. J. (O.S.) C. P. 121 ; 29 R. R. 634.

Upon an action against the underwriter for a loss, the underwriter cannot set off the premiums although they have never been paid, unless he can make it appear that the state of the relative accounts between assured, broker, and underwriter, is such as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured, that he has paid the premium to the underwriter. *De Gaminde* v. *Pigou*, 4 Taunt. 246.

Debt—Claim on Life Policy Moneys.]—B. being indebted to A., gave him money to effect an insurance ; as a security A. took the insurance in his own name, and shortly afterwards died. The executors received the money from the insurance office, and sued B. for the debt, who was not allowed to set off the amount obtained from the insurance office. *White* v. *Gompertz*, 1 L. J. (O.S.) K. B. 52.

Damages must be Liquidated.]—Notwithstanding that a marine policy of insurance is a contract of indemnity, it is to be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages. *Irving* v. *Manning*, 6 C. B. 391. See *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365 ; 3 C. L. R. 61 ; 24 L. J., C. P. 2 ; 18 Jur. 1024 ; 3 W. R. 116—Ex. Ch.

Action to recover a partial loss on a valued policy of insurance. Plea, that the loss was adjusted between the plaintiff and the defendant at a certain rate per cent., and that the amount payable by the defendant to the plaintiff was thereby liquidated, and ascertained to be a sum certain ; against which the defendant has a set-off for premiums of insurance :—Held, a bad plea, the action being for unliquidated damages, which were not liquidated by the adjustment, as it would not be conclusively binding on the parties. *Luckie* v. *Bushby*, 13 C. B. 864 ; 1 C. L. R. 685 ; 22 L. J., C. P. 220 ; 17 Jur 625 ; 1 W. R. 455.

A declaration on a policy of insurance on a ship and cargo alleged an average damage or loss on a portion of the cargo insured, and a breach by reason of the non-payment of the defendant's proportion of the average loss. Plea, set-off for premiums :—Held, bad, as the action was for unliquidated damages. *Boddington* v. *Castelli*, 1 El. & Bl. 879 ; 1 C. L. R. 281 ; 23 L. J., Q. B. 31 ; 17 Jur. 781 ; 1 W. R. 359—Ex. Ch. S. P., *Pellas* v. *Neptune Marine Insurance Co.*, 49 L. J., C. P. 153 ; 5 C. P. D. 34 ; 42 L. T. 35 ; 28 W. R. 405—C. A.

Underwriters and Assured.]—The assured had subsequently to the date of a policy of insurance on goods executed a deed of inspectorship under the Bankruptcy Act, 1851, s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents :—Held, that he was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the assured to them

under the mutual credit clause, s. 171, of the Bankruptcy Act, 1849. *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; 27 L. T. 120; 20 W. R. 801.

6. Master and Servant.

What may be Set off against Wages.]—In an action by a servant against his master for wages, the latter cannot generally set off the value of goods lost by the negligence of the former; but if it was part of the original agreement and understanding between them, that the servant should pay out of his wages for his master's goods lost through his negligence, the value of the goods so lost may be deducted from the amount of the wages. *Le Loir* v. *Bristow*, 4 Camp. 134.

In an action for work and labour, and goods sold and delivered, the defendants pleaded that the services were performed, and the goods sold, in pursuance of an agreement between the plaintiff and defendants, that the former should navigate certain barges for the defendants, who were common carriers by water; and that the plaintiff should be responsible for the safety and due delivery of all goods taken on board by him; and that the amount of any pilferages or damage sustained should be deducted from his wages, and might be pleaded or set off accordingly; and concluded by averring a loss by pilferage of wine delivered to the plaintiff in the course of his employment; and that the defendants were rendered liable to pay in respect thereof a sum exceeding the amount of the plaintiff's wages, and offered to set off the difference:—Held, that the plea was good in substance. *Cleworth* v. *Pickford*, 7 M. & W. 314; 8 D. P. C. 873; 10 L. J., Ex. 41.

The defendant was a clerk to the plaintiffs under an agreement for an annual salary determinable by three months' notice, or on payment of three months' salary. The plaintiffs, discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him without notice or salary. They subsequently sued him in a county court to recover money which he had received to their use. The defendant admitted the receipt of the money, but relied as a defence by way of a set-off on a claim for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—Held, that although there were no sufficient grounds for depriving the defendant of his salary, yet as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became on the dismissal a debt to the defendant, and was a proper subject of set-off. *East Anglian Ry.* v. *Lythgoe*, 2 L., M. & P. 221; 10 C. B. 726; 20 L. J., C. P. 84.

7. Partners.

Authority of, to allow Set-off.]—A. and B. were partners in a firm. A. allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which B. had in the debt. B. filed a bill against the debtor and against A., to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of A.:—Held, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him. *Piercy* v. *Fynney*, 40 L. J., Ch. 404; L. R. 12 Eq. 69; 19 W. R. 710.

One Partner a separate Trader.]—Where one was a partner in a firm, and also carried on a separate trade himself, and the firm, being indebted to him, remitted to him a note given to them by a third person:—Held, that in an action on the note by him as indorsee against the maker, the latter might set off a demand which he had against the firm. *Puller* v. *Roe*, Peake, 197.

Incoming Partner.]—F. & H., attorneys, sued the defendant for work and labour; the defendant pleaded a set-off, for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, notwithstanding F. had, after the commencement of the partnership, admitted the receipt of the money. *France* v. *White*, 8 Scott, 257; 8 D. P. C. 53; 6 Bing. (N.C.) 33; 9 L. J., C. P. 27.

Surviving Partner.]—A debt due to a surviving partner may be set off against a demand on him in his own right. *Slipper* v. *Stidstone*, 1 Esp. 47; 5 Term Rep. 493. S. P., *French* v. *Andrade*, 6 Term Rep. 582.

Only Apparent Partner.]—So, a debt due from one who was the only apparent trader may be set off in an action by himself and partners. *Stracey* v. *Deey*, 2 Esp. 469, n.; 7 Term Rep. 361, n.

Survivor Insolvent — Deceased Partner.]—Joint simple contract creditor may proceed against a clear residue of assets of deceased partner, the survivor being insolvent; and may set off, against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of debt secured. *Cheetham* v. *Crook*, M'Clel. & Y. 307.

—— Outgoing Partner.]—A. and B. entered into partnership as brewers, A. bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, &c., at a valuation, but the amount was not to be paid till the mortgages were satisfied. B. became bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of his bankruptcy. *Rowe* v. *Anderson*, 4 Sim. 267.

Retiring Partner — Assignment by.]—A retiring partner received security from the continuing partners for his share, and which he assigned to third parties:—Held, that the assignees took subject to the right of equitable set-off of the continuing against the retiring partner. Held, also, that the assignees having

assented to a substituted security in 1846, in lieu of a prior one in 1845, were subject to all the equities existing at the date of the second security. *Smith* v. *Parkes*, 16 Beav. 115.

Legacy to Partner.]—The assignees of a firm indebted to the testator are not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Smith* v. *Smith*, 3 Giff. 263; 31 L. J., Ch. 91; 7 Jur. (N.S.) 1140; 5 L. T. 302.

Continuing and Retired Partner.]—As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan. *Lee* v. *Flood*, 2 Sm. & G. 250; 2 W. R. 348.

Change in Firm—Assignment of Bond.]—If a customer borrows money from his bankers and gives a bond to secure it, and afterwards on his general banking account a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond exists both at law and in equity. If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond and the debtor in the general account would be different persons; but as, in equity, the persons entitled to the bond and the debtors on the general account would be the same person, a right of set-off would exist, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him. *Cavendish* v. *Geaves*, 24 Beav. 163; 27 L. J., Ch. 314; 3 Jur. (N.S.) 1086; 5 W. R. 615.

Annuity to Widow from Profits—How Ascertained.]—By articles of partnership, entered into in May, 1843, between A. and B. as solicitors, it was agreed, that on the death of either the surviving partner should during the joint lives of himself and the widow of the deceased partner pay to the appointee of the deceased partner an annuity of 200*l.*, or one-fourth part of the profits of the business according as the surviving partner should elect. In August, 1843, A., on his marriage with the petitioner, made an appointment in her favour of an annuity of 200*l.*, or at B.'s election, of one-fourth of the part of the profits of B. in the business. The partnership between A. and B. continued until A.'s death, in September, 1851. B. then conducted the business alone until his bankruptcy in 1856; but he did not in the interval between the death of A. and his own bankruptcy make any payment, either in respect of the annuity of 200*l.* or of one-fourth part of the profits of his business, nor did he make any election between the two; his assignees in bankruptcy, however, elected, if obliged to elect, to pay to the petitioner one-fourth part of the profits. At the death of A. the partnership was indebted to different persons to an amount exceeding such one-fourth part of the profits, and those debts had been paid off by B. prior to his bankruptcy:—Held, that the assignee were entitled to set off against the profits of the business payable to the petitioner the amount of the debts due from the partnership at A.'s death. *Harper, Ex parte*, 1 De G. & J. 180; 26 L. J., Bk. 74; 3 Jur. (N.S.) 724; 5 W. R. 537.

Between Partners.]—Where in an action for use and occupation of stables, it appeared that, the plaintiff and defendant having formerly been engaged in running a stage-coach, weekly accounts were delivered by the former to the latter, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the work done:—Held, that they were not evidence of set-off; for that to become a matter of set-off, the balance in such partnership account must be final. *Fromont* v. *Coupland*, 2 Bing. 170; 9 Moore, 319; 1 Car. & P. 275; 3 L. J. (O.S.) C. P. 237; 27 R. R. 575.

Upon a dissolution of partnership, the defendant agreed to pay to his co-partners 6,817*l.* 9*s.* 8*d.*, as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.*, due from the firm to H. After the dissolution they became bankrupts, and never paid H.:—Held, that in an action by their assignees for the 6,817*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay the 51,891*l.* 12*s.* to H. *Abbott* v. *Hicks*, 5 Bing. (N.C.) 578; 7 Scott, 715; 8 L. J., C. P. 314.

Disclosure of Partnership.]—A. and B., in Australia, entered into an agreement to buy gold dust on a joint speculation, on the terms that the profits should be divided, so that A. should have half the profits on the sale of the dust bought by B., and B. should have half the profits on the dust bought by A. They each bought quantities of gold dust according to such agreement. They afterwards entered into another agreement, that each should consign his gold dust to the plaintiffs for sale, by a consignment on the joint account of them, A. and B., and that each should instruct the plaintiffs to divide the net proceeds, and to credit A. with one moiety and B. with the other moiety, in their respective accounts with the plaintiffs. B. accordingly consigned to the plaintiffs, as on the joint account of himself and A., the gold dust so bought by him, and gave directions to sell it, and to give credit for one moiety of the proceeds to A., and for the other moiety to himself. Also, A. consigned the gold dust so bought by him to the plaintiffs for sale, but inadvertently omitted to advise the plaintiffs that it was consigned on the joint account of A. and B., and to instruct the plaintiffs respecting the division of the profits; and B. wrote to the plaintiffs, telling them that in case A. should so omit to instruct the plaintiffs, they were not to pass the one-half profits of B.'s gold dust to the credit of A. The plaintiffs wrote to A., informing him that they would pass to his credit half the proceeds of the gold dust; and they subsequently received both consignments, and sold them, and gave credit to B. as well for the moiety of the proceeds sent by A. as also for the whole proceeds of the gold dust sent by B., setting the same off against a debt due to them from B., who had become bankrupt between the date of his consignment and the sale of it. After this giving of credit to B. for the whole of the proceeds of B.'s consignment, and after the bankruptcy, B. informed the plaintiffs that A. was entitled to a moiety:—

Held, that A. had a right in equity to such moiety, and to set off the same by way of equitable defence in an action of debt by the plaintiffs against him. *Elkin* v. *Baker*, 11 C. B. (N.S.) 526 ; 31 L. J., C. P. 177 ; 8 Jur. (N.S.) 915.

Bond by Firm for Partner.]—Set-off is allowed of a debt of the bankrupt's to one partner separately, against a joint debt of him and his partner, on their bond to secure the separate debt of the former. *Hanson, Ex parte*, 18 Ves. 233 ; 1 Rose, 156 ; 8 R. R. 335.

Bond to Partner in Trust for Firm.]—It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off in an account current between them. *Crosse* v. *Smith*, 1 M. & S. 545 ; 14 R. R. 529.

Joint and Separate Debts.]—A plea of set-off alleged that the debt claimed from the defendant was due by him and A. jointly ; and that the plaintiff was indebted to the defendant and A., which debt the defendant and A. were ready and willing to set off. On special demurrer, on the ground that the statute of set-off applied only to mutual debts between the plaintiff and the defendant, exclusively of any third person, the plea held good. *Stackwood* v. *Dunn*, 3 G. & D. 115 ; 3 Q. B. 822 ; 12 L. J., Q. B. 3.

Where the employment of the plaintiffs, which was the subject of the action, was made by the defendant alone, he cannot set off a debt due from the plaintiffs to the firm of which the defendant was a member. *Toplis* v. *Grane*, 2 Arn. 110 ; 5 Bing. (N.C.) 636 ; 7 Scott, 620 ; 9 L. J., C. P. 180.

Where one member of a firm, with the concurrence of the others, had employed an auctioneer to sell some of the partnership property, in an action by the firm against him for the proceeds, he was not allowed to set off a debt due from the partner who employed him to sell, although, at the time he was employed, he believed such partner was the exclusive owner of the property, and had no notice of the interest of the other partners, unless the other partners had consented to their co-partner so appearing to the auctioneer as sole owner, or had otherwise been guilty of some default on their part. *Gordon* v. *Ellis*, 3 D. & L. 803 ; 2 C. B. 821 ; 15 L. J., C. P. 178 ; 10 Jur. 359.

Where two partners were creditors of a bankrupt, and one of them was separately his debtor : —Held, the joint debt cannot be set off against the separate demand. *Riley, Ex parte*, W. Kel. 24.

Debtor by bond to the separate estate of a deceased partner, not allowed in equity to set off his bond debt, in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankruptcy. *Addis* v. *Knight*, 2 Mer. 117.

8. Trustees and Assignees.

Action by Trustees—Debt from Cestui que Trust.]—In an action by a trustee to recover a debt for the benefit of the cestui que trust, a debt due from the cestui que trust cannot be set off. *Tucker* v. *Tucker*, 1 N. & M. 477 ; 4 B. & Ad. 745 ; 2 L. J., K. B. 143.

Where A. has a money demand against B., and B. (though a trustee) has a money demand against A., which, but for the intervention of the trust, would have constituted a good legal set-off against A.'s demand, the latter may be p'eaded by way of equitable set-off. *Cochrane* v. *Green*, 9 C. B. (N.S.) 448 ; 30 L. J., C. P. 97 ; 7 Jur. (N.S.) 548 ; 3 L. T. 475 ; 9 W. R. 124.

When a plaintiff is suing merely as trustee, and the defendant has a claim against the cestui que trust, which, but for the intervention of the trust, would have been a legal set-off, such claim can be set off in equity, and, therefore, in an action can be set off by an equitable plea. *Thornton* v. *Maynard*, 44 L. J., C. P. 382 ; L. R. 10 C. P. 695 ; 33 L. T. 433.

A demand, in the character of trustee or executor, cannot be set off against a debt due from the trustee or executor personally, although the executor gives evidence to show that he is, in fact, personally beneficially entitled to the amount which is due to him in the character of executor. *Middleton* v. *Pollock, Nugee, Ex parte*, 44 L. J., Ch. 584 ; L. R. 20 Eq. 29 ; 33 L. T. 240 ; 23 W. R. 766.

The only cases in which such a set-off of claims arising in different rights can be allowed are those where the person claiming the benefit of it can show some equitable ground (other than the mere claim of set-off) for being protected against the legal demand. *Ib.*

A. was an executor and trustee of a fund to which as to one moiety he was entitled beneficially. The fund was in the hands of P., who died insolvent ; at the time of P.'s death A. was indebted to P. :—Held, that A. could not set off the debt to the trust against his debt due to P. *Ib.*

The plaintiffs claimed in this case to receive from the defendants, the contractors, a sum in their hands, and a further sum for non-completion of the line within the stipulated time. By counterclaim the defendants sought to recover similar sums from the trustees' corporation on their guarantee. By an agreement of November 21, 1889, the price to be paid for the construction of the works was fixed at the whole capital of the company. The money as received was to be paid to the bankers, and made applicable for payment to the contractors. By agreements of December, 1889, a sale of shares and debentures was arranged, and the bankers guaranteed the interest on the debentures and preference shares up to the time fixed for completion of the works. By agreement of December 31, 1889, the contractors entered into an undertaking with the company for the payment of such interest. During the progress of the works the business of the bankers was transferred to a limited company, which eventually went into liquidation, and such banking company were allowed to continue as bankers on the guarantee of the trustees' corporation. The works were not completed for more than a year after the time fixed for completion. Interest on the debentures and preference shares in the meantime became due, which was not paid by the contractors, and was paid by the company only so far as concerned the debentures. Subsequently this action was brought, and the matters in dispute were referred to arbitration. The award was made in November, 1894 :—Held, first, that there were such special circumstances as to allow the contractors to sue the trustees' corporation in their own name. The contractors had admitted that at the time of action brough there was due from them 35,000*l.*, which might

have been recovered by the bankers from the corporation or the company. Held, secondly, that, inasmuch as the debt of the bankers was not due at law to the contractors, this sum could in ordinary circumstances not be set off against them, yet, as the contractors were entitled to sue in their own name, set-off was available, and that, as the right of set-off in equity of a surety rested on exoneration by his principal. *Bechervaise* v. *Lewis* (26 L. T. 848) was an authority as to what assets in the bankers' liquidation were available for this purpose. *Alcoy & Gandia Ry.* v. *Greenhill*, 76 L. T. 542.

Interest Assigned—Beneficiary—Executor.]—A. being entitled to a share under a settlement, the funds of which had been lent to B. on his covenant, became executor of B. A suit was instituted to recover the trust funds out of B.'s estate, and generally for administration. After a decree for accounts, A. assigned his share, with notice of the suit, and was subsequently found to be indebted as executor to B.'s estate beyond the amount of his share. By the order, on further directions, A.'s share had been declared liable to make good his debt:—Held, that the creditors of B. were entitled to be paid out of the estate in priority to the assignees of A.'s share. *Irby* v. *Irby*, 4 Jur. (N.S.) 989; 6 W. R. 853. *And see* 24 Beav. 525; 3 Jur. (N.S.) 1314.

Assignees of Debt or Bond.]—The defendant cannot plead by way of set-off a bond debt of the plaintiff assigned to the defendant by another, to whom and for whose use it was originally given. *Wake* v. *Tinkler*, 16 East 36.

S. gave a bond conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved his will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C. in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for the payment of a sum of money to the use of S. if C. should marry and survive her intended husband. She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond:—Held, that, in this action, the claim of E. upon S.'s bond could not be set off. *Tucker* v. *Tucker*, 4 B. & Ad. 745; 1 N. & M. 477; 2 L. J., K. B. 143.

A company, in an action upon certain debenture bonds, sought to set off the amount of calls due from the obligee of the bonds, upon shares in their company. The amounts of the debentures were therein expressed to be made payable to him, his executors, administrators, or assigns. He transferred the debentures to C. and S., on whose behalf the action was really brought. The company registered the transfers and issued certificates of registration to the transferees, stating that they had been entered as registered proprietors of the debentures. Neither C. nor S. had any notice, when the debentures were transferred, that the company had or would claim any right of set-off against the debentures. Previously to the falling due of the debentures the obligee and holder became indebted to the company in various sums for calls due upon shares held by him in the company from the date of its coming into existence. Subsequently to the accruing due of part of such calls the secretary wrote a letter to the transferees acknowledging them to be the owners of the debentures, and requesting time for payment, and the company accepted two of the debentures in payment of calls due from the transferees as shareholders in the company. The company also paid interest to the transferees up to the time of the debentures falling due. The articles of association of the company provided that the company should have a lien upon the shares or debentures of any member indebted to the company, and should be entitled to sell the same and apply the proceeds in discharge of his debt:—Held, that the company was not entitled in equity to set off the calls due to them from the obligee as against the transferees, on the ground that the terms of the debentures and the articles of association appeared to contemplate the transfer of the debentures free from all claims against the original holder, and that the company, by their subsequent conduct, had recognised and dealt with the transferees as absolute owners of the debentures transferred to them. *Higgs* v. *Northern Assam Tea Co.*, 38 L. J., Ex. 233; L. R. 4 Ex. 387; 17 W. R. 1125.

To an action for non-payment of 45*l.*, the balance due upon a building agreement, the defendant pleaded a set-off of a judgment for 40*l.* 2*s.* against the plaintiff. The plaintiff replied, that, before the recovery of the judgment, he for a good consideration assigned the debt of 45*l.* to S.; that the defendant before the recovery of the judgment had notice of the assignment, and that the plaintiff was suing as a trustee for S.:—Held, that the replication was bad, and disclosed no legal answer to the plea. *Watkins* v. *Clark*, 12 C. B. (N.S.) 277.

In an action for freight, the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in the course of being earned, he assigned it for value to A., of which the defendant, before the debt became due, and before the action was brought, had notice; and that the plaintiff was suing only as trustee for A.:—Held, no answer to the plea. *Wilson* v. *Gabriel*, 4 B. & S. 243; 8 L. T. 502; 11 W. R. 803.

A railway company bound themselves to the plaintiffs by Lloyd's bonds, to pay certain sums of money and interest at the expiration of a year. A few days afterwards the company granted the plaintiffs a lease; they then assigned away the bonds. In an action by the plaintiffs for the benefit of the assignees on the bonds, the company claimed to be entitled to set off rent which accrued due under the lease after such assignment and notice thereof:—Held, that the company was not so entitled either at law or in equity. *Watson* v. *Mid-Wales Ry.*, 36 L. J., C. P. 285; L. R. 2 C. P. 593; 17 L. T. 94; 15 W. R. 1107.

Assignee in Scotch Bankruptcy.]—To an action by a trustee of a Scotch bankrupt for money received by the defendant for the use of the trustee, after the bankruptcy, and for interest upon money due from the defendant to the trustee, forborne to the defendant at his request, it is a good defence that there were mutual credits between the bankrupt and the defendant, and by the Scotch law the trustee is only entitled to sue for the balance. *Macfarlane* v. *Norris*, 2 B. & S.

783; 31 L. J., Q. B. 245; 9 Jur. (N.S.) 74; 6 L. T. 492.

9. SURETIES.

In What Cases.]—The obligor in a bond, becoming surety for advances to the obligee, and being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond. *Jones* v. *Mossop*, 3 Hare, 568; 13 L. J., Ch. 470; 8 Jur. 1064.

Joint simple contract creditor may proceed against a clear residue of assets of deceased partner, the survivor being insolvent; and may set off, against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of debt secured. *Cheetham* v. *Crook*, M'Clel. & Y. 307.

A legacy may be set off against a debt of the legatee to the testators, though such debt is barred by the Statute of Limitations. A. was indebted to R. in two sums of 1,000*l.* each, for one of which S. was surety. B. afterwards obtained from A. a life policy, as a security for both debts. A. subsequently became bankrupt; and B. proved for 1,500*l.* on the two debts, and he received a dividend of 97*l.*, and a sum of 97*l.* 10*s.*, upon the surrender of the policy:—Held, first, that by surrendering the policy the surety was not released; and, secondly, the surety was not liable for half the debt proved, after deducting half the dividends and half the produce of the policy. *Coates* v. *Coates*, 33 Beav. 249; 33 L. J., Ch. 448; 10 Jur. (N.S.) 532; 9 L. T. 795; 12 W. R. 634.

The money payable on a policy on the life of A. deposited with the insurance company as a security for a loan to B. is to be paid to the surety of B. satisfying the loan, and cannot be set off against a debt due by A to the company of which B.'s surety had no notice. *Jeffery, In re*, 20 W. R. 857.

A. guaranteed to B. & Co. the payment of all goods supplied by them to H. until they received notice from C. of the discontinuance of the guarantee, "but so as A.'s liability under the guarantee should not at any time exceed 250*l.*" H. afterwards became bankrupt, and owed B. & Co. for goods 657*l.*, upon which sum they received a dividend in the bankruptcy. A. paid the 250*l.* under his guarantee:—Held, that A. was entitled to receive from B. & Co. a proportionate part of the dividend. *Hobson* v. *Bass*, 19 W. R. 992.

In an action against a surety to recover a part of a debt, by the first and second counts, the plaintiffs declared as indorsees of a bill of exchange drawn by them and accepted by H., indorsed by the plaintiffs to the defendant, and by him to the plaintiffs; the third and fourth counts were upon another bill of exchange; and the fifth count was upon a deed, whereby the defendant bound himself to secure payment by H. of his two acceptances. The counts upon the two bills averred, that the plaintiffs indorsed the bills to the defendant without consideration, in order that they might be indorsed by the defendant to the plaintiffs for the purpose of the defendant becoming surety for the payment of the bills by the acceptor to the plaintiffs. As to 4,606*l.*, part of the money so alleged to have been secured by the bills and deed, the defendant, in the five counts, pleaded, that the two bills which were guaranteed by the defendant had been given for the balance of the purchase-money for certain stations in New South Wales, previously purchased by H. from the plaintiffs, under an agreement which provided that in case of any dispute between the vendors and the purchasers as to any matter connected with the sale, such dispute should not annul the sale, but should be referred to arbitration in the manner therein stated; and the plea further stated, that a dispute had arisen as to the extent of land comprised in the stations, that H. had appointed S. as his arbitrator, that the plaintiffs neglected to appoint an arbitrator, and that S. made his award concerning the dispute, and thereby awarded that the plaintiff should pay to H. 4,606*l.* in satisfaction of his claim. The plea also stated, that H., before the commencement of the suit, claimed and offered to deduct and set off the sum of 4,606*l.* against an equal amount in price:—Held, that a plea constituted a good equitable defence to the action, as from the nature and terms of the contract set forth in the plea, the compensation admitted to have been awarded was an abatement of the price of the stations, and reduced pro tanto the amount of the purchase money then unpaid, and as in equity the defendant might have claimed the benefit of the amount of compensation awarded as a deduction, he was entitled to put this forward as a defence, on equitable grounds, to so much of the cause of action as was covered by that amount. *Murphy* v. *Glass*, 6 Moore, P. C. (N.S.) 1; L. R. 2 P. C. 408; 20 L. T. 461; 17 W. R. 592. And see *Alcoy & Gandia Ry.* v. *Greenhill*, 76 L. T. 542.

E. PLEADING AND EVIDENCE.

Pleading.]—Set-off must be specially pleaded. *Graham* v. *Partridge*, 1 M. & W. 395; 5 D. P. C. 108; 1 Tyr. & G. 754; 5 L. J., Ex. 160.

The Statute of Limitations must be specially replied to a plea of set-off. *Chapple* v. *Durston*, 1 C. & J. 1.

A discharge, under the Insolvent Debtors Act (1 & 2 Vict. c. 110), s. 91, to a plea of set-off, must be specially replied. *Ford* v. *Dornford*, or *Dunford*, 8 Q. B. 583; 15 L. J., Q. B. 172; 10 Jur. 285.

—— **Whether Compulsory.**]—There is no compulsion upon a defendant to plead a set-off, and if he pleases he may bring a cross action, provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court which will follow, unless good reason can be shown for not pleading such set-off. *Green* v. *Law*, 2 Smith, 668.

B. brought an action against A. for the benefit of F., to whom he assigned all moneys owing from A., whereof A. had notice; the action was referred, and a sum of money was awarded, together with costs. A second action was brought on the award by B., for the benefit of F., to which A. pleaded a set-off of matters that had not been brought forward at the time of making the award:—Held, that A. was entitled to do so, and that it was not a good reply in equity, that the matter might have been brought forward at the time of making the award, and that F. had thereby been induced to think there was no further set-off. *Baker* v. *Alexander*, 35 L. J., C. P. 217; 12 Jur. (N.S.) 692.

A surety, who, in an action by the creditor,

has omitted to plead by way of set off, the receipt by the creditor of dividends from the debtor's estate, is not precluded from establishing his title to such dividends in equity. *Thornton* v. *McKewan*, 1 H. & M. 525; 1 N. R. 16; 32 L. J., Ch. 69; 11 W. R. 140.

If a party, knowing all the circumstances, makes a payment without taking advantage of his right to make certain deductions at the time, he cannot afterwards claim a set-off as between himself and his creditor for such omissions. *Turner, Ex parte*, 11 L. T. 352; 13 W. R. 104.

Action for Set-off in prior Action.]—A party cannot bring an action for what has been the subject of a set-off in a former action by the defendant against him:—but if the set-off was more than sufficient to cover the demand in the former action, he may maintain an action for the surplus. *Hennell* v. *Fairlamb*, 3 Esp. 104.

A plea to an action for a debt, alleging that in a former action brought by the defendant against the plaintiff the latter pleaded a set-off, in respect of the same money now sought to be recovered, but the jury found for the plaintiff, on which judgment was given:—Held, a good plea of estoppel; and a replication that the plaintiff was not prepared to support his plea of set-off at the former trial:—Held, ill. *Eastmure* v. *Lawes*, 5 Bing. (N.C.) 444; 7 D. P. C. 431; 7 Scott, 461; 2 Arn. 54; 8 L. J., C. P. 236; 3 Jur. 460.

To a declaration for goods sold and delivered, the defendant pleaded, that in an action brought by the now defendant in a county court, against the now plaintiff, the now plaintiff set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15*l.*; that it was adjudged that the now defendant was not indebted to the now plaintiff in that sum, or any part thereof, and that the now plaintiff had no claim against the now defendant, averring the identity of the two debts. Replication, that by the rules of the county court, made in pursuance of the statute, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court, and that the now plaintiff did not give such notice;—Held, that the replication was good. *Stanton* v. *Styles*, 5 Ex. 578; 1 L., M. & P. 575; 19 L. J., Ex. 336. S. P., *Danks* v. *Farley*, 1 C. L. R. 95; 1 W. R. 291.

Proof by Plaintiff.]—Where there are cross demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance which he claims, and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to show that a larger sum was due. *Williams* v. *Davies*, 1 C. & M. 464; 1 D. P. C. 647; 3 Tyr. 383; 2 L. J., Ex. 102.

Proof by Defendant.]—A plea of set-off on a bill of exchange, payable to the order of the defendant, and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded the bill had got back to the hands of the defendant. *Braithwaite* v. *Coleman*, 4 N. & M. 654; 4 L. J., K. B. 152.

Where a defendant pleaded by way of set-off a bond given to him by the plaintiff conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear:—Held, that he was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny* v. *Foy*, 8 B. & C. 11; 2 M. & Ry. 181; 6 L. J. (o.s.) K. B. 230.

A payment which has been made in bills is good evidence under a set-off, and it shall be presumed that they were paid unless the contrary is shown. *Hebden* v. *Hartsink*, 4 Esp. 46.

Where a plaintiff sues on a quantum meruit for work and labour, the defendant may, without pleading a set-off, give in evidence that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less because his men had their beer provided for them by the defendant. *Grainger* v. *Raybould*, 9 Car. & P. 229.

Particulars.]—*See* PRACTICE (PARTICULARS).

J. M.

SETTLED ACCOUNTS.

See ACCOUNTS AND INQUIRIES.

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Confirmation of Sales under the 25 & 26 Vict. c. 108.]—*See* POWERS, xix. d, 1, d.

A. SETTLEMENTS AND SETTLED ESTATES.

1. WHAT ARE.

"Settled."]—In determining whether the estate is "settled," reference must be had to the state of things at the date of the instrument, and not to the state of circumstances when it comes into operation.

The interest which may be taken by way of accruer is a limitation, "by way of succession," within the meaning of the acts. *Goodwin, In re, Butler, Ex parte*, 3 Giff. 623; 8 Jur. (N.S.) 1170; 6 L. T. 530; 10 W. R. 612.

Limitations Spent.]—The time for ascertaining whether hereditaments stand limited by way of succession so as to bring them within the operation of the 19 & 20 Vict. c. 120, is when application is made to the court. If, when the application is made, the limitations are spent, and the estate vested in fee, the case is not within the act. *Birtle's Estate, In re*, 2 N. R. 252; 32 L. J., Ch. 439; 8 L. T. 408; 11 W. R. 739.

Unconverted Realty.] — The interest of an infant under the statute of distributions in realty which has improperly been allowed to remain unconverted, is settled land within s. 59 of the Settled Land Act, 1882. *Wells, In re*, 49 L. T. 859; 31 W. R. 764.

Personalty.]—A settlement of real estate as personalty, is within the 19 & 20 Vict. c. 120. *Greene's Settled Estates, In re*, 10 Jur. (N.S.) 1098; 11 L. T. 301.

Discretionary Trust for Sale.] — Real estate devised on a discretionary trust for sale is within the 19 & 20 Vict. c. 120. *Laing, In re*, 35 L. J., Ch. 282; L. R. 2 Eq. 416; 12 Jur. (N.S.) 119; 14 L. T. 56; 14 W. R. 328.

Real estates devised on a discretionary trust for conversion and then to pay the income to one for life with remainders over, constitute a "settled estate" within 19 & 20 Vict. c. 120, s. 1. *Chamberlain, In re*, 23 W. R. 852.

Real estate devised on trust for conversion, and payment of income to A. for life with remainder to his children. Discretionary power of sale during A.'s minority, after that with A.'s consent in writing. The property had not been sold; A. had long since attained twenty-one:—Held, that this was a "settled estate" within the meaning of the Settled Estates Act, 1877. *Morgan's Settled Estates, In re*, 49 L. J., Ch. 577.

Moiety of Profits.]—A testator devised an estate in fee, upon trust to let and manage it during the life of his wife and the minority of any of his children, and to pay a moiety of the net profits to the wife for life, and subject thereto in trust for the children in fee in equal shares. On a sale of part of the estate, under 19 & 20 Vict. c. 120, s. 28, the purchaser objected that one moiety of the estate was not "settled":—Held, that the whole was a settled estate within the act. *Shepheard, In re*, 39 L. J., Ch. 173; L. R. 8 Eq. 571; 21 L. T. 525.

"By way of Succession."]—A testatrix devised real estate to trustees for A. in case she should attain twenty-one, or marry previously to attaining that age, with a gift over in strict settlement in case A. should not live to attain a vested interest:—Held, that this was a limitation "by way of succession," within 19 & 20 Vict. c. 120, s. 1. *Horn, In re*, 29 L. T. 830.

Shares Vesting at Twenty-one—Survivorship.]—Real and personal estate devised upon trust for sale and investment and subject to an annuity out of the income for his wife, upon trust for children equally at twenty-one or marriage; and in case of the death of either of his children under twenty-one or unmarried, the share of the one dying to be held in trust for the others, or survivors or survivor of them; and in case all the children should so die, then for his wife absolutely:—Held, that after the death of the widow the real estate was settled within the 19 & 20 Vict. c. 120. *Collett* v. *Collett*, L. R. 2 Eq. 203.

Contingent Interest.]—Real estate, to which an infant is entitled contingently on attaining twenty-four, is, by virtue of s. 41 of the Conveyancing and Law of Property Act, 1881, to be deemed a settled estate within the Settled Estates Act, 1887. *Sparrow's Settled Estates, In re*, 61 L. J., Ch. 260; [1892] 1 Ch. 412; 66 L. T. 276; 40 W. R. 326. S. P., *Liddell, In re, Liddell* v. *Liddell*, 52 L. J., Ch. 207; 31 W. R. 238.

Annuities—Tenant for Life.] — Estates, including mansion-house and demense of B. devised to F. for life, with remainder as she should by will appoint. F. devised the estate to J. B. M. and G. H. M. as trustees, and created a number of perpetual rent-charges or annuities charged upon the lands, some settled, and some devised in fee, and subject thereto she devised the lands to G. H. M. in fee, who was also devisee of one of the annuities. She died, and her will was proved by G. H. M., one of the executors. On an application under the Settled Land Acts by the trustees and one of the annuitants, for the sanction of the court to a provisional contract for the sale of the mansion-house and demense of B.:—Held, that the estate was "settled land" under the will, which conferred a life estate upon F., and so remained notwithstanding her death, but there was no one who, under her will, had the powers of a tenant for

life within s. 58 of the Settled Land Act, 1882. The fact that part of an estate is settled land within the acts does not render the entirety so. *Bective Estate, In re*, 27 L. R. Ir. 364.

Compound Settlement—Different Instruments—Identical Limitations.] — Estates settled by deed in 1872, other real estates devised in 1874, to the trustees, and directed to be held upon the trusts of the settlement, residuary personalty bequeathed to executors (not the trustees) upon trust to invest in land to be settled to the uses of the settlement:—Held, that the settlement and will constituted one settlement. *Mundy's Settled Estates, In re*, 60 L. J., Ch. 273; [1891] 1 Ch. 399; 63 L. T. 311; 39 W. R. 209.

Testator, by will in 1844, settled freeholds in strict settlement. By deed in 1845 he declared trusts of money to be invested in lands to be settled on himself for life, with remainders on limitations identical with those declared by the will, except that two terms of years were interposed. The powers and provisions of the two instruments varied in several particulars. The same persons were trustees of both instruments:—Held, that the two instruments formed one settlement, on the principle of the decision in *Mundy's Settled Estates, In re* (supra). *Byng's Settled Estates, In re*, 61 L. J., Ch. 511; [1892] 2 Ch. 219; 66 L. T. 754; 40 W. R. 457.

—— **Settlements made in Exercise of Power in Will.**]—Under a will made in 1828, a tenant for life had power to charge the settled land—first, with a yearly rentcharge for any husband who might survive her; and, secondly, with portions for younger children. The tenant for life married three times, and exercised these powers, and also charged her own interest under the will by her marriage settlements. In 1894 A. and B. were appointed trustees of the will for the purposes of the Settled Land Act, 1882:—Held, that the will and the settlements together constituted "the settlement" within the meaning of s. 2. sub-s. 1 of the Settled Land Act, 1882. *Tibbits, In re*, 66 L. J., Ch. 660; [1897] 2 Ch. 149; 77 L. T. 88; 46 W. R. 3.

—— **Appointment of Trustees for purposes of Settled Land Acts.**] — Where trustees for the purposes of the Settled Land Acts were appointed of a will which empowered the tenant for life to charge the settled land with pin-money, jointure, and portions for younger children, and to create a term of years for that purpose, and the tenant for life afterwards exercised these powers by his marriage settlement, it was held that the trustees of the will were not "trustees of the settlement" within the Settled Land Acts, and that the will and marriage settlement together constituted a compound settlement. *Meade's Settled Estates, In re*, [1897] 1 Ir. R. 121.

—— **Schedule of Lands.**]—When an act of parliament giving powers of sale and exchange over settled estates contained a recital of the object of the act, which was restricted in terms to such settled estates, and then vested in trustees all and singular the lands in certain counties, limited by a settlement and former act of parliament, which were described in the schedule, together with the appurtenances belonging thereto, or therewith occupied or known, as part thereof:—Held, that lands not included in the settlement or former act, though described in the schedule and in the same occupation, did not pass. *Howard* v. *Shrewsbury* (*Earl*), 43 L. J., Ch. 495; L. R. 17 Eq. 378; 29 L. T. 862; 22 W. R. 290.

—— **Settlement Subject to Charges.**]—The policy of the Settled Land Act, 1882, is that the powers thereby given should be applicable in cases where the land was settled at the time of the settlement taking effect, even though most of the limitations might be spent at the time when the exercise of those powers was invoked. A. was a tenant for life of certain estates under a deed of 1885; under prior deeds of 1826 and 1863 certain jointure rentcharges had been created:—Held, that these three deeds constituted a "settlement" under s. 20 of the Settled Land Act, 1882, and that A. was the existing tenant for life under those deeds. *Ailesbury* (*Marquis*) *In re*, and *Iveagh* (*Lord*), 62 L. J., Ch. 713; [1893] 2 Ch. 345; 3 R. 440; 69 L. T. 101; 41 W. R. 644.

Settlement comprising Different Estates.]—Four estates were by the same instrument settled upon the same tenant for life, with remainders as to three of the estates, C., L., and S., to different persons in strict settlement. A term was created in the fourth estate, and the rents were to be applied in payment of mortgage debts on all the estates in a certain order, the L. estate coming second in such order, and the S. estate first; subject to such terms the fourth estate was limited in moieties to the uses of the S. estate and the L. estate:—Held, that the L. estate and one moiety of the fourth estate constituted one settled estate within the meaning of the Settled Land Act, and that capital moneys arising from the moiety was applicable for improvements on the L. estate. *Stamford's* (*Earl*) *Settled Estates, In re*, 58 L. J., Ch. 849; 43 Ch. D. 84; 61 L. T. 504.

A testator, by will, devised his W., S., and R. estates to A. for life, with contingent remainders to his children. At the date of the testator's death the R. estate and part of the W. estate were mortgaged. A., as tenant for life, sold a portion of the S. estate, and the proceeds were applied towards the discharge of the incumbrances on the W. and R. estates. The contingent remainders failed as to the S. estate, and the unincumbered portion of the W. estate:—Held, that, though owing to the failure of the contingent remainders the three estates did not, in the event, devolve in the same way, yet they constituted only one settled estate under one settlement. *Freme, In re, Freme* v. *Logan*, 63 L. J., Ch. 139; [1894] 1 Ch. 1; 7 R. 1; 69 L. T. 613; 42 W. R. 119—C. A.

Original and Derivative Settlements.]—When a complete settlement of land has been made, and derivative settlements have been afterwards made by persons who take interests (not yet in possession) under the original settlement, the original settlement alone is the settlement for the purposes of the Settled Land Act. *Knowles' Settled Estates, In re*, 54 L. J., Ch. 264; 27 Ch. D. 707; 51 L. T. 655; 33 W. R. 364.

Limitation of Various Interests to the same Person by way of Succession—Person entitled to Income.]—Under a will made in exercise of limited powers of appointment real estate stood

limited upon trust for a married woman for life without power of anticipation, with remainder to such uses as she should by will appoint, and in default of appointment to the use of herself in fee. She contracted to sell the land as tenant for life:—Held, that there was no settlement within s. 2, sub-s. 1; but that the vendor had the powers of a tenant for life "as a person entitled to the income of land" within s. 58, sub-s. 1, clause 9, and sub-s. 2, and could make a good title. *Pocock and Prankerd's Contract, In re*, 65 L. J., Ch. 211; [1896] 1 Ch. 302; 73 L. T. 706; 44 W. R. 247.

Tenant for Life—Married Woman—Fee-simple with Restraint on Anticipation.]—A restraint on anticipation attached to a married woman's estate in fee-simple for her separate use does not create a settlement within the meaning of the Settled Land Act, 1882, so as to give her the powers of a tenant for life under the act. *Bates* v. *Kesterton*, 65 L. J., Ch. 108; [1896] 1 Ch. 159; 73 L. T. 656; 44 W. R. 150.

Inclosure Act and Award—Limitation to Vicar and his "Successors"—Restrictions on Alienation—Terminable Rentcharge.]—Where under an inclosure act and an award land is allotted to a vicar and his "successors" in respect of the glebe, such land vests in fee-simple in the vicar as an ecclesiastical corporation sole, subject to the restrictions on the alienation of ecclesiastical land, and the act of parliament and the award do not constitute a "settlement" within s. 2 of the Settled Land Act, 1882. The purchase money of such land, paid into court may, under s. 32 of the Settled Land Act, 1882, and s. 1 of the Settled Land Act, 1887, be applied at the discretion of the court in the discharge of terminable rent-charges on the glebe, created in respect of improvements by the vicar, with the sanction of the ecclesiastical commissioners. *Byron's Charity, In re* (23 Ch. D. 171), *Jesus College, Cambridge, Ex parte* (50 L. T. 583), and *Bethlehem and Bridewell Hospitals, In re* (30 Ch. D. 541) followed. *Castle Bytham (Vicar) and Midland Ry., Ex parte*, 64 L. J., Ch. 116; [1895] 1 Ch. 348; 13 R. 24; 71 L. T. 606; 43 W. R. 156.

2. Effect of the Acts on.

a. Settlement Powers.

Powers of Management.]—An infant tenant in tail was entitled to possession, under a settlement which gave the trustees power, during the minority of any person entitled to possession, to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate, to be settled to the same uses:—Held, that the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement, and without regard to the act. *Newcastle's (Duke) Estates, In re*, 52 L. J., Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782.

Sale.]—Semble, that the court has jurisdiction to order a sale under the 19 & 20 Vict. c. 120, notwithstanding the existence of powers under which the proposed sale may be effectual. *Thompson, In re, Green* v. *Thompson*, 1 Johns. 418; 5 Jur. (N.S.) 1343.

Leasing—Consent.]—Where the tenant for life of settled lands has leasing powers, to be exercised only with the consent of a person named, the court will not exercise the powers given it by the 19 & 20 Vict. c. 120, so as to enable the tenant for life to dispense with such consent, even though it appears that the person whose consent is required has arbitrarily, but not maliciously, refused. *Hurle's Settled Estates, In re*, 2 H. & M. 196; 5 N. R. 167; 11 Jur. (N.S.) 78; 11 L. T. 592; 13 W. R. 171.

b. Forfeiture Clauses.

Proviso in Restraint of Sale of Land—Validity.]—A testator bequeathed to trustees 4,000*l.* to apply the income in certain repairs and pay the surplus income to the person for the time being entitled to possession of certain settled land, with a proviso that, if such person alienated the property, the 4,000*l.* was to fall into the residue:—Held, that the provision was void under s. 51 of the Settled Land Act, 1882, as it tended to induce the tenant for life to abstain from exercising his power of sale. *Ames, In re, Ames* v. *Ames*, 62 L. J., Ch. 685; [1893] 2 Ch. 479; 3 R. 558; 68 L. T. 787; 41 W. R. 505.

Non-residence—No Sale of Land.]—A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will:—Held, that, no sale having been made, the forfeiture took effect, notwithstanding s. 51 of the Settled Land Act, 1882. *Haynes, In re, Kemp* v. *Haynes*, 57 L. J., Ch. 519; 37 Ch. D. 306; 58 L. T. 14; 36 W. R. 321.

Residence Clause.]—Estates devised to A. so long as he should reside on some part of the estate for not less than three months in each year. On sale by A.:—Held, he was by s. 51, of the Settled Land Act, 1882, entitled to the income of the proceeds of sale for his life. *Paget's Settled Estates, In re*, 55 L. J., Ch. 42; 30 Ch. D. 101; 53 L. T. 90; 33 W. R. 898.

A condition of forfeiture on non-residence in, selling, or letting of a mansion house and demesne part of settled estates held void under the Settled Land Act, 1882. *Thompson's Will, In re*, 21 L. R. Ir. 109.

c. Possession and Custody of Title Deeds.

Possession.]—The fact that the court in its discretion might upon terms put an equitable tenant for life into possession, or take the receipt of the rents from the trustees, and give them to him, does not make him a person "entitled to the possession, or to the receipt of the rents and profits," within s. 32. *Taylor, Ex parte, Taylor* v. *Taylor*, 44 L. J., Ch. 727; L. R. 20 Eq. 297; 33 L. T. 89; 23 W. R. 947.

—— Equitable Tenant for Life—Right to receive Rents.]—Where trustees are directed to stand possessed of the net rents of real estate, upon trust to pay the same to Mrs. W., a married woman, for life, for her separate use; and also directed, out of the rents, to keep in repair all the buildings on the estate during the period of their trust:—Held, that, notwithstanding the direction to the trustees with respect to repairs, Mrs. W. was equitable tenant for life of the settled land, and, as such, was entitled to be let into the possession and management of the estate, upon

her undertaking to see to the repairs. *Bentley, In re, Wade* v. *Wilson*, 54 L. J., Ch. 782; 33 W. R. 610.

—— **Custody of Title Deeds.**]—The powers granted to, and the duties imposed on, a tenant for life by the Settled Land Acts raise a presumption in favour of his title to possession not before existing, and render it incumbent on the court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life should be let into possession of the estate. An equitable tenant for life is, as a general rule, entitled to the custody of the title deeds. *Wythes, In re, West* v. *Wythes*, 62 L. J., Ch. 663; [1893] 2 Ch. 369; 3 R. 433; 68 L. T. 520; 41 W. R. 375.

Under a settlement of real estate upon trust for sale, with power of postponement, the income of the invested proceeds of sale and the rents until sale were to be held upon trust for a married woman for life for her separate use without power of anticipation. Powers of management were vested in the trustees. The costs of management being heavy, the tenant for life applied for possession or receipt of the rents and profits, and for leave to exercise her powers under the Settled Land Acts other than the powers of sale and exchange:—Held, (i.) that on the ground of convenience and economy, the court would have exercised its discretion by letting the tenant for life into possession; (ii.) that the Settled Land Acts afforded additional ground for exercising such discretion in favour of the tenant for life; (iii.) that it was convenient to allow the tenant for life to exercise all the powers of the Settled Land Act, except the powers of sale and exchange; (iv.) that the tenant for life, there being no case against the trustees, must pay the costs. Dictum in *Wythes, In re* (supra), disapproved. *Bagot's Settlement, In re, Bagot* v. *Kittoe*, 63 L. J., Ch. 515; [1894] 1 Ch. 177; 8 R. 41; 70 L. T. 229; 42 W. R. 170.

—— **Women.**]—The power of the court to make an order allowing an equitable tenant for life to take possession of settled property is discretionary, and will only be made upon proper undertakings. The circumstances under which, and the terms upon which, the order will be made, depend upon the facts of each particular case. *Newen, In re, Newen* v. *Barnes*, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309: 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

Similar considerations apply in the making of an order, giving an equitable tenant for life the custody of title deeds. *Ib.*

Such an order may be made where the tenant for life is a woman. *Ib.*

The fact that the tenant for life has mortgaged his interest is not conclusive against giving him possession of the property, but is a very strong reason for not granting an application for the custody of the title deeds. *Ib.*

Originating Summons or Writ—Parties—Costs.]—*Bagot's Settlement, In re* (supra), held to authorise the making of an order for letting the tenant for life into possession upon an originating summons. The trustees are as a rule the only necessary respondents. A trustee, who is also a beneficiary, should sever and will be allowed his separate costs. A reversioner is entitled to appear, but is not as of right entitled to costs. A mortgagee of the life interest is a necessary party, and is entitled to costs. *Ib.*

Undertaking as to production of Deeds.]—An equitable tenant for life of a settled estate declared entitled to the custody of the title deeds upon undertaking not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions. *Burnaby's Settled Estates, In re*, 58 L. J., Ch. 664; 42 Ch. D. 621; 61 L. T. 22.

d. Trust for Sale.

Devise to Pay Debts.]—In order that land may be subject to a trust or direction for sale within s. 63 of the Settled Land Act, 1882, an implied trust or direction for that purpose arising from a devise on trust to pay debts is sufficient. *McCurdy's Settled Estate, In re*, 27 L. R. Ir. 395.

No Person Entitled to Income.]—If when trustees under an absolute trust for sale, contract to sell, there is no person who, under the instrument creating the trust, is entitled to the income of the money arising from the sale, or of the land until sale, for his life, or any other limited period, s. 63 does not apply, but the trustees can exercise the trusts for sale just as they could have done prior to the passing of the act. *Earle and Webster's Contract, In re*, 52 L. J., Ch. 828; 24 Ch. D. 144; 48 L. T. 961; 31 W. R. 887.

Direction for Postponed Sale.]—Estates devised on trust for sale with a direction that the M. estate should not be sold for twenty years from date of the will, for the purpose of transmission the real estate to be treated as converted from testator's death, and the rents previous to conversion to be applied in the same manner as the income of the proceeds of sale. The trusts were for the children at twenty-five or marriage:—Held, there was no trust or direction for sale within s. 63 of the Settled Land Act, 1882. *Horne's Settled Estate, In re*, 57 L. J., Ch. 790; 39 Ch. D. 84; 59 L. T. 580; 37 W. R. 69—C. A.

B. SALES.

1. In General.

Application to Court.]—At the date of an application for a sale under the 19 & 20 Vict. c. 120, a succession, remainder, or reversion must be existing. Section 27 of the act only limits the time within which the court is empowered to lease or sell, &c., under the act. *Birtle's Settled Estates, In re*, 2 N. R. 252; 32 L. J., Ch. 439; 8 L. T. 408; 11 W. R. 739.

Property not Settled.]—Where settled realty became in part emancipated from all settlement, by becoming vested in persons in fee, and in other persons as mortgagees:—Held, that an order obtained in the matter of the 19 & 20 Vict. c. 120, and in the matter of the estates comprised in the original settlement, for the sale of all the lands comprised therein, was erroneous. *Thompson, In re, Green* v. *Thompson*, 1 Johns. 418; 5 Jur. (N.S.) 1343.

Jurisdiction.]—Semble, that the court has jurisdiction to order a sale under the act, not-

withstanding the existence of powers under which the proposed sale may be effectual. *Ib.*

Prospective Order.]—When the settlor declared that the estate shall not be leased or sold until the happening of a future event, the court will not, merely to save expense, make a prospective order. *Hurle's Settled Estates, In re*, 2 H. & M. 196; 5 N. R. 167; 11 Jur. (N.S.) 78; 11 L. T. 592; 13 W. R. 171.

Surface apart from Minerals.]—The court can, under 25 & 26 Vict. c. 108, give a general direction that persons having powers of sale and exchange in a settlement or will, not expressly authorising the reservation of minerals on a sale, or the sale of minerals apart from the land, may exercise the powers as if they did authorise such reservation or separation. *Wynn, In re*, L. R. 16 Eq. 237; 21 W. R. 695.

Whether Contract Necessary.]—Under the 19 & 20 Vict. c. 120, the court, upon petition to sanction a contract for sale by trustees, can only authorise a contract already entered into, or such contracts as the petitioners may satisfy the court to be beneficial, but it cannot authorise a sale generally. *Peacock, In re*, 12 Jur. (N.S.) 959; 15 L. T. 263; 15 W. R. 100.

Land stood settled upon trust for A. for life, and after her decease for sale. On petition by the trustees, tenant for life, and all other beneficiaries, for a sale during her life no particular contract was referred to:—Held, that the court could under the 40 & 41 Vict. c. 18, s. 16, authorise the trustees to sell indefinitely, they bringing the proceeds into court. *Andrew, In re*, 38 L. T. 877; 26 W. R. 811.

No Trustees.]—Where there was no trustee of the settled estate which had been sold, the court required new trustees to be appointed, and the conveyance of the lands purchased to be made to such new trustees. *Sexton Barnes, In re*, 6 L. T. 40; 10 W. R. 416.

Trustee Dying.]—Pending the completion of a sale of a portion of a settled estate, one of the two trustees of the settlement died. A purchaser having refused to take a conveyance from the surviving trustee, the court directed a petition to be presented for the appointment of a new trustee in the place of the deceased trustee. *Scott* v. *Heisch*, 33 L. T. 498; 24 W. R. 108.

Succession Duty.]—On a sale by the court of settled estates the uses of the settlement are revoked by s. 22 of the Settled Estates Act, 1877; and by the operation of s. 42 of the Succession Duty Act, 1853, the duty is shifted from the land sold to the purchase money or its investments, and the land in the hands of a purchaser is freed from the succession duty. *Warner's Settled Estates, In re, Warner* to *Steel*, 50 L. J., Ch. 542; 17 Ch. D. 711; 45 L. T. 37; 29 W. R. 726.

Out of Court.]—A sale out of court may be directed under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the purchase money being brought into court; and such a sale may be authorised to be made by public auction or private contract, subject to a reserved price to be fixed by the judge in chambers. *Adams' Settled Estates, In re*, 9 Ch. D. 116; 38 L. T. 877; 27 W. R. 110.

The court has no jurisdiction to direct a sale under the Settled Estates Act, 1877, to be conducted out of court. *Adams' Settled Estates, In re* (supra), not followed. *Harvey's Settled Estates, In re*, 21 Ch. D. 123; 30 W. R. 697.

By whom.]—Power in a settlement to the trustees, with the consent of tenant for life, if of age, and if not, of his guardians, to sell or exchange:—Held, that this power was exercisable by the trustees during the minority, at the request and by the direction of the guardians of the infant tenant in tail. *Newcastle's (Duke) Estates, In re*, 52 L. J., Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782.

Persons beneficially entitled to settled estates applied by petition, to which two beneficiaries, of whom one was infant, were made respondents, for the sale of the estates out of court:—Held, that the petition was properly presented, all the beneficiaries being before the court, but that the sale could not be made out of court, but must be made under the direction of the court. *Dryden's Settled Estates, In re*, 50 L. J., Ch. 752; 45 L. T. 254; 29 W. R. 884.

—— **Absolute Interest.**]—When the court sees clearly on the construction of a will that two persons or one of them are or is indefeasibly entitled to an estate in fee simple, it can direct a sale on the petition of the two persons so entitled. *Williams, In re*, 27 L. T. 335.

Estates settled on children at twenty-one or marriage under a will which contained clauses of survivorship and accruer, but no powers of sale or demise. The shares of two children were resettled by the parties entitled. Four other children had attained twenty-one, and their shares were vested absolutely in them. The other three children were infants. Under the 19 & 20 Vict. c. 120, and the 21 & 22 Vict. c. 77, on a petition presented for the purpose by the parties entitled to all the shares (including the trustees and cestuis que trustent of the two shares resettled, certain mortgages, and the guardians of the three infants), the court made an order for a sale of the whole of the property. *Goodwin, In re, Butler, Ex parte*, 3 Giff. 623; 8 Jur. (N.S.) 1170; 6 L. T. 530; 10 W. R. 612.

Where parties entitled absolutely to some of the shares joined as petitioners, the court decreed the whole estate to be sold. *Ib.*

The shares of children who have attained twenty-one may be included in an order for sale of the whole estate upon such children becoming co-petitioners. *Ib.*

Too Remote Interest.] — Testator entitled absolutely to one property and in fee to a contiguous settled estate, subject to a shifting clause in favour of A. in the event of testator's children dying under twenty-one without issue, devised all his real estate upon trust for sale. He left four children, the eldest being twelve years old. On a petition by the trustees under the Settled Estates Act, 1877, for the sale of the two properties together and the apportionment of the purchase-money:—Held, that A.'s interest was too remote to be considered, and the court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, made the order

asked for. *Spurway's Settled Estates, In re*, 48 L. J., Ch. 213; 10 Ch. D. 230; 40 L. T. 377; 27 W. R. 302.

Effect of Order of Court.]—Certain portions of a settled estate were, in 1878, directed by the court to be sold, under the Settled Estates Act, 1877. No sale had taken place, and trustees for sale under the Settled Land Act, 1882, had been recently appointed:—Held, that the order of 1878 would prevent the tenant for life from selling under the Settled Land Act, 1882, but that the court had power, if a proper case were made out, to stay proceeding under that order. *Barrs-Haden's Settled Estates, In re*, 49 L. T. 661; 32 W. R. 194.

How Carried out.] — On a petition for the purchase of a trust estate without the necessity of a sale by auction, the court referred the matter to chambers, and directed that, if it should appear by the certificate that it was fit and proper, and for the benefit of all parties interested, the petitioner should be the purchaser of the property, a conveyance should be made to that effect. *Hilton, In re*, 14 L. T. 129.

—— **Copyhold — Enfranchisement.**]—Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *Adair, In re*, 42 L. J., Ch. 841; L. R. 16 Eq. 124.

Objection to Jurisdiction.]—It is competent to a purchaser under the 19 & 20 Vict. c. 120, to object at any time before completion that the order for sale was in excess of the jurisdiction of the court. *Thompson, In re, Green* v. *Thompson*, 1 Johns. 418; 5 Jur. (N.S.) 1343.

Conveyance—Lots.]—Where land is sold pursuant to an order of the court, under the 19 & 20 Vict. c. 120, the conveyance must be settled by the judge whether the parties differ or not. *Eyre's Settled Estates, In re*, 4 K. & J. 268; 4 Jur. (N.S.) 830.

But where land is to be sold in lots, and one conveyance had been settled by the conveyancing counsel of the court, it may be adopted by the chief clerk for all the rest, in which no special circumstances exist to render such a course improper. *Ib.*

Infant—Contingent Interest.]—Real estate to which an infant was entitled contingently on his attaining twenty-one was ordered to be sold as a settled estate within the provisions of the act. *Liddell, In re, Liddell* v. *Liddell*, 52 L. J., Ch. 207; 31 W. R. 238.

—— **By Trustees out of Court.**]—The court can authorise trustees who have been appointed for the purposes of the Settled Land Act, 1882, to sell property of their infant cestui que trust out of court. *Price, In re, Leighton* v. *Price*, 27 Ch. D. 552; 51 L. T. 497; 32 W. R. 1009.

Real estate devised upon trust to pay an annuity to a daughter and after her death upon trust for all her children who should attain twenty-one, equally. The daughter died, leaving children, some of whom were infants. The trustees having contracted for the sale of a portion, a petition was presented on behalf of the infant children, but the court refused to authorise such sale under the 19 & 20 Vict. c. 120. *Burdin's Will, In re*, 28 L. J., Ch. 840; 5 Jur. (N.S.) 1378; 2 L. T. 70—L.JJ. Affirming 7 W. R. 711.

—— **Absolute Trust for Sale—Order for Sale—Concurrence of Tenant for Life not Required.**]—A testator devised all his real and personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property at their discretion, and to pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, the daughters' shares being settled for life with remainders over. In an administration suit, the wife being dead, an order was made for sale of part of the estate by the trustees:—Held, that the concurrence of the children constituting the tenant for life under the Settled Land Act, 1882, was not necessary; but even if such concurrence would be necessary the order of the court was sufficient to enable the trustees to sell without joining any of the children in the conveyance. *Taylor* v. *Poncia*, 53 L. J., Ch. 409; 25 Ch. D. 646; 50 L. T. 20; 32 W. R. 335.

Concurrence of all Beneficiaries.] — Estates devised on trust for a daughter for life, with remainder for all the daughter's children equally, as tenants in common, the shares of the children to be vested at twenty-one or marriage. The will contained clauses of survivorship and accruer, but no powers of sale or demise. The daughter died leaving nine children. The shares of two children were resettled by the parties entitled. Four other children had attained twenty-one, and their shares were vested absolutely in them. The other three children were infants. Under the 19 & 20 Vict. c. 120, and the 21 & 22 Vict. c. 77, on a petition presented for the purpose by the parties entitled to all the shares (including the trustees and cestuis que trustent of the two shares resettled, certain mortgagees, and the guardians of the three infants), the court ordered a sale of the whole of the property. *Goodwin, In re, Butler, Ex parte*, 3 Giff. 623; 8 Jur. (N.S.) 1170; 6 L. T. 530; 10 W. R. 612.

The shares of children who have attained twenty-one may be included in an order for sale of the whole estate upon such children becoming co-petitioners. *Ib.*

Call on Shares — Remaindermen.] — Where remainderman (to avoid forfeiture) paid calls on shares of unlimited liability, settled by a marriage settlement containing power to vary investments with the consent of the tenant for life, the court refused to order a sale of the shares upon the application of the remainderman without the consent of the tenant for life. *Parke* v. *Thackray*, 24 W. R. 21.

Persons Appointed to Convey.]—Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made appointing A. and B., under the 19 & 20 Vict. c. 120, to convey. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will:—Held, that notwithstanding such conveyance by the mortgagees, A. and B. had

power to convey, and that the concurrence of the trustees of the will was unnecessary. *Eyre* v. *Saunders, Yeo. Ex parte*, 28 L. J., Ch. 439 ; 5 Jur. (N.S.) 703 ; 7 W. R. 366.

Tenant for Life—Lunatic.]—Land of which a lunatic is tenant for life cannot be sold for building purposes, under 16 & 17 Vict. c. 70, s. 125, which applies only to lands of which a lunatic is seised or entitled in fee. *Corbett, In re*, 35 L. J., Ch. 793 ; L. R. 1 Ch. 516 ; 12 Jur. (N.S.) 679 ; 14 L. T. 748 ; 14 W. R. 904.

Neither can such land be sold under the powers conferred by s. 116, unless the sale is actually for one of the purposes specified in that section. *Ib.*

Semble, where it is desirable that the land of a lunatic tenant for life, who has a sufficient maintenance, should be sold for building purposes, the proper course is to apply to the court under the Settled Estates Acts. *Ib.*

Will—Power of Sale and Conversion—"Express Declaration."]—A testator devised land to his trustees on trust to sell with power to postpone sale, and expressed an earnest wish that his mineral land should remain in his family for a considerable number of years, and he expressed his will to be that the trust for sale, so far as it related to his mineral lands, should not be exercised until after the decease of his children. On a petition for the sale of the mineral lands in the lifetime of certain of his children :—Held, that these words did not constitute an "express declaration" within s. 38 of the Settled Estates Act, 1877, to prevent the court from exercising its statutory powers. *Peake's Settled Estates, In re*, 63 L. J., Ch. 109 ; [1893] 3 Ch. 430 ; 3 R. 722 ; 69 L. T. 281 ; 42 W. R. 125.

Where no Beneficial Owner—Trust for Accumulation—Sale for Fee Farm Rent.]—Trustees of a will, containing a trust for sale of land, and giving them power of leasing and management until sale, are persons who, if there is no beneficial owner for the time being of the rents and profits, may be authorised, on petition, to sell such land for building at fee farm rents, and for such purpose to undertake works necessary for developing the estate. Quære, whether a definite plan for such development ought not to be presented to the court. *Christy's Settled Estates, In re*, 8 R. 439 ; 42 W. R. 613.

Improvement of Land Act—Priorities.]—A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment with interest. By several statutes, the exchequer loan commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls and profits, &c., of such works ; and priority is given to mortgages given to the commissioners over mortgages made to private individuals, except bonâ fide creditors, who at the time of the advances by the commissioners are entitled to repayment. The 1 & 2 Will. 4, c. 26 gave power to the commissioners, in case of default of payment, to enter and sell. The 5 & 6 Vict. c. 9 enacted that the property sold by the commissioners should be held freed and discharged from all claim and demand of the mortgagees, or of persons claiming under them, in all respects as if they were foreclosed ; provided, that nothing herein contained shall prejudice the rights "of any creditors, in respect of any surplus" arising on the sale :—Held, that the commissioners had a legal right to enter and sell ; and that after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors ; but that this liability could be enforced against the commissioners only, and not against the purchaser. *S. E. Ry.* v. *Jortin*, 6 H. L. Cas. 425 ; 27 L. J., Ch. 145 ; 4 Jur. (N.S.) 467.

—— **Glebe Lands—Order by Inclosure Commissioners for Payment of Arrears.**]—A rent-charge for a certain period of time, in arrear, charged by an order made by the inclosure commissioners upon the inheritance of glebe lands of a rectory, under the provisions of the General Land Drainage and Improvement Company's Act of 1849 (12 & 13 Vict. c. xci.), was, under the provisions of the same act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the inclosure commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the ecclesiastical commissioners were made defendants :—Held, that the ecclesiastical commissioners were not necessary parties. *Scottish Widows' Fund* v. *Craig*, 51 L. J., Ch. 363 ; 20 Ch. D. 208 ; 30 W. R. 463.

—— **Scottish Act—Personal Action against Possessor of the Land.**]—By the Scottish Drainage and Improvement Company's Act, 1856 (19 & 20 Vict. c. lxx.), s. 61, "Every charge on land by virtue of this act may be recovered by the company or the person for the time being entitled to the same by the same means and in like manner in all respects as any feu duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland" :—Held, that it was not competent for the company to maintain a personal action against a landowner for the annual charge upon the land under the act. *Scottish Drainage and Improvement Co.* v. *Campbell*, 14 App. Cas. 139.

2. By Tenant for Life.

Who is—Conditional Life Estate—Forfeiture by Non-residence—Invalidity of Condition.]—Estates devised to the use of a son so long as he should reside on some part of the estate for not less than three months in each year, and after death of the son for the benefit of his children as he should by will appoint ; and, in default of such appointment, or, if he should fail in compliance with the above condition, to trustees, on trust for sale and distribution, of the proceeds of sale among the son's children :—Held, that the son had the powers of a tenant for life under the Settled Land Act, and could sell the estate, and that, notwithstanding the condition as to residence, he would, by virtue of s. 51 of the act, be entitled to the income of the proceeds of sale during his life. *Paget's Settled Estates, In re*, 55 L. J., Ch. 42 ; 30 Ch. D. 161 ; 53 L. T. 90 ; 33 W. R. 898.

—— **Personal Occupation—"In Possession."**]—Where by a settlement lands were limited to trustees for a term of years upon trust to permit the premises to be personally occupied by the

widow of a tenant for life during her life, so long as she should remain a widow and should be desirous of personally occupying the same, and after her decease or second marriage over, and the widow had not expressed any desire to personally occupy the same, but had joined in leasing the premises for a term of five years, it was held that if upon the determination of the lease the lady should be desirous of personally occupying the premises, she would then, but not before, have the powers of a tenant for life for the purposes of the Settled Land Acts, under s. 58 of the act of 1882. *Edwards' Settlement, In re*, 66 L. J., Ch. 658; [1897] 2 Ch. 412; 76 L. T. 774.

—— **Persons entitled to Bid at Sale—Life Estates bought back.**]—Settled lands were appointed to a father for life, and after his death to trustees during life of W., and after his death to his sons successively in tail male, remainder to trustees during life of G., with remainders over. The appointments to trustees were on trust to absolutely sell the life estates, and pay the proceeds to W. and G. as tenants in common. It was provided that until sale the rents and profits of the life estates should be paid to W. and G. in equal shares as tenants in common. W. and G. covenanted not to claim the life estates in specie, it being the intention of the parties that the trusts for sale should be absolute and irrevocable. On a sale by W. and G. after the father's death:—Held, that as either W. or G. alone or both of them together might bid at any sale by the trustees, they must be treated as if they had bought the life estates back, in which case they would be tenants for life, and could therefore sell under the powers of the act. *Hale and Clarke, In re*, 55 L. J., Ch. 550; 55 L. T. 151; 34 W. R. 624.

—— **Person entitled to Income under Trust for Payment.**]—A testator devised an estate to the use of trustees for a term of years and subject thereto to his son H. S. for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, and to pay off mortgage debts and other charges. The testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into and hold possession of the rents and profits of the estate, "and not deliver the same to any person beneficially interested in any part thereof." Very full powers of management were given to the trustees, as well as such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882:—Held, that H. S. was a person having the power of a tenant for life of the estate within the meaning of s. 58, sub-s. 1, cl. ix., of the Settled Land Act, 1882, and that his consent was necessary under s. 56, sub-s. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will. *Clitheroe Estate, In re*, 55 L. J., Ch. 107; 31 Ch. D. 135; 53 L. T. 733; 34 W. R. 169—C. A. And see *Pocock and Pankherd's Contract, In re*, supra, col. 725.

Leasehold interests in mines were limited to trustees for a term upon trust to work the mines and invest the profits, and, subject to the trusts of that term, upon trusts corresponding to limitations of freehold estates, under which A. was tenant for life, with remainders over:—Held, that during the subsistence of the trust term the court had not jurisdiction to order a sale upon the petition of A. alone, but that the court would have jurisdiction if the trustees were joined as co-petitioners, and liberty to amend the petition was accordingly given. *Puxley, Ex parte*, Ir. R. 2 Eq. 237.

—— **Discretionary Trust.**]—A trust, although it be to last during the life of A., to apply the rents and profits of an estate for the benefit of A. and his wife and his children, if any, does not constitute A., or A. and his wife together, a tenant for life of the estate under s. 2, sub-s. 6 of the Settled Land Act, 1882, or a person with the powers of a tenant for life under s. 58 of that act. *Atkinson, In re, Atkinson* v. *Bruce*, 55 L. J., Ch. 49; 31 Ch. D. 577; 54 L. T. 403; 34 W. R. 445—C. A.

"Possession."]—The word "possession," in s. 2, sub-s. 5, and in s. 58, sub-s. 1, is to be read as in antithesis to "remainder" or "reversion." *Ib.*

"So entitled."]—The words "so entitled," in s. 2, sub-s. 6, mean entitled under the direction in the preceding sub-section, i.e. for life. *Ib.*

No Legal or Equitable Estate in Possession.]—Real estate devised to trustees upon trust for twenty years after testator's death, to manage and to accumulate or invest rents in purchase of land, and after the determination of the twenty years to settle the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which the testator's son took certain estates as tenant for life:—Held, that the testator's son, not having any estate or interest in possession until the determination of the term, had not, during its continuance, the powers of a tenant for life. *Strangways, In re, Hickley* v. *Strangways*, 56 L. J., Ch. 195; 34 Ch. D. 423; 55 L. T. 714; 35 W. R. 83—C. A.

Person in Receipt of Rents under Thellusson Act.]—A person receiving, whether in his own right or as executor, the rents of land under a direction to accumulate which is avoided by the Thellusson Act, has the powers of a tenant for life under the Settled Land Act, 1882. *Vine* v. *Raleigh*, 65 L. J., Ch. 103; [1896] 1 Ch. 37; 73 L. T. 655; 44 W. R. 169.

No Income arising.]—Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders to the use of A.'s children and issue. The trustees were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on incumbrances, and during A.'s life to pay out of the residue an annuity, and pay the ultimate residue to A. The estates were so heavily incumbered that A. had received nothing, and there was no prospect of his receiving anything for many years:—Held, that A. was within the meaning of the Settled Land Act, 1882, s. 58, sub-s. (1), cl. ix., and therefore possessed the power of selling given by the act to tenants for life. *Jones, In re*, 53 L. J., Ch. 807; 26 Ch. D. 736; 50 L. T. 466; 32 W. R. 735—C. A.

No Trustees.]—Estates devised to trustees upon trust to pay rents to A. for life, and after

his decease to sell and stand possessed of proceeds for all A.'s children. A. was a widower, seventy years old, and he had one child only, and she and her husband, in July, 1880, contracted to sell her reversion in the estate to the plaintiff. The tenant for life, in January, 1883, advertised the estate for sale under the powers of the Settled Land Act, 1882. On motion by the plaintiff to restrain the tenant for life from selling:—Held, that the tenant for life had power under the act to sell the fee-simple and inheritance of the property if he should comply with the provisions of the act; but held, also, that there were no trustees to whom he could under s. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the act. *Wheelwright* v. *Walker*, 52 L. J., Ch. 274; 23 Ch. D. 752; 48 L. T. 70; 31 W. R. 363.

Held, also, that the plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the plaintiff objecting) that the defendant's solicitor ought not to be appointed. *Ib.*

Trust for Sale—Leave to Sell.]—Where land was devised upon trust for sale, with trusts of the proceeds (subject to certain liabilities which were shortly cleared off) for two persons as tenants for life, and then for the same persons as were the trustees for sale, and the trustees declined to sell the land:—Held, that leave to sell the land, under s. 63 of the Settled Land Act, 1882, should, under s. 7 of the Settled Land Act, 1884, be given to the tenants for life. *Harding's Settled Estate, In re*, 60 L. J., Ch. 277; [1891] 1 Ch. 60; 63 L. T. 539; 39 W. R. 118.

Direction for Postponed Sale—Contingent Interest—Trust for Accumulation.]—Devise in 1874 of real estates to trustees upon trust for sale, but with a direction that testator's M. estate should not be sold until the expiration of twenty-one years from the date of his will; for the purpose of transmission the real estate to be treated as converted from the death; the rents previous to conversion to be applied in the same manner as the income of the proceeds of sale; after payment of debts and legacies the surplus proceeds of sale to be invested, the capital to be held in trust for all the testator's children, at twenty-five or marriage, in equal shares. There was a maintenance clause, with a direction to accumulate the unapplied surplus of the income. The testator died in February, 1888, leaving six children, two of whom were over twenty-one but under twenty-five; and four who were infants:—Held, that the children could not exercise the powers of tenants for life over the M. estate, and that that estate could not be sold under ss. 63, 58, or 59 of the Settled Land Act, 1882. *Horne's Settled Estate, In re*, 57 L. J., Ch. 790; 39 Ch. D. 84; 59 L. T. 580; 37 W. R. 69—C. A.

Notice—Lunatic.]—The notice to be given, under s. 45 of the Settled Land Act, 1882, by the tenant for life of settled land to the trustees of the settlement, when he is intending to make a sale or lease, must be—not merely general notice of an intention to sell or lease—but a notice of a specific sale or lease which is contemplated at the time when the notice is given. The committee of a lunatic tenant for life cannot give a valid notice under s. 45, unless he has previously obtained authority from the court of lunacy to do so. *Ray's Settled Estates, In re*, 53 L. J., Ch. 205; 25 Ch. D. 464; 50 L. T. 80; 32 W. R. 458.

Absolute Power—Consent of Trustees of Settlement.]—A tenant for life has under the Settled Land Act, 1882, an absolute power of sale. If the trustees believe that any intended exercise of the power is improper, they may apply to the court under s. 44. It is sufficient for the protection of the purchaser if when he completes there are trustees to whom he may pay his purchase money, and notice has been given them under s. 45, sub-s. 1; but, quære, whether a purchaser is liable with actual knowledge that no notice has been given. *Hatten* v. *Russell*, 57 L. J., Ch. 425; 38 Ch. D. 334; 58 L. T. 271; 36 W. R. 317.

The relative position and powers of a tenant for life and the trustees of a settlement under the Settled Land Acts, 1882 and 1884, considered. *Ib.*

—— **Effect of Previous Restrictive Act.**]—By a private act estates were vested in trustees upon trust by sale or mortgage thereof to raise money for the discharge of certain incumbrances and liabilities. The trustees had an absolute power of sale of all or any part of the estates, provided that the trustees should not sell any of the lands in C. and H. unless it should be absolutely necessary for the purposes of the act to do so, and in any case should not sell any of those lands until all the rest of the estates were sold. After the Settled Land Act, 1882, the tenant for life contracted to sell some of the lands in C. and H. The whole of the rest of the estates had not then been sold:—Held, that the power of sale conferred on the tenant for life by the Settled Land Act was an absolute power over and above that given to the trustees by the private act, and that he was therefore entitled to sell. *Chaytor's Settled Estate Act, In re*, 53 L. J., Ch. 312; 25 Ch. D. 651; 50 L. T. 88; 32 W. R. 517.

Owner of Undivided Moiety—Concurrence of other Owner.]—The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life, without the concurrence of the owner of the other undivided moiety. *Collinge's Settled Estates, In re*, 57 L. J., Ch. 219; 36 Ch. D. 516; 57 L. T. 221; 36 W. R. 264.

Several Persons Constituting one Tenant for Life — Separate Solicitors — Costs.] — Where several persons entitled as tenants in common together constitute a tenant for life for the purposes of the Settled Land Act, 1882, they need not, on a sale of the settled land, employ a common solicitor to carry out the sale; and costs of separate solicitors for perusing and completing the conveyance will be allowed out of the proceeds. *Smith, In re, Smith* v. *Lancaster*, 63 L. J., Ch. 842; [1894] 3 Ch. 439; 7 R. 465; 71 L. T. 511; 43 W. R. 17—C. A.

Consent of Assignee for Value—Service of Summons for Rescission of Contract.]—A tenant for life contracted to sell the settled estates free from incumbrances. His wife, who claimed to be an assignee for value of his life interest was not a party to the contract, and refused to consent to the sale. The purchaser took out a

summons under the Settled Land Acts, and the Vendor and Purchaser Act, asking for a declaration whether her consent was necessary and had been obtained, and that, if it was necessary and had not been obtained, he was entitled at his option to rescind the contract or to have specific performance, with compensation. The summons was served on the vendor and also on his wife. She appeared, and on the hearing objection was taken on her behalf to the jurisdiction:—Held, that she had been improperly served with the summons, and must be dismissed from the proceedings. *Ailesbury Settled Estates, In re*, 62 L. J., Ch. 1012; 3 R. 704; 69 L. T. 493; 42 W. R. 45.

Price.]—Where the tenant for life of a settled estate is attempting to sell it, and the remainderman offers to buy the estate at its full value, the remainderman is entitled to an injunction restraining the tenant for life from selling at a less price than that offered by the remainderman, or from selling to any person other than the remainderman without giving him a reasonable opportunity of purchasing the estate at a higher price than may be offered by any other bidder. *Wheelwright* v. *Walker*, 48 L. T. 867; 31 W. R. 912.

—— **Increase in Value.**]—Independently of the cumulative powers of sale given to tenants for life by the Settled Land Act, 1882, the tenant for life, and the trustees under a will which gives them power to sell the estate at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, will not be restrained from selling the estate at the request and for the benefit of the tenant for life on merely speculative evidence adduced by the remainderman of an expected future increase in the value of the property from the development of coal mines, and the construction of a railway through the estate. *Thomas* v. *Williams*, 52 L. J., Ch. 603; 24 Ch. D. 558; 49 L. T. 111; 31 W. R. 943.

Pendency of Administration Action.] — A tenant for life can sell after decree made in administration action. *Cardigan (Lady)* v. *Curzon-Howe*, 55 L. J., Ch. 71; 30 Ch. D. 531; 53 L. T. 704; 33 W. R. 836.

Restraint on Anticipation.]—A jointress has not a concurrent estate or interest with the tenant for life, but only a charge on the estate so long as the jointure is paid. On a sale by the tenant for life free from incumbrances, a restraint on anticipation was released by the court in order to enable a jointress to consent to the payment off out of the purchase money of certain mortgages to which her jointure had priority. *Ailesbury (Marquis) and Iveagh (Lord), In re*, 62 L. J., Ch. 713; [1893] 2 Ch. 345; 3 R. 440; 69 L. T. 101; 41 W. R. 644.

Infant—Executory Limitation over—Death under Twenty-one without Issue.] — Estates devised to the use of the testator's wife and G. T., upon trust to pay the net rents and income to the wife for the maintenance of the testator's son until twenty-one, and without being liable to account for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for the wife for life, and after her death upon the trusts therein mentioned:—Held, under the Settled Land Act, 1882, s. 58, sub-s. 2, that the infant son had the powers of a tenant for life, being tenant in fee-simple with an executory limitation over in case of dying under twenty-one without issue. *Morgan, In re*, 53 L. J., Ch. 85; 24 Ch. D. 114; 48 L. T. 964; 31 W. R. 948.

—— **Shares Vesting at Twenty-one.**]—A testator devised all the residue of his real estate in trust for his six younger children, and in case any of them should die in his lifetime leaving issue living at his decease, and which issue, being male, should live to twenty-one years, or, dying under that age, should leave issue surviving, or being female, should live to attain that age or marry: then the share to which such child would, if he or she had survived the testator, and had attained the age of twenty-one years, have become absolutely entitled, should be held upon trust for such issue:—Held, that the two infant children of one of the six younger children of the testator who had died in the testator's lifetime took a vested interest in the share of their deceased parent, liable to be divested on their death under the age of twenty-one years, and that they had, therefore, the powers of a tenant for life under the Settled Land Act, 1882, s. 58, sub-s. 2, in respect of that share. *James' Settled Estates, In re*, 51 L. T. 596; 32 W. R. 898.

—— **Appointment of Persons to Exercise Powers.**]—Where, in the absence of any trustees of a settlement within the meaning of the Settled Land Act, capable of exercising powers of sale over the settled land, an appointment has been made under s. 60 of persons to exercise on behalf of an infant tenant for life the powers of a tenant for life, and to sell part of the settled estate, the persons so appointed can make a good title without the necessity of appointing under s. 38 trustees of the settlement to whom notice of the intended sale can be given under s. 45. The order made under s. 60 ought in such a case to direct that the purchase-money be paid into court. *Dudley (Countess) and L. & N. W. Ry., In re*, 56 L. J., Ch. 478; 35 Ch. D. 338; 57 L. T. 10; 35 W. R. 492. And see *Eyre* v. *Saunders*, supra, col. 732.

Suspension or Cesser of Life Estate—Trust for Accumulation of Income for Payment of Debts.]—Real estate devised upon trust to permit a daughter to receive the rents and profits during her life for her separate use, and a direction that, if a claim for 1000*l.*, settled on the marriage of the daughter, should be enforced, "then all her interest and benefit from the estate" should "cease until all the debts and claims on the same" should be paid. After the testator's death payment of the 1000*l.* was demanded:—Held, that the daughter's life estate was suspended only; that there was, in substance, an estate for life subject to a "trust for accumulation of income" for payment of debts; and therefore, that the testator's daughter was a person having the powers of a tenant for life within s. 58, sub-s. 1 (vi.) of the Settled Land Act, 1882. *Williams* v. *Jenkins*, 62 L. J. Ch. 665; [1893] 1 Ch. 700; 3 R. 298; 68 L. T. 251; 41 W. R. 489.

Life Estate—Merger.]—A tenant for life of a

settled estate agreed to sell part thereof to a company, and before the conveyance was completed, by deed, in consideration of the release by his son, who was the succeeding tenant for life, of a rentcharge, payable to him, and of a covenant by the son to pay and keep down certain charges in exoneration of the father, and of such part of the settled estate as was retained by the father, conveyed part of the settled estate, including the land agreed to be conveyed to the company, to a trustee for a term of years upon trusts for further securing the payment of the charges covenanted to be paid by the son, and subject to such term and to the trusts thereof to the use of the son, his heirs and assigns :—Held, on a summons taken out under the Vendor and Purchaser Act, 1874, that, having regard to the provisions of s. 25, sub-s. 4, of the Judicature Act, 1873, and to the fact that it was for the benefit of the son that the father's life estate should be kept alive, the father's life estate was not merged and extinguished, and that he had the power to execute a valid conveyance to the company of the land agreed to be conveyed to them. *Barry Ry. and Wimborne (Lord), In re*, 76 L. T. 489.

Incumbrance—Release of Part of Rentcharge created under Improvement of Land Act, 1864—Consent of Incumbrancer—Approval by Board of Agriculture.] — An improvement rent-charge created under the Improvement of Land Act, 1864, is an incumbrance to which s. 5 of the Settled Land Act, 1882, applies; and a tenant for life, selling under the Settled Land Act part of an estate of which the whole is subject to an improvement rentcharge, can, with the consent of the owner of the rent-charge and without obtaining the approval of the Board of Agriculture, exonerate the land sold from the rent-charge, and charge the same on the unsold remainder of the estate exclusively. *Strafford (Lord)* to *Maples*, 65 L. J., Ch. 124; [1896] 1 Ch. 235; 73 L. T. 586; 44 W. R. 259—C. A.

3. What Property may be Sold.

a. Mansion House and Heirlooms.

Service of Summons.]—Service of a summons for leave to sell the mansion house and heirlooms on the children of the tenant for life was dispensed with, their interest being sufficiently represented by the trustees, who had been served. *Brown's Will, In re*, 53 L. J., Ch. 921; 27 Ch. D. 179; 51 L. T. 156; 32 W. R. 894.

Residence Clause.]—A testator devised his mansion house and estate, to trustees upon trust for his son for life, with equitable remainders over in strict settlement for the benefit of the son's issue; he bequeathed heirlooms to be annexed to the mansion house and held in trust for the person for the time being entitled to it, and he directed that his mansion house and certain lands thereto belonging, should be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms should at all times be kept in the mansion house. The trustees had powers of sale and leasing over any part of the estate except the mansion house and lands above mentioned. The tenant for life applied for leave to sell the excepted mansion house and lands, on the ground that, owing to ill health, he was unable to reside in the mansion house, and also that the bulk of the estate could not be sold advantageously without the mansion house and adjoining lands. The summons did not ask for the sale of or contain any reference to the heirlooms :—Held, that the case was a proper one for a sale of the mansion house and adjoining lands, but that leave for sale would not be granted without some direction as to the disposal of the heirlooms. *Ib.*

The summons was then amended, with the consent of the trustees, by asking for leave to sell the heirlooms also, under s. 37 of the Settled Land Act, 1882, by reference to an inventory verified by affidavit, whereupon an order was made for the sale of the heirlooms, with liberty for the tenant for life to bid at such sale. *Ib.*

Purchase of new Mansion House—Sale and Removal of Chattels.] — By the will of the settlor, chattels were given upon trust to be held and enjoyed and go along with his P. house. After his death some of the personalty settled by the will was laid out in the purchase of real estate, with a house upon it more suitable for the family mansion than the P. house. It was desired to sell the P. house, and such of the chattels in it as were not suitable for removal to the new house, and to remove to that house such of the chattels as were suitable for removal :—Held, that this might be done. *Browne* v. *Collins*, 62 L. T. 566.

Proposed Sale—Discretion of Court.]—The tenant for life of settled estates applied to the court to sanction the sale of pictures settled as heirlooms at the mansion house, the money arising to be applied in reduction of charges upon the settled estates. The estimated sum to arise from the sale was 7,300*l.*, and the annual income of the estate was about 7,500*l.* The guardians ad litem of the tenant in tail in remainder and the trustees opposed the sale. It appeared that there had been no substantial depreciation in the property. The pictures were a characteristic feature of the mansion house :—Under the circumstances of the case the court in the exercise of its discretion refused to sanction the proposed sale, *Beaumont's Settled Estates, In re*, 58 L. T. 916.

Discretion of Tenant for Life.]—Sect. 37 of the Settled Land Act, 1882, gives a tenant for life a discretion to sell heirlooms, but in the exercise of that discretion, and when determining whether they ought to be sold or not, he is to act as trustee not for himself only, but for himself and all the persons entitled under the settlement, and must take into consideration all the circumstances of the particular case. *Radnor's (Earl) Trusts, In re*, 59 L. J., Ch. 782; 45 Ch. D. 402—C. A. Affirming 63 L. T. 191.

Assignees of Tenant for Life — Consent.] — Where the tenant for life has mortgaged his life interest to its full value and the trustees oppose a sale of the mansion house and park, the court, in its exercise of its discretion, will not make the order without full information as to the proposed sale, and the consent of the mortgagees. *Sebright's Settled Estates, In re*, 56 L. J., Ch. 169; 33 Ch. D. 429; 55 L. T. 570; 35 W. R. 49—C. A.

Where Testator has given a Power of Sale.]—W., by will, after giving certain chattels in K. mansion house to be enjoyed by his eldest son as

heirlooms during his life, devised the K. mansion house and all other his real estate upon trust out of the rents and profits to pay annuities to his daughters, and subject thereto to pay the rents and profits to his said son during his life, and after his death to sell the same and divide the proceeds as therein mentioned. The son desired to sell the mansion house with the rest of the estate. The trustees refused their consent:—Held, that, the mansion house not being a family seat, and the testator having himself directed its sale at the death of the tenant for life, the tenant for life ought to be allowed to sell at his discretion. *Wortham's Settled Estates, In re*, 75 L. T. 293.

Remaindermen opposing Sale—Tenants on Estate.]—The tenant for life of an estate, including an old family mansion house, was a young man who had mortgaged his life estate to a money lender who had brought an action for foreclosure. The tenant for life, being too poor to reside on the estate, had contracted under the Settled Land Acts to sell the whole for a good price to a purchaser, and petitioned under s. 10 of the Settled Land Act, 1890, for the sanction of the court to the sale of the mansion house and demesne lands. The remaindermen opposed the petition:—Held, that the court in the exercise of its discretion under the Settled Land Acts must have regard to the well-being of the land, and the interests of the persons from whose industrial occupation the rents and profits were derived, as well as to the interests of those entitled under the settlement; and that to refuse the sanction in such a case would be to defeat the object of the legislature, which was the wellbeing of settled land. *Bruce* v. *Ailesbury (Marquis)*, 62 L. J., Ch. 95; [1892] A. C. 356; 1 R. 37; 67 L. T. 490; 41 W. R. 318; 57 J. P. 164—H. L. (E.)

Heirlooms already Sold.]—The court has no jurisdiction, under s. 37 of the Settled Land Act, 1882, to sanction the sale of heirlooms already sold. *Ames, In re, Ames* v. *Ames*, 62 L. J., Ch. 685; [1893] 2 Ch. 479; 3 R. 558; 68 L. T. 787; 41 W. R. 505.

Specified Heirlooms.]—Leave given to a tenant for life, under a settlement containing a discretionary trust for sale of the estates, and also a power to sell certain settled heirlooms, to sell a specified portion of the heirlooms to pay for improvements. *Houghton Estate, In re*, or *Cholmondeley's (Marquis) Settled Estate, In re*, 55 L. J., Ch. 37; 30 Ch. D. 102; 53 L. T. 196; 33 W. R. 869.

Annuitants.]—A tenant for life of settled lands, including a mansion house and demesne, devised perpetual rentcharges or annuities charged upon the lands, some of the annuities being in fee, others in strict settlement. On an application for leave to sell the mansion house and demesne:—Held, that the annuitants could not sell any part of the settled lands. *Bective Estate, In re*, 27 L. R. Ir. 364.

b. Other Property.

Incorporeal Hereditament.]—A dignity or title of honour, as an incorporeal hereditament, is "land" within the meaning of s. 37 of the Settled Land Act, 1882. The Settled Land Act, 1882, does not enable a limited owner to sell any property which, when vested in a tenant in fee simple, is by law inalienable. *Rivett-Carnac's Will, In re*, 54 L. J., Ch. 1074; 30 Ch. D. 136; 53 L. T. 81; 33 W. R. 837.

—— **Tithes.**]—Tithes are an incorporeal hereditament within s. 2, sub-s. 10, of the Settled Land Act, 1882. *Esdaile, In re, Esdaile* v. *Esdaile*, 54 L. T. 637.

Minerals apart from Surface.]—The 19 & 20 Vict. c. 120, empowers the court to authorise the sale and conveyance of minerals situate under a settled estate, apart from the surface thereof. *Law, In re*, 7 Jur. (N.S.) 511. S. P., *Mallin, In re*, 3 Giff. 126; 30 L. J., Ch. 929; 4 L. T. 435; 9 W. R. 588.

The contract for sale was ordered to be carried into effect by a grant, with a provision limiting the time within which the coal was to be worked out. *Ib.*

The court has jurisdiction under the Leases and Sales of Settled Estates Act to order a sale of mines apart from the surface, with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time. *Milward, In re*, L. R. 6 Eq. 248; 16 W. R. 1078.

Under 25 & 26 Vict. c. 108, the court can direct that persons having powers of sale and exchange, not authorising reservation or separation of mines and surface, can exercise the powers as if they authorised such reservation or separation. *Wynn, In re*, L. R. 16 Eq. 237; 21 W. R. 695.

And see POWERS, xix. d, 1 d.

4. Title of Purchaser.

When Indefeasible.]—Semble, that the conveyance when completed under the 19 & 20 Vict. c. 120, will give an indefeasible title by virtue of s. 28, notwithstanding any excess of jurisdiction. *Thompson, In re, Green* v. *Thompson*, 1 Johns. 418; 5 Jur. (N.S.) 1343.

Where an order under the 19 & 20 Vict. c. 120, was wrong, the purchaser having the concurrence of all persons beneficially interested would take an indefeasible title under s. 28. *Shepheard's Settled Estates, In re*, 39 L. J., Ch. 173; L. R. 8 Eq. 571; 21 L. T. 525.

Under s. 28 a purchaser obtains by a conveyance under the act an indefeasible title, except against persons beneficially interested whose concurrence has not been obtained, although the estate is not a settled estate. *Ib.*

—— **Conveyancing Act, 1881, s. 70.**]—An order for sale under the Settled Estates Act, 1877, contained a direction dispensing with the concurrence or consent of the persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to a certain estate tail, without naming them. The purchaser objected to the title on the ground that the order on the face of it was irregular:—Held, by the court of appeal, that under s. 70 of the Conveyancing and Law of Property Act, 1881, whether the objection to the order appears on the face of it or not, the purchaser has a good title and must complete. *Hall Dare's Contract, In re*, 51 L. J., Ch. 671; 21 Ch. D. 41; 46 L. T. 755; 30 W. R. 556.

And see POWERS (POWER OF SALE).

C. LEASES.

1. In General.

Form of Order.]—Decree that it is fit and proper that an application should be made to parliament to extend the leasing powers affecting a settled estate. *Savil* v. *Bruce*, 29 Beav. 557.

When authorised—Jurisdiction.]—By s. 21 of the 19 & 20 Vict. c. 120, no application is to be granted where a similar application has been rejected by parliament. Where, therefore, a petitioner had several times applied to parliament for similar powers of leasing settled property as were asked for by the petition, and such applications were rejected :—Held, that the court had no power to grant such an application. *Wilson's Estate, In re*, 1 L. T. 25.

—— **Contracts.**]—The powers of leasing conferred by the 19 & 20 Vict. c. 120, s. 2, can only be exercised in cases where the contracts for granting the leases are strictly within the terms of that act. In such cases the Trustee Acts apply only after a decree in a suit to which the intended lessees would be necessary parties. If the powers of leasing are not aided by either of these acts, the prudent course is to apply to parliament for the proper powers. *Cust* v. *Middleton*, 3 De G. F. & J. 33 ; 30 L. J., Ch. 260 ; 7 Jur. (N.S) 151 ; 9 W. R. 242.

A testator entered into contracts for leases of parts of his estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted :—Held, that the 19 & 20 Vict. c. 120, could not safely be resorted to for granting these leases. *Ib.*

—— **Beneficiaries Opposing.**]—The court cannot authorise a lease, under the 19 & 20 Vict. c. 120, if any one of the parties interested under the settlement opposes the application. *Merry, In re*, 36 L. J., Ch. 168 ; 15 L. T. 529 ; 15 W. R. 307.

A testator devised real estate to two trustees, of whom K. was one, in fee, to receive the annual produce and rents, and subject to outgoings, to apply the net rents to M. for life ; and by a codicil he gave the ultimate remainder in certain events to K. The will contained no power of leasing. On petition by M., praying that a power to grant leases might be vested in the other trustee :—Held, that the opposition of K. was fatal to the application. *Taylor* v. *Taylor*, 45 L. J., Ch. 848 ; 3 Ch. D. 145 ; 35 L. T. 450 ; 25 W. R. 279—C. A.

Consent Refused.]—Where a tenant for life of devised estates has leasing powers, which are expressly to be exercised only with the consent of a person named, the court will not exercise the powers given it by the 19 & 20 Vict. c. 120, so as to enable the tenant for life to dispense with such consent, even though it appears that the person whose consent is required has arbitrarily, but not maliciously refused. *Hurle's Settled Estates, In re*, 5 N. R. 167 ; 2 H. & M. 196 ; 11 Jur. (N.S.) 78 ; 11 L. T. 592 ; 13 W. R. 171.

How Granted.]—On petition, the court made an order vesting in trustees of a settlement certain powers to grant leases, and to do other things, without in the first instance directing a reference to the conveyancing counsel, or ordering an inquiry as to the propriety of the powers. *Jones' Settled Estates, In re*, 5 Jur. (N.S.) 564 ; 7 W. R. 171, 523.

—— **Rescinding Leasing Powers.**]—Where trustees have obtained, on petition, general leasing powers, and it is desired to obtain the same powers for the tenant for life, the court will rescind the former order, and, without prejudice to anything done under it, make the order. *Wheeler* v. *Tootal*, 18 L. T. 534 ; 16 W. R. 273.

—— **Varying Leasing Powers.**]—Where it is desired to vary powers of leasing granted to trustees by the court under the Settled Estates Act, 1877, it is necessary, in spite of the powers given by the Settled Land Act, 1882, and of s. 56 of that act, to make an application to the court in that behalf under the Settled Estates Act, 1877, stating the advisability of the proposed course, and asking that the operation of the order may be stayed or the leave to grant leases thereunder be suspended. *Poole's Settled Estate, In re*, 50 L. T. 585 ; 32 W. R. 956.

Building Land.]—Under the 19 & 20 Vict. c. 120, the court will authorise leases on the terms of the lessees making roads. *Chamber, In re*, 28 Beav. 653 ; 29 L. J., Ch. 924 ; 6 Jur. (N.S.) 1005 ; 8 W. R. 646.

Where the court has granted general powers of leasing to trustees, enabling them, under 19 & 20 Vict. c. 120, s. 14, to lay out lands for squares, roads, &c., the court will not always require plans to be laid before it. *Hargreave, In re*, 15 L. T. 173 ; 15 W. R. 54.

Surrender — Equitable Tenant for Life.]—Section 7 of the Settled Estates Act, 1887, does not authorise an equitable tenant for life, not being a lessor, to take a surrender which is not sanctioned by the court. *Easton* v. *Penny*, 67 L. T. 290 ; 41 W. R. 72.

The court will authorise the grant of a new lease upon the surrender of an old one, if the best rent, which under all the circumstances of the case can be retained, is reserved. *Rawlin, In re*, L. R. 1 Eq. 286 ; 13 L. T. 626 ; 14 W. R. 218.

A lease may be authorised upon the surrender of an existing lease, although an underlease granted by the surrendering lessee is unexpired. *Ford, In re*, L. R. 8 Eq. 309.

Covenant to Renew Lease at Future Time.]—The court has no power under ss. 4 and 5 of the Settled Estates Act, 1877, to sanction a sub-lease of settled land (held under a renewable lease) for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not be a lease taking effect in possession. *Farnell's Settled Estates, In re*, 33 Ch. D. 599 ; 35 W. R. 250.

Consideration — Best Rent — Past Voluntary Expenditure by Lessee.]—A voluntary expenditure cannot be treated as consideration for the grant of a building lease, under s. 8, sub-s. 1, of

the Settled Land Act, 1882, at less than the "best rent" required by s. 7, sub-s. 2; and, in calculating such rent, no regard can be had to money which has been laid out for the benefit of the settled land, unless it has been laid out in reference to the transaction of the lease. Therefore, a past voluntary expenditure by a lessee cannot be regarded under the section. *Chawner's Settled Estates, In re*, 61 L. J., Ch. 331; [1892] 2 Ch. 192; 66 L. T. 745; 40 W. R. 538.

Customary Lease.] — Trustees of a charity authorised to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial. *Cross, In re*, 27 Beav. 592.

The court authorised the granting of building leases of settled estates for 999 years, or at fee-farm rent, such being the custom of the country, and it appearing that it could not be beneficially disposed of for such purposes on any other terms. *Carr's Settled Estates, In re*, 7 Jur. (N.S.) 1267; 9 W. R. 776.

Building Leases—Infant Tenant in Tail.]—Where an infant tenant in tail in possession was eighteen years of age, the court refused, on the application of the trustees of the settlement, who had the powers of a tenant for life, under s. 60 of the Settled Land Act, to grant general authority to make building leases not exceeding 200 years, but gave such authority subject to the approval of the court to the making of each lease. *Cecil* v. *Langdon*, 54 L. T. 418.

—— **Covenant by Lessee to Spend a Specified Sum in doing Scheduled Repairs—Discretion of Court.**]—Semble, a lease by which the lessee covenants to expend a fixed sum in doing repairs specified in a schedule to the lease is a "building lease" within the meaning of s. 2, sub-s. 10 (iii.), and s. 8 (i.) of the Settled Land Act, 1882, and the court has therefore jurisdiction, under s. 7 (i.) of the Settled Land Act, 1884, to give leave to a person who, by virtue of s. 63 of the Settled Land Act, 1882, is tenant for life of settled property, to grant such a lease for any term not exceeding ninety-nine years. The giving of such leave is in each case in the discretion of the court. *Daniell's Settlement, In re*, 64 L. J., Ch. 173; [1894] 3 Ch. 503; 7 R. 462; 71 L. T. 563; 43 W. R. 133—C. A.

—— **Trust to Accumulate Rents.**]—A testator gave his real estate to trustees for a term of 100 years, on trust to raise annuities, and accumulate the rents and profits for twenty-one years, or till some devisee entitled in possession should attain twenty-five; the accumulations to be laid out in real estate to be conveyed to the uses of the will. Subject to the term, he gave his real estate to A. for life, remainder to his first and other sons in tail male, with divers remainders over. He gave power to any tenant for life in possession who should have attained twenty-one, and to trustees during minorities, to grant building leases. A. had attained twenty-one, but not twenty-five. The trustees having purchased a building estate, a petition was presented by the trustees and A. and the first tenant in tail, an infant, asking that power to grant building leases might be vested in the trustees so long as there should be no tenant for life in possession who should have attained twenty-five:—Held, that as all parties interested concurred, and the exercise of a power of leasing would be beneficial to the estate, the court would give the power. *Harris's Settled Estates, In re*, 42 L. T. 583; 28 W. R. 721.

Estates Settled upon Distinct Trusts.] — The trustees of a will, by which two contiguous estates were devised to them upon distinct trusts, obtained from the court an order giving them power to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act, 1856, 19 & 20 Vict. c. 120, s. 10, and with the consent of the respective tenants for life for the time being. The trustees and the tenants for life of the two estates afterwards entered into an agreement to grant a mining lease of the two estates for forty years, as if the two estates were one property:—Held, that the trustees had no power to grant such a lease of the two estates. *Tolson* v. *Sheard*, 5 Ch. D. 19; 36 L. T. 756; 25 W. R. 667.

Mansion House.]—When a mansion house and appurtenances were settled in strict settlement under a will which contained an express direction that the mansion house should not be let, the court, though it would have been greatly for the benefit of all parties, and of the estate, that the house should be let, refused an application by the tenant for life, with the consent of the remainderman, to let it for seven years. *Cleveland (Duchess), In re*, 22 W. R. 818.

—— **Residence Clause.**]—A principal mansion house and demesne in the county of Dublin were settled upon the same trusts as lands in the counties of Mayo and Sligo, with a condition of forfeiture on non-residence in, selling of, or letting of the said mansion house and demesne, which attached both to them and to the other lands settled:—Held, that they were a "principal mansion-house" and demesne within the meaning of s. 15 of the Settled Land Act, 1882; that the condition of forfeiture was void for the purposes of that act; and that the court, on the facts, would authorise a temporary letting of them to be made. *Thompson's Will, In re*, 21 L. R. Ir. 109.

Payment to Induce Tenant for Life to Execute Lease—Validity of Lease.]—Where a sum of money has been paid by an intending lessee, not by way of fine, but to induce a tenant for life to grant a lease, and a lease purporting on the face of it to be made under the Settled Land Act, 1882, has been executed by the tenant for life, but not in conformity with the provisions of the act, the liability of the lessee is not limited to the payment to the trustees of the settlement of the sum of money so wrongfully paid, but the lease is after the death of the tenant for life void as against the persons entitled to remainder. The court in granting relief to such persons will not enter into the question whether they have been damnified by what has been done. *Chandler* v. *Bradley*, 66 L. J., Ch. 214; [1897] 1 Ch. 315; 75 L. T. 581; 45 W. R. 296.

Quære, whether, if such sum had been agreed upon as a fine, and it had not been paid as capital money either to the trustees of the settlement or into court, but some bonâ fide mistake had been made as to the proper mode of payment, the lessee would be protected under s. 45, sub-s. 3, and s. 54 of the Act of 1882. *Ib.*

2. By Whom Granted.

Equitable Tenant for Life.]—A husband devised two-fifths of real and personal estate to trustees, to receive the rents and income and pay the same to his widow for life. He then, subject to annuities and legacies, gave his residuary real and personal estate to the same trustees upon trust, after defraying rents, taxes and other expenses, to pay the "net annual rents, interest, and income then left" to his widow for life, with remainder over. The will contained no power of leasing:—Held, that his widow had no power to grant leases under the Leases and Sales of Settled Estates Act, s. 33 (19 & 20 Vict. c. 120). *Taylor, Ex parte, Taylor* v. *Taylor*, 44 L. J., Ch. 727; L. R. 20 Eq. 297; 33 L. T. 89; 23 W. R. 947.

Tenant for Years—Estate Determinable with Lease.]—A testator who had granted a lease of a house for a term which would end in 1890, by his will, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the said lease if she should so long live," and in case she should die "before the expiration of the term created by such lease," then he gave and devised the house to the children of his brother in fee, and he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees should sell the house, and out of the income of the proceeds pay 50*l.* a year to his wife during her life, and subject thereto he gave the residue of the proceeds for his brother's children. The testator died in 1866:—Held, that the widow was not a person under s. 58 of the Settled Land Act, 1882, entitled to the powers of a tenant for life, and was therefore not able to accept a surrender and make a new lease of the house for twenty-one years from December 25th, 1883, at an increased rent. *Hazle's Settled Estates, In re*, 54 L. J., Ch. 628; 29 Ch. D. 78; 52 L. T. 947; 33 W. R. 759—C. A.

Guardians.]—Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years:—Held, that this power was exercisable during minority by the guardians, with the consent of the trustees. *Newcastle's (Duke) Estates, In re*, 52 L. J., Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782.

No Trustees of Settlement.]—An agreement to give a lease, entered into by the tenant for life, under a settlement at a time when there are, to the knowledge of the intending lessee, no trustees of the settlement for the purposes of the Settled Land Acts will not, under those Acts, bind the settled lands. *Hughes* v. *Fanagan*, 30 L. R., Ir. 111—C. A.

——**Tenant for Life acting as Absolute Owner—Operation of Deed as exercise of Statutory Power.**]—A tenant for life granted a lease by deed to the plaintiff on the footing of absolute ownership and without any reference to the Settled Land Acts. The lease complied with the regulations for building leases made by tenants for life contained in s. 6 of the Act of 1882, but at the date of the lease there were no trustees of the settlement in existence for the purposes of the act, and consequently no notices could have been given. The plaintiff contracted to sell the lease to the defendant, who refused to complete, on the ground that the lease was void as against the remainderman:—Held, that the lease could and did operate as a lease under the powers of the Settled Land Act, 1882; that the lessor's title to the property for life did not depend on the existence or non-existence of trustees for the purposes of the act; that the lessee had acted in good faith, and was protected by s. 45, sub-s. 3; that, inasmuch as the existence of trustees was not a question of title, the lessee could not be held to have had constructive notice that there were none; that, even if he had known it, it did not follow that the title would be bad; that the defendant's title would practically not be open to attack; and that there must be judgment for specific performance. *Mogridge* v. *Clapp*, 61 L. J., Ch. 534; [1892] 3 Ch. 382; 67 L. T. 100; 40 W. R. 663—C. A.

Impeachment for Waste—Permissive Waste.]—A tenant for years is liable for permissive waste, and therefore a lease by a tenant for life under 40 & 41 Vict. c. 18, s. 46, exempting the lessee from liabilities for "fair wear and tear and damage by tempest" is void as "made without impeachment of waste." In granting such a lease the tenant for life has a discretion as to what are proper covenants, and the lease will be void only when there is an outrageous omission of covenants. *Nugent* v. *Cuthbert* (Sugden on Real Property, 475) distinguished. *Davies* v. *Davies*, 57 L. J., Ch. 1093; 38 Ch. D. 499; 58 L. T. 514; 36 W. R. 399.

Leasing Power, bonâ fide exercise of—Easement over Lands enjoyed with principal Mansion-house.]—A lease of a right of way granted by the tenant for life of a settled estate not in the bonâ fide exercise of his leasing power for the benefit of the settled estate, but in order to confer upon a third party a benefit at the expense or to the serious injury of the remaindermen is invalid under s. 53 of the Settled Land Act, 1882. A lease by a tenant for life of a house and lands together with a right of way over the park and lands usually occupied with the principal mansion-house of the settled estate is invalid under s. 10, sub-s. 2, of the Settled Land Act, 1890, and cannot be rendered valid under s. 2 of 12 & 13 Vict. c. 26, in respect of the house and lands comprised therein, excluding the easement. *Sutherland (Dowager Duchess)* v. *Sutherland (Duke)*, 62 L. J., Ch. 946; [1893] 3 Ch. 169; 3 R. 650; 69 L. T. 186; 42 W. R. 13.

3. Mining Leases.

By Assignee of Tenant for Life.]—An assignee of a tenant for life having petitioned the court to sanction a particular mining lease, and to grant a power of making mining leases, and there being persons unborn interested, the court entertained the application as to particular lease, but refused the general power to make mining leases. *Hutchinson, In re*, 12 Jur. (N.S.) 244; 14 L. T. 129; 14 W. R. 473.

Facilities for Working Mines.]—Trustees of a marriage settlement had power to grant mining leases for twenty-one years, and an order was made under 19 & 20 Vict. c. 120. On an application by the lessees:—Held, that the words "so

much land as the trustees should consider necessary for the convenient and effective working of the minerals" might be inserted. *Reveley, In re*, 32 L. J., Ch. 812; 8 L. T. 450; 11 W. R. 744.

Tenant for Life — Contract with Absolute Owner.]—Section 11 of the Settled Land Act, 1882, does not apply to a mining lease granted by a tenant for life for giving effect to a contract entered into by a predecessor who was absolute owner. *Kemeys-Tynte, In re, Kemeys-Tynte* v. *Kemeys-Tynte*, 61 L. J., Ch. 377; [1892] 2 Ch. 211; 66 L. T. 752; 40 W. R. 423.

Setting aside part of Rent—Capital Moneys —Tenant for Life impeachable for Waste.]—A person who is entitled for his life to the income of the money to arise from the sale of settled land and to the rents and profits of the settled land until sale, although to be deemed a tenant for life under s. 63 of the Settled Land Act, 1882, is not, properly speaking, "impeachable for waste in respect of minerals" within the meaning of s. 11. Nevertheless, where a lease of unopened minerals is made by such a person under the provisions of the act, three-fourths of the rents and royalties should be set aside as capital moneys arising under the act, and the residue only should go as rents and profits. *Ridge, In re, Hellard* v. *Moody*, 55 L. J., Ch. 265; 31 Ch. D. 504; 54 L. T. 549; 34 W. R. 159—C. A.

"Contrary Intention."]—Under a settlement the trustees had power during the minority of any person entitled to possession to receive and apply rents and profits in management of estate or maintenance of infant and to accumulate or apply the surplus in paying off charges, or in purchase of real estate to be settled to the same uses. The guardians had power during minority to grant mining leases for 60 years:—Held, that the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in s. 11 of the act:—Held, that there being no power in the settlement to sell surface land apart from minerals, the trustees could exercise that power under s. 17 of the act; and this being an execution of a statutory power, the consent of the guardians would not be necessary. *Newcastle's (Duke) Estates, In re*, 52 L. J., Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782.

4. Settlement of, by Court.

Model Lease.]—Where it was necessary to grant a large number of building leases of charity lands in nearly the same form, under the provisions of an act of parliament, and one lease had been settled in chambers, the court allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model lease being appended to the order. *Att.-Gen.* v. *Christ Church, Oxford*, 3 Giff. 514; 8 Jur. (N.S.) 989; 7 L. T. 238.

Where trustees have been enabled by the court under the Settled Estates Act (19 & 20 Vict. c. 120) to grant building leases over a small piece of ground in the neighbourhood of a town, the court will direct a model lease to be settled and adopted for all the remaining leases without the necessity of applying to chambers in each case. *Hemingway, In re*, 7 W. R. 279.

And see *Jersey (Earl), In re*, 9 W. R. 609; *Russell, In re*, 22 W. R. 399.

In Chambers.]—An order made under 19 & 20 Vict. c. 120, authorising leases by trustees to be made and settled in chambers was amended after the passing of 27 & 28 Vict. c. 45, by inserting a declaration that such leases need not be settled in chambers. *Hoyle, In re*, 10 Jur. (N.S.) 811; 10 L. T. 775; 12 W. R. 1125. And see *Procter's Settled Estates, In re*, 3 Jur. (N.S.) 534; 5 W. R. 464.

D. Dedications.

Powers of Court.]—Before the 19 & 20 Vict. c. 120, the court had no power to charge, mortgage, or sell part of a settled estate in order to raise money for making roads and sewers on building land forming other part of the estate; nor had it power to apply for that purpose money which was liable to be laid out in the purchase of lands to be settled to the same uses as the settled estate. *Venour, In re, Venour* v. *Sellon*, 45 L. J., Ch. 409; 2 Ch. D. 522; 24 W. R. 752.

——**Building Estate—Drainage.**]—The Settled Estates Act, 1877, does not empower the court to direct the carrying out of schemes of drainage for agricultural purposes; but the powers given by ss. 20 & 21 have reference to the development of lands for the purposes of a building estate. Order of reference under the Drainage Act (8 & 9 Vict. c. 56). *Poynder's Settled Estates, In re, Dickson-Poynder* v. *Cook*, 50 L. J., Ch. 753; 45 L. T. 403; 30 W. R. 7.

—— **Sale of Part of Estate—Fund in Court.**]—When a tenant for life, without power to dedicate roads to the public, applies to the court for that purpose, the court will direct such roads to be made only where they are either beneficial to the property in its actually existing state, or required for the purposes of houses then about to be built on leases then immediately contemplated, and will not sanction the laying out of roads upon the chance that they may be beneficial at some future time; and the court will not, in any case, sell any portion of the property for the purpose of making such roads. *Hurle's Settled Estates, In re*, 2 H. & M. 196; 2 N. R. 167; 11 L. T. 592; 13 W. R. 171.

Semble, a fund in court held upon the same trusts as the settled estate can be so applied. *S. C.*, 5 N. R. 167.

—— **Consent.**]—Where A. was tenant for life with remainder in fee subject to an annuity to B., and the use for her life by B. of the dwelling-house, and A. had power with the consent of B. during her life to grant building leases, the court on B.'s refusal to consent authorised A. to make roads and dedicate them at his own cost, but refused to sanction the sale of part of the estate for that purpose. *Chambers, In re*, 28 Beav. 653; 29 L. J., Ch. 924; 6 Jur. (N.S.) 1005; 8 W. R. 646.

Plans.]—Where the court has granted general powers of leasing to trustees, enabling them, under 19 & 20 Vict. c. 120, s. 14, to lay out lands for squares, roads, &c., the court will not always require plans to be laid before it. *Hargreave, In re*, 15 L. T. 173; 15 W. R. 54.

And see *Christy's Settled Estates, In re*, supra, col. 733.

Sites for Churches.]—A father who was a tenant for life of a settled estate cannot, as guardian by nature of his infant son, who is entitled to the inheritance in remainder, concur on the son's behalf in a grant by himself of part of the settled estate as a site for a church under 36 & 37 Vict. c. 50, s. 1, Places of Worship Sites Act. *Salisbury (Marquis) and Ecclesiastical Commissioners, In re*, 45 L. J., Ch. 250 ; 2 Ch. D. 29 ; 34 L. T. 5 ; 24 W. R. 380.

E. PETITIONS.

1. In General.

When Necessary.]—Quære, whether the court can direct leases and sales under the 19 & 20 Vict. c. 120, in a cause without a petition. *Harvey* v. *Clark*, 25 Beav. 7.

Form of—Description.]—Semble, that in proceedings under 19 & 20 Vict. c. 120, it is not necessary to specify the particular settlement to which property is at the time subject, provided the property is sufficiently identified, and is actually under settlement. *Thompson, In re, Green* v. *Thompson*, Johns. 418 ; 5 Jur. (N.S.) 1343.

Semble, that the title of a petition under the Settled Estates Act need contain only such a description as will make the matter intelligible to the court. *Burnley, In re*, 23 W. R. 546.

Amendment — Death of Petitioner.]—After a petition had been served and advertised, the petitioner died :—Held, that the petition might be amended by stating the fact, and substituting a new petitioner. *Wilkinson, In re*, L. R. 9 Eq. 71. *And see* 21 W. R. 537.

Title.]—Where, on a petition under the Settled Estates Act, 1877, the court, under s. 39 of the Conveyancing and Law of Property Act, 1881, makes an order binding the interest of a married woman who is restrained from anticipation, the petition need not be intituled under the latter act. *Landfield's Settled Land, In re, Landfield* v. *Landfield*, 46 L. T. 227 ; 30 W. R. 377.

2. Advertisements.

For what Period.]—Interpretation put upon a judge's order, that advertisements be entered in certain newspapers for three successive weeks. *Browne* v. *Pennefather*, 4 N. R. 221.

Title.]—In the heading of advertisements issued in pursuance of the 19 & 20 Vict. c. 120, s. 20, under General Order XLI., r. 15, the Act is sufficiently described as the Leases and Sales of Settled Estates Act. *Bicknell, In re*, L. R. 14 Eq. 467 ; 20 W. R. 939.

The object of the advertisements is to give information to the parties, and where the description in them is sufficiently explicit to prevent mistakes, the court may waive the irregularity. *Ib.*

Description of Property and Settlor.]—The description in an advertisement, of property being dealt with under the 19 & 20 Vict. c. 120, and 27 & 28 Vict. c. 45, must correspond verbally with the description in a petition under those acts. *Bateman, In re*, 5 N. R. 455 ; 34 L. J., Ch. 320 ; 12 L. T. 132 ; 13 W. R. 513.

In the advertisements a settlor was described as of "Gotham, in the county of Middlesex," instead of the county of Nottingham. The court considered that, as all parties interested under the settlement were represented on the application, the advertisements might be considered sufficient. *Hemsley, In re*, 43 L. J., Ch. 72 ; L. R. 16 Eq. 315 ; 29 L. T. 173 ; 21 W. R. 821.

Address.]—When the advertisement of a petition omitted the address of the next friend of the petitioner, but both address and description were correctly set forth in the petition itself :—Held, that the provisions of the act in this respect had been sufficiently complied with. *Burley, In re*, 18 L. T. 458.

The advertisements of a petition did not state the address of some of the petitioners :—Held, that it was unnecessary to reissue the advertisements for the purpose of stating those addresses. *Bourne, In re*, 16 W. R. 1115.

If in the advertisement of a petition under the 19 & 20 Vict. c. 120, the address of the petitioner is omitted, and that of his solicitor alone is given, the court has jurisdiction to make an order on the petition so advertised. *Snell, In re*, 24 L. T. 824 ; 19 W. R. 1000.

In the advertisement of a petition under the 19 & 20 Vict. c. 120, presented by R. T. and others, the address and description of R. T., and the names, addresses, and descriptions of the other petitioners were omitted :—Held, that the court could make an order on the petition so advertised. *Whiteley, In re*, L. R. 8 Eq. 574 ; 21 L. T. 545.

Further Advertisements.]—Where an estate has been sold under the 19 & 20 Vict. c. 120, it is not necessary to publish in the newspapers any notice of an application for the reinvestment of the purchase money in other land. *Sexton Barns, In re*, 6 L. T. 40 ; 10 W. R. 416.

Where trustees have obtained, on petition, general barring powers, and it is desired to obtain the same power for the tenant for life, the advertisements issued on the first petition need not be repeated. *Wheeler* v. *Tootal*, 18 L. T. 534 ; 16 W. R. 273.

—— **Amended Petition.**]—When, after a petition has been presented under the 19 & 20 Vict. c. 120, and advertised, amendments in it became necessary, it is not of course upon the amended petition to begin de novo with respect to the advertisements. The course to be adopted will depend upon the particular circumstances of each case. *Bunbury, In re*, 4 De G. J. & S. 573 ; 5 N. R. 229 ; 11 Jur. (N.S.) 27 ; 11 L. T. 585 ; 13 W. R. 370.

If the amendment involves the statement of such new facts or the introduction of such new parties as to give to the petition a new character, new advertisements would be directed. *Ib.*

Where in a joint petition of an eldest and a youngest son, it was alleged that the former was the customary heir, instead of the latter, no fresh advertisements need issue. *Ib.*

So, where an amendment of a petition was directed in consequence of one of the petitioners having, subsequently to its presentation, made an appointment of a share of the property. *Ib.* And see *Corbet, In re*, 15 L. T. 173.

—— **Death of Tenant for Life.**]—A leasing power having been granted by the court to a

tenant for life who had since died, a petition was presented by the succeeding tenant for life and her husband, praying that the power might be vested in one of the trustees of the settlement:—Held, that it was not necessary, under such circumstances, to repeat the advertisements. *Kentish Town Estate, In re, Weeding* v. *Weeding*, 1 J. & H. 230.

—— **Person Born after.**]—Upon a petition, an infant, remotely interested, had been born after the advertisement had been made. The court permitted him to be made a party by amendment, and dispensed with further advertisements. *Horton, In re*, 34 Beav. 386.

—— **Marriage.**]—After a petition had been advertised, one of the parties married and assigned a portion of his interest in the settled estate to the trustees of his marriage settlement. The court allowed the trustees to be made parties by amendment, and dispensed with further advertisements. *Wilkinson, In re*, L. R. 9 Eq. 71; 21 W. R. 537.

When a petition was presented by a lady who was a feme sole, and the usual advertisements were inserted in the newspapers and she married before the hearing of the petition:—Held, that fresh advertisements were not necessary. *Marshall, In re*, L. R. 15 Eq. 66; 27 L. T. 439.

—— **Title.**]—A petition and advertisements under the repealed acts for the leases and sales of settled estates omitted to describe in the title certain property contained in a contract for sale and ordered by the court to be sold. On a fresh petition under the Settled Estates Act, 1877, containing proper descriptions, fresh advertisements were not directed. *Kilmorey (Earl), In re*, 25 W. R. 54.

3. Parties.

Remaindermen.]—Where a testator leaves property to his widow for life or during widowhood, and she and the parties entitled in remainder join in a petition, under the 19 & 20 Vict. c. 120, that is a sufficient compliance with the terms of s. 16. *Williams* v. *Williams*, 9 W. R. 888.

Lunatic not so Found.]—A person of unsound mind, not found lunatic by inquisition, was entitled to a charge upon the property proposed to be dealt with:—Held, that such person was not a necessary party to a petition, as the court would direct that what was done under the petition should be subject to that charge. *Tarbutt, In re*, 2 N. R. 158; 8 L. T. 603; 11 W. R. 657.

Marriage after Petition.]—After advertisement of a petition one party married and assigned part of his interest to trustees. The court allowed the trustees to be made parties by amendment. *Wilkinson, In re*, L. R. 9 Eq. 71; 21 W. R. 537.

No Beneficial Owner.]—An order under the 19 & 20 Vict. c. 120, and 37 & 38 Vict. c. 33, can only be made upon the petition of a person who is, within the meaning of the acts, "entitled to the possession or the receipt of the rents and profits" of the settled estate, and if there is no such person no order can be made. *Taylor* v. *Taylor*, 45 L. J., Ch. 848; 3 Ch. D. 145; 35 L. T. 450; 25 W. R. 279.

Where an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are persons who may, under s. 23 of the Settled Estates Act, 1877, apply to the court by petition in a summary way to exercise the powers conferred by the act. *Wolley* v. *Jenkins* (23 Beav. 53; 26 L. J., Ch. 379; 3 Jur. (N.S.) 321) discussed. *Vine* v. *Raleigh*, 24 Ch. D. 238; 49 L. T. 440; 31 W. R. 855. And see *Tessyman's Trusts, In re*, 77 L. T. 484, infra, col. 770.

Tenant for Life subject to Term.]—Where leaseholds are limited to trustees for a term and subject thereto to A. for life:—Held, that during the term the court could only order a sale on joint petition of A. and trustees. Liberty to amend petition brought by A. by adding trustees as co-petitioners. *Puxley, Ex parte*, Ir. R. 2 Eq. 237.

Concurrence of all Beneficiaries—Infant.]—On petition by all the beneficiaries of trust estates (one being an infant) for sale out of court:—Held, that the petition was properly presented, all the beneficiaries being before the court. *Dryden's Settled Estates, In re*, 50 L. J., Ch. 752; 45 L. T. 254; 29 W. R. 884. *And see cases*, supra, col. 730.

4. Consents.

a. In General.

"Persons Entitled."]—The expression "persons entitled" in 19 & 20 Vict. c. 120, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children; but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust. *Grey* v. *Jenkins*, 26 Beav. 351.

What Necessary.]—The persons whose consent is required by s. 17 of the 19 & 20 Vict. c. 120, to an application for a sale are persons whose consents are capable of being obtained. *Beioley* v. *Carter*, 38 L. J., Ch. 283; L. R. 4 Ch. 230; 20 L. T. 381; 17 W. R. 300.

Estates limited to A. for life, remainder to whom A. should leave her heir-at-law:—Held, order for sale made on application of A. with the concurrence of the trustee was valid. *Ib.*

Unascertained Class.]—Lands were devised to trustees for a tenant for life, and after her death to sell, with power to give receipts, and hold proceeds for all her children living at her death who should attain twenty-one, and the issue then living who should attain twenty-one, of any child who had died previously, per stirpes as tenants in common. The tenant for life had six children, one of whom, Mrs. W., was married and had infant children. Upon a petition for a sale under the 19 & 20 Vict. c. 120, the trustee, the tenant for life, and all her children were either represented or willing to concur, but the infant children of Mrs. W. were not represented:—Held, first, that, as a class of persons entitled to a contingent interest who could not at present be ascertained, the concurrence of the infant children of Mrs. W. was not requisite. *Strutt, In re*, 43 L. J., Ch. 69; L. R. 16 Eq. 629; 21 W. R. 880.

Held, secondly, that the property being devised to trustees upon trust for sale with power

to give receipts, the concurrence of the cestuis que trustent was unnecessary. *Ib.*

Order made without Prejudice.]—If upon a petition presented under the 19 & 20 Vict. c. 120, it is very difficult or impossible to obtain the consent of all the parties interested, the court will, under s. 18, make an order in the absence of those parties, expressing in the order that it is subject to and so as not to affect their rights. *Legge's Settled Estates, In re*, 6 W. R. 20.

Numerous Beneficiaries.]—Order was made saving the rights of pecuniary legatees interested in the estate, who were numerous. *Parry, In re*, 34 Beav. 462.

On petition under the Settled Estates Acts, 1856 and 1874, the beneficiaries being very numerous, the court dispensed with service of the petition on a wife and her husband entitled to a life interest in one-tenth of the settled estates, and also held that notice to the parties, whose concurrence was dispensed with, was unnecessary. *Cundee, In re*, 37 L. T. 271.

—— **Value of Interests.**]—The court will not dispense with the concurrence of persons opposing an application if their number and the value of their interests are nearly equal to those of the persons supporting the application. *Taylor* v. *Taylor*, 45 L. J., Ch. 848; 3 Ch. D. 145; 35 L. T. 450; 25 W. R. 279.

Private Act.]—A private act provided that sales of certain settled estates should be made under the provisions of the 19 & 20 Vict. c. 120. A petition was presented under the private act by the tenant for life for the reinvestment of the purchase money, but was not served upon any of the other parties interested under the settlement:—Held, that the petition must be served upon the different parties interested under the settlement, down to the first tenant in tail. *Bolton Estates Act, In re*, 24 L. T. 86; 19 W. R. 429.

Persons absolutely Entitled.] — When property was vested in a trustee upon trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, on a petition by the tenant for life, for a sale of the property:—Held, that under the Settled Estates Act (19 & 20 Vict. c. 120), s. 17, the consent of all the beneficiaries was necessary. *Ives, In re, Bailey* v. *Holmes*, 3 Ch. D. 690; 24 W. R. 1068.

Infants.]—A. on her marriage settled a contingent reversionary interest to which she was entitled under a will. She had four children under age. On a petition to approve a sale of part of the settled estate:—Held, that under s. 17 of the Settled Estates Act, 1856, her children were beneficiaries whose consent was necessary, and leave was given to amend the petition by making the children respondents, and serving notice on their father. *Dendy, In re*, 46 L. J., Ch. 417; 4 Ch. D. 879; 25 W. R. 410.

Cestuis que Trustent.]—Cestuis que trustent of a term for raising portions must be served with a copy of a petition presented under the 19 & 20 Vict. c. 120, s. 17, although their trustees, who have powers of sale and of giving receipts for the purchase money of the property, appear and consent to the prayer of the petition. *Boughton, In re*, 9 L. T. 360; 12 W. R. 34.

Trustees.]—Estates were settled upon A. for life, and then to trustees, with powers of sale, upon trust for the children of A.:—Held, that the trustees, and not the children, ought to be served with a petition under the 19 & 20 Vict. c. 120. *Potts, In re*, 15 W. R. 29. *And see* L. R. 16 Eq. 631, n.

Notice.]—The Leases and Sales of Settled Estates Amendment Act, 1874, s. 3, does not enable the court to dispense with any consent to an application under the principal act without notice of the application being given to the person whose consent is required by the principal act. *Rylar, In re*, 24 W. R. 949.

Amending Order.]—Upon a motion under Ord. XLIA, an order made on petition under the Settled Estates Act, 1877, which had been passed and entered, was directed to be varied so as to dispense with the consent of tenants for life to the exercise of leasing powers granted by the order. *Riley's Trusts, In re*, 30 W. R. 78.

Service of Proceedings.]—Remaindermen who are sui juris, and who may become beneficially interested in the proceeds of sale of settled estates, must be served as well as the trustees. But the service on the infant children of such remaindermen who may ultimately become beneficially entitled instead of their parents may be dispensed with under 37 & 38 Vict. c. 33. *Chamberlain, In re*, 23 W. R. 852.

Estates having been sold under the 19 & 20 Vict. c. 120, and the proceeds paid into court, a petition was presented for reinvestment in other lands:—Held, that it was unnecessary again to serve those parties whose concurrence had previously been obtained at the time of the sale. *Cleveland's (Duke) Harte Estate, In re*, 1 Dr. & Sm. 481; 30 L. J., Ch. 862; 7 Jur. (N.S.) 769; 2 L. T. 78; 9 W. R. 883.

The words "every application," in s. 17 of the 19 & 20 Vict. c. 120, refer only to applications under the act for the sale of estates, and not to petitions dealing with purchase money. *Ib.*

—— **Out of Jurisdiction.**]—Leave to serve a petition under the Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120, on a respondent out of the jurisdiction was refused. *Mewburn, In re*, 22 W. R. 752.

—— **Infant.**]—On a petition by a married woman and her children and others under the 19 & 20 Vict. c. 120, and 37 & 38 Vict. c. 33:—Held, that an infant born after the presentation of the petition need not be served. *Lewis, In re*, 24 W. R. 103. And see *Horton, In re*, supra, col. 755.

In a petition presented under the Settled Estates Act, 19 & 20 Vict. c. 120, when there are infant petitioners the concurrence of the father is not sufficient, but a guardian must be appointed. *Caddick's Settled Estates, In re*, 7 W. R. 334.

In a petition for a sale of property in which an infant is interested in remainder, the consent of the testamentary guardian of the infant is not sufficient, and a guardian must be appointed. *James, In re*, L. R. 5 Eq. 334.

The regulations of the 8th August, 1857, are not absolutely binding as orders. *Longstaffe, In re*, 1 Dr. & Sm. 142 ; 8 W. R. 491.

Therefore, though those regulations direct that a guardian to an infant petitioner must be appointed before the petition is presented, the court authorised such an appointment on an application after petition had been presented and answered. *Ib.*

Under s. 36 of the 19 & 20 Vict. c. 120, a guardian to an infant may be appointed after a petition has been presented by the infant. *Hargreaves' Settled Estates, In re*, 28 L. J., Ch. 197 ; 5 Jur. (N.S.) 60 ; 7 W. R. 156.

Where an infant was entitled to an undivided share of land the court refused to appoint one of the co-owners to exercise on behalf of the infant the power of concurring in a sale under the Settled Estates Act. Upon a sale under the act the infant's share in the purchase money was directed to be brought into court. Form of application under the act on behalf of an infant. *Greenville Estate, In re*, 11 L. R. Ir. 138.

—— **Costs.**]—Petitions having been presented under the 19 & 20 Vict. c. 120, and under a private act, respecting money in court, to which an infant remainderman was entitled, the court directed that a guardian ad litem should be appointed to represent the infant remainderman, and also that the trustees of the will, under which the property was settled, should have their costs of appearing upon the petition. *Harte Estates Act, In re*, 29 L. J., Ch. 530 ; 2 L. T. 78 ; 8 W. R. 336. And see *Dendy, In re*, supra, col. 757.

Lunatic.]—The service of an intended application under the 19 & 20 Vict. c. 120, on a person of unsound mind, not so found by inquisition, who had only a remote contingent interest in the property, was dispensed with, there being others in the same interest who concurred. *Frankling's Settled Estates, In re*, 7 W. R. 45.

A notice, under 37 & 38 Vict. c. 33, s. 2, of an application under the Leases and Sales of Settled Estates Act, may be given to a person of unsound mind, not so found by inquisition. *Crabtree, In re*, 44 L. J., Ch. 261 ; L. R. 10 Ch. 201 ; 32 L. T. 349 ; 23 W. R. 761.

The court cannot appoint a guardian to consent, on behalf of a lunatic not so found by inquisition, to a sale of his estates. *Clough, In re*, 42 L. J., Ch. 393 ; L. R. 15 Eq. 284 ; 28 L. T. 261 ; 21 W. R. 452.

Consent to an application may be given on behalf of a person of unsound mind not found so by inquisition, by a guardian appointed by the court for the purpose. *Venner, In re*, L. R. 6 Eq. 249 ; 16 W. R. 1033.

The committee of a lunatic must obtain the permission of the court of lunacy before he consents to an application to the court of chancery under the 19 & 20 Vict. c. 120. *Woodcock, In re*, L. R. 3 Ch. 229 ; 16 W. R. 532. And see *Ray's Settled Estates, In re*, infra, col. 766.

b. Married Women ; Separate Examination of.

When taken.]—The examination of a married woman applying to the court under the 19 & 20 Vict. c. 120, may be taken after the presentation of a petition at any time before it is heard. *Hooper's Settled Estates, In re*, 5 W. R. 670.

The examination by the court of a married woman, who is herself a petitioner, may be taken at any time before an order is made. *Packer, In re*, 39 L. J., Ch. 220.

Where a married woman is the petitioner her consent should be taken subsequent to the petition being answered, but before any further proceedings, and an independent solicitor should take her consent. *Manson's Settled Estates, In re*, 24 Beav. 220.

A married woman entitled to a jointure charged on settled estates must be examined under s. 37 of the 19 & 20 Vict. c. 120. *Turbut's Estate, In re*, 2 N. R. 487.

The examination of a married woman ought not to take place until the petition has been presented and answered, and carried into the chambers of the judge by whom it is to be heard, but ought to take place before any judicial step has been taken by him upon it. *Foster, In re*, 1 De G. & J. 386 ; 24 Beav. 220 ; 26 L. J., Ch. 836 ; 5 W. R. 726.

The issuing of advertisements, under s. 20, before the examination, will not invalidate the proceedings. *Ib.*

The examination of a married woman, and her consent to any application intended to be made by her, must be obtained before the petition is presented. *Brealy's Settled Estates, In re*, 5 W. R. 613.

The examination of a married woman and her consent to any application must, if the married woman be a petitioner, be obtained before the petition is presented. But quære if she be a respondent. *Hadwen's Settled Estates, In re*, 5 W. R. 614.

Where a petition has been presented, but not answered, in which a married woman is co-petitioner, her examination previously to the presenting of the petition being requisite, the court gave leave to omit the name of the married woman as a petitioner. *Reedley's Settled Estates, In re*, 5 W. R. 649.

The examination of a married woman ordered to be taken in court when the petition came on to be heard. *Taylor, In re*, 42 L. J., Ch. 504 ; L. R. 14 Eq. 557 ; 27 L. T. 335.

How taken.]—Semble, the solicitor appointed to take the examination must not be the solicitor acting in the matter. *Brealy's Settled Estates, In re*, 5 W. R. 613. S. P., *Manson's Settled Estates, In re*, 24 Beav. 220.

No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. *Bendyshe, In re*, 26 L. J., Ch. 814 ; 3 Jur. (N.S.) 727 ; 5 W. R. 816.

On a petition by a married woman under the 19 & 20 Vict. c. 120, and 37 & 38 Vict. c. 33 :—Held, that the fact that the signatures of the married woman and the commissioner to her examination had been attested by the husband's solicitor, will be no objection to the admission of the certificate. (Contrary to a dictum of Kindersley, V.-Ch., in *Bendyshe, In re*, supra.) *Lewis, In re*, 24 W. R. 103.

Affidavit of no Settlement.]—An affidavit of no settlement is not necessary in the case of a married woman under the Settled Estates Act. *Standish, In re*, 25 W. R. 8.

Where taken.]—Sect. 38 of the 19 & 20 Vict. c. 120, does not authorise a commission to exa-

mine a married woman abroad. *Noyes' Settled Estates, In re*, 6 W. R. 7.

Under s. 38 of the 19 & 20 Vict. c. 120, the court refused to direct a commission to a barrister and solicitor of a court in Canada, but this is not necessary since the 21 & 22 Vict. c. 77, s. 6. *Turner* v. *Turner*, 2 De G. & J. 534 ; 27 L. J., Ch. 272 ; 4 Jur. (N.S.) 127 ; 6 W. R. 355.

A writer to the signet will not be appointed to take the consent of a married woman residing in Scotland. *Hooper's Settled Estates, In re*, 5 W. R. 670.

Dispensed with.]—Where a married woman is a petitioner, the court may, upon reasonable ground, dispense with the examination required by s. 37 of the 19 & 20 Vict. c. 120, and will do so where it is satisfied that the order asked for is beneficial to all parties, and that the delay necessary for taking the examination would be prejudicial. *Halliday, In re*, 40 L. J., Ch. 687 ; L. R. 12 Eq. 199 ; 19 W. R. 966. And see *Tessyman's Trusts, In re*, 77 L. T. 484, infra, col. 770.

When a petition is presented to authorise a sale of settled estates under the 19 & 20 Vict. c. 120, and a party interested, being a married woman, is abroad and served, the court will dispense with her acknowledgment. *Tibbett, In re*, 20 L. T. 299 ; 17 W. R. 394.

The separate examination of a married woman, who was entitled to a life interest with a possible absolute interest in the whole and who was living in America, was dispensed with by the court. *Thorne, In re*, 20 W. R. 587.

The court dispensed with the separate examination of a married woman, as to her consent to an application, under the 19 & 20 Vict. c. 120, s. 37, where her interest was remote, and was sufficiently represented by trustees who consented. *De Tabley (Lord), In re*, 8 L. T. 719 ; 11 W. R. 936.

On petition under the Settled Estates Act, 1877, where an order for sale had already been obtained, the court dispensed with the consent and examination of married women contingently entitled to rent-charges on or to portions out of the settled estates, the trustees for one of the married women and the trustees for raising portions being before the court ; and service on their respective husbands and children (if any) was also dispensed with. *Kilmorey (Earl), In re*, 25 W. R. 54.

A spinster, with others, presented a petition under the above act. After the publication of advertisements, but before the hearing of the petition, she married. The examination of the married woman dispensed with. *Marshall, In re*, L. R. 15 Eq. 66 ; 27 L. T. 439.

Infant.]—For the purposes of the 19 & 20 Vict. c. 120, a married woman who is under age is in the same position as if she were of full age, and must be examined under s. 37. It is not sufficient for her to concur in the petition as an infant by a special guardian. *Broadwood, In re*, 41 L. J., Ch. 349 ; L. R. 7 Ch. 323 ; 26 L. T. 650 ; 20 W. R. 458.

Tenant for Life.]—On an application under the Settled Estates Act, 1877, for the sanction of the court to the purchase of certain land out of funds in court, the separate examination of a married woman, the tenant for life, was directed, notwithstanding s. 32 of the Settled Land Act, 1882. *Arabin's Trusts, In re*, 52 L. T. 728.

Notice.]—A married woman interested in a settled estate which is leased or sold under the Settled Estates Act, 1877, who has been served with a notice under s. 26 of the act and submits her rights to the court, need not be separately examined. *Stanley's Settled Estates, In re*, 59 L. J., Ch. 82 ; 61 L. T. 169 ; 38 W. R. 32.

Property acquired before 1882.]—When a married woman is a petitioner, or a respondent to a petition, under the Settled Estates Act, 1877, relating to property, her interest in which was acquired before the commencement of the act of 1882, she must be examined separately, as provided by s. 50 of the act of 1877. *Harris' Settled Estates, In re*, 54 L. J., Ch. 208 ; 28 Ch. D. 171 ; 51 L. T. 855 ; 33 W. R. 393.

Marriage since 1882.]—A married woman consenting to a sale under the Settled Estates Act, 1877, need not be examined as to her consent, as required by s. 50 of the act, if she has been married since the commencement of the Married Women's Property Act, 1882. *Riddell* v. *Errington*, 54 L. J., Ch. 293 ; 26 Ch. D. 220 ; 50 L. T. 584 ; 32 W. R. 680.

5. TIME FOR SETTING DOWN AND HEARING.

Expiry of Twenty-one days.]—Where a petition is presented under the 19 & 20 Vict. c. 120, before it can come on to be heard, the secretary of the lord chancellor must certify that the advertisements ordered have been inserted, and that the twenty-one days since the last advertisement, required by the General Order XLI., r. 20, have expired. *Blake, In re*, 6 Jur. (N.S.) 724 ; 8 W. R. 539.

Acceleration.]—An application to set down a petition, under the 19 & 20 Vict. c. 120, before the time fixed by the Consolidated Order XLI., art. 20, refused. *Mallin, In re*, 6 Jur. (N.S.) 809.

Special leave granted to move under 19 & 20 Vict. c. 120, s. 20 (the seven days after the publication of the advertisement of the application having expired), where the applicant was resident out of the jurisdiction. *Merry, In re*, 14 L. T. 510 ; 14 W. R. 665.

Vacation.]—A petition cannot be set down for hearing until the expiration of twenty-one days from the publication of the last of the advertisements, although that time may prevent the petition being set down till after the long vacation. *Townsend, In re*, L. R. 14 Eq. 433.

The court will abridge the time required by the general orders to elapse between the publication of the last advertisement of a petition under the 19 & 20 Vict. c. 120 and the hearing of the petition, when the petition would otherwise be thrown over the long vacation. *Bower, In re*, 23 L. T. 358 ; 18 W. R. 1085.

A petition was allowed to be placed in the paper for the last petition day before the long vacation, although the twenty-one days from the last advertisement prescribed by Consolidated Order XLI., r. 20, would not then have expired. *Taylor, In re*, 42 L. J., Ch. 504 ; L. R. 14 Eq. 557 ; 27 L. T. 335.

Where the publication of the last of the advertisements required by 19 & 20 Vict. c. 120 would not expire in time to allow the twenty-one days necessary to elapse before setting down the

petition for a hearing, so that the petitioner would be thrown over the long vacation, the court allowed the petition to be set down on the last day of petitions before the vacation. *Adam, In re*, 6 L. T. 604.

F. TRUSTEES.

1. Who are.

Power of Sale.]—A trustee with power of sale subject to the consent of another is trustee for the purposes of the Settled Land Acts. A trustee of a settlement with power of sale is trustee for the purposes of the Settled Land Acts, including the sale of heirlooms. *Constable* v. *Constable*, 55 L. J., Ch. 491 ; 32 Ch. D. 233 ; 54 L. T. 608 ; 34 W. R. 470.

Trustees having a power of sale which can only be exercised with the concurrence of a person whose consent cannot be obtained, are not trustees within the meaning of the Settled Land Act, 1882. In such cases, if a sale be desirable, it is expedient to appoint such persons as trustees for the purposes of the act. *Johnstone's Settlement, In re*, 17 L. R. Ir. 172.

By the marriage settlement of A. and B., trustees had power, with the consent of A. and B., and after their death on the trustees' own authority to sell and invest the proceeds ; all after-acquired property to be settled upon the same trusts as the principal sum. By another settlement made on the marriage of C. and D., trustees had power, with the consent of C. and D., and after their death on the trustees' own authority, to call in the principal money and lay it out again and to vary investments : all after-acquired property to be settled as the principal sum. Real estate descended on B. and D. as co-heiresses during their covertures. A. and B. contracted to sell and C. and D. to buy this real estate :—Held, upon summons under the Vendor and Purchaser Act, 1874, that under the express power contained in the first settlement, and the implied power in the second settlement, the existing trustees of both settlements had full power to act as trustees under the act, and that it was not necessary to apply to the court under the Settled Land Act, 1882, s. 38, for the appointment of new trustees for the purposes of the act. *Garnett-Orme* to *Hargreaves*, 53 L. J., Ch. 196 ; 25 Ch. D. 595 ; 49 L. T. 655 ; 32 W. R. 313.

Executors — Different Instruments.] — Residuary personal estate bequeathed to executors on trust to invest in land and to settle the same upon the trusts of a certain settlement. The trustees of the settlement were not the same persons as the executors :—Held, that the executors were not trustees within the Settled Land Act, 1882. *Mundy's Settled Estates, In re*, 60 L. J., Ch. 273 ; [1891] 1 Ch. 399 ; 63 L. T. 311 ; 39 W. R. 209. And see *Meade's Settled Estates, In re*, supra, col. 723.

Tenant for Life.—Power to Mortgage—Payment of Incumbrances—Interest of Parties entitled under the Settlement.]—Having regard to s. 53 of the Settled Land Act, 1882, the court ought to restrain a tenant for life from mortgaging the settled estate under s. 11, sub-s. 1 of the Settled Land Act, 1890, when it can see that as a trustee he is acting unjustly towards annuitants or others whose interests he is bound to consider and to protect, though he be acting honestly and with a view to preserve the estates for the enjoyment of those persons intended by the settlor. *Hampden* v. *Buckinghamshire (Earl)*, 62 L. J., Ch. 643 ; [1893] 2 Ch. 531 ; 2 R. 419 ; 68 L. T. 695 ; 41 W. R. 516—C. A.

2. Appointment of.

Who appointed.]—The court will not in general appoint as trustees of a settlement for the purposes of the act two persons who are near relatives to each other. There ought to be two independent trustees. *Knowles' Settled Estates, In re*, 54 L. J., Ch. 264 ; 27 Ch. D. 707 ; 51 L. T. 665 ; 33 W. R. 364.

Where estates in England and Ireland were devised upon similar limitations, and all the persons beneficially interested resided in England, the court appointed, as trustees of the Irish estates for the purposes of the Settled Land Act, 1882, two persons, who had been appointed by the chancery division in England trustees of the English estates, for the purpose of the act, notwithstanding their residence in England. *Maberly's Settled Estate, In re*, 19 L. R. Ir. 341.

—— **Women.**] — The court will appoint a woman as a trustee for the purposes of the Settled Lands Acts where she appears to have exceptional qualifications. *Peake's Settled Estates, In re*, [1894] 3 Ch. 520 ; 8 R. 539 ; 71 L. T. 371 ; 42 W. R. 687.

—— **Solicitor to Tenant for Life.**]—It is a sufficient objection to the appointment of one of the trustees of a settlement of lands as a trustee of the same lands for the purposes of the Settled Land Act 1882, that he is the solicitor of the tenant for life, and has been acting for him in the matter of a proposed sale of the lands. *Walker's Trusts, In re*, 48 L. T. 632 ; 31 W. R. 716.

Real and personal estate devised to G. and W. upon certain trusts. The will contained no power of sale. W. was the family solicitor, a person of good position and high character, and after the death of the testator, he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of the Settled Land Act, 1882, applied to the court to appoint G. and W. trustees for the purposes of the act :—Held, that W. ought not to be appointed, as he was solicitor to the tenant for life. *Kemp's Settled Estates, In re*, 52 L. J., Ch. 950 ; 24 Ch. D. 485 ; 49 L. T. 231 ; 31 W. R. 930. S. P., *Wheelwright* v. *Walker*, 52 L. J., Ch. 274 ; 23 Ch. D. 752 ; 48 L. T. 70 ; 31 W. R. 363.

Under s. 38—Discretion of Court.]—Semble, in appointing trustees under s. 38, the court should require to be satisfied not only of the fitness of the proposed trustees, but also that the purpose for which their appointment is sought is such as to render their appointment safe and beneficial to all persons interested in the property. Where a fund in court was subject to a trust for investment in land in the counties of C. and T., the court, under s. 38, refused to appoint trustees to carry out a transfer of a mortgage secured on land in the counties of C. and K. *Burke* v. *Gore*, 13 L. R. Ir. 367.

—— **On Retirement.**]—One of two trustees

appointed under s. 38 of the Settled Land Act, 1882, desired to retire. The court appointed a new trustee for the purposes of the Settled Land Acts in the place of the retiring trustee on an application made under that section:—Quære, whether s. 31 of the Conveyancing Act, 1881, applies to trustees appointed for the purposes of the Settled Land Acts. *Wilcock, In re*, 56 L. J., Ch. 757; 34 Ch. D. 508; 56 L. T. 629; 35 W. R. 450.

—— **Residing Abroad.**]—One of three trustees, appointed by the court under s. 38 of the Settled Land Act, 1882, having gone to reside abroad, the court appointed a new trustee, for the purposes of the act, in his place, under s. 38. *Wilcock, In re* (supra), followed. *Kane's Trusts, In re*, 21 L. R. Ir. 112.

—— **Beneficiary a Trustee.**]—Where a testator's daughter was beneficial tenant for life of a fund paid into court, the daughter being one of the two trustees of the will, and both trustees being desirous of resigning their trusts, and there being no power of sale in the will, the court appointed two new trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *Wright's Trusts, In re*, 53 L. J., Ch. 139; 24 Ch. D., 662.

—— **Tenant for Life Lunatic.**]—Where a tenant for life is a lunatic, and his committee wishes to exercise the power of leasing given by the Settled Land Act, 1882, if there are no trustees of settlement in existence new trustees must be appointed for the purposes of the act. *Taylor, In re*, 52 L. J., Ch. 728; 49 L. T. 420; 31 W. R. 596.

—— **Infant.**]—Trustees appointed under s. 38 of the Settled Land Act, 1882, of the share of an infant under the statute of distributions in realty, which had improperly remained unconverted. *Wells, In re*, 49 L. T. 859; 31 W. R. 764.

Where under a will an infant was tenant in fee simple with an executory limitation over in case of dying under twenty-one without issue the trustees of the will were appointed trustees for the purpose of the Settled Land Act, 1882. *Morgan, In re*, 24 Ch. D. 114; 48 L. T. 964; 31 W. R. 948.

—— **Infant absolutely entitled Resident Abroad.**]—The court has jurisdiction upon an appointment of trustees of a settlement for the purposes of the Settled Land Acts to appoint persons who are domiciled and resident in a British colony. Such jurisdiction is properly exercised upon an appointment of trustees to carry out the sale of land which is settled land by reason of the person entitled thereto being an infant, where the infant is domiciled and resident in a colony. *Simpson, In re*, and *Whitchurch, In re*, 66 L. J., Ch. 166; [1897] 1 Ch. 256; 76 L. T. 131; 45 W. R. 277—C. A.

Form of Order.]—Trustees appointed under s. 38 of the Settled Land Act, 1882, should be appointed trustees of "the settlement effected by the instrument in question for the purposes of the Settled Land Acts." Form of order in *Wright's Trusts, In re* (supra), adopted. *Ib.*

No existing Trustees.]—Where there were no trustees of the settled estates which had been sold, the court ordered new trustees to be appointed. *Sexton Barnes, In re*, 6 L. T. 40; 10 W. R. 416.

Death of Trustee.]—Where one of two trustees died before the completion of a sale of part of the settled estate, the court directed a petition to be presented for the appointment of a new trustee in place of the one deceased. *Scott* v. *Heisch*, 33 L. T. 498; 24 W. R. 108.

Power to appoint—Donee appointing Himself.]—A power to appoint "any other person or persons" as a new trustee is not well exercised by the appointor appointing himself. A power to appoint new trustees is a fiduciary power, and the appointor cannot appoint himself. *Skeat's Settlement, In re* (42 Ch. D. 522), followed. *Newen, In re, Newen* v. *Barnes*, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309; 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

Person having Powers of Tenant for Life—Undivided Moiety — Sale.]—Where a person having the powers of a tenant for life within the meaning of the Settled Land Act, 1882, under a settlement of an undivided moiety of land, but whose interest is postponed to the payment of debts, satisfies the court that the time is favourable for a sale, and that he intends to sell, the court, though not bound to do so, will appoint fit persons named by him to be trustees of the settlement for the purposes of the act. *Williams* v. *Jenkins*, 13 R. 92.

3. Notice to.

Lunatic Tenant for Life.]—A general notice by a tenant for life of an intention to sell or lease all or any part of the settled estates, at any time or times when a proper opportunity shall arise, is not a sufficient notice within s. 45 of the Settled Land Act, 1882. *Ray's Settled Estates, In re*, 53 L. J., Ch. 205; 25 Ch. D. 464; 50 L. T. 80; 32 W. R. 458.

Costs.]—A lunatic tenant for life, by his committee, gave the trustees a general notice of his intention to sell or lease all or any part of the settled estates as a proper opportunity should arise. Upon a summons by the trustees, asking for a declaration that this was not a sufficient notice:—Held, that as the notice was insufficient within s. 45 of the act, and the committee had served it without obtaining the sanction of the court in lunacy, he must pay the costs of the summons. *Ib.*

Contract by Tenant for Life to Sell.]—On a sale by a tenant for life under the Settled Land Act, 1882, a notice to the trustees given less than a month before the contract, but more than a month before the day fixed for completion:—Held, a sufficient compliance with s. 45. Semble, a purchaser cannot avail himself of a defect in such notice as a defence to an action for specific performance. *Marlborough (Duke)* v. *Sartoris*, 56 L. J., Ch. 70; 32 Ch. D. 616; 55 L. T. 506; 35 W. R. 55.

Where there were no trustees at the date of contract, but trustees were appointed and notice given under s. 45, sub-s. 1 before completion:—

Held, that the section was sufficiently complied with. *Hatton* v. *Russell*, 57 L. J., Ch. 425; 38 Ch. D. 334; 58 L. T. 271; 36 W. R. 317.

G. CAPITAL MONEY.

1. What is.

Cash under the Control of the Court—Sale of Land.]—Purchase moneys in court arising from a sale under the 19 & 20 Vict. c. 120, are "cash under the control of the court" within 23 & 24 Vict. c. 38, ss. 10, 11, so as to empower the court to order them to be invested as such. *Tuddy, In re*, 43 L. J., Ch. 191; L. R. 16 Eq. 532. S. P., *Thorold, In re*, 41 L. J., Ch. 780; L. R. 14 Eq. 31; 26 L. T. 682; 20 W. R. 898.

The purchase moneys of settled estates paid into court, are "cash under the control of the court" within 23 & 24 Vict. c. 38, ss. 10, 11, so as to empower the court to order them to be invested as such. *Ib.*

The purchase money of a settled estate sold by the order of the court is not "cash under the control of the court," and therefore can be invested only in the securities specified in the 19 & 20 Vict. c. 120, s. 25. *Langmead* v. *Cockerton*, 25 W. R. 315.

Money liable to be laid out in the Purchase of Land—Charity Lands.]—Lands belonging absolutely to a charity were taken by a public body, and the purchase money paid into court under the Lands Clauses Act:—Held, that the purchase money could be dealt with as "money liable to be laid out in the purchase of land to be made subject to a settlement." *Bryon's Charity, In re*, 23 Ch. D. 171; 48 L. T. 515; 31 W. R. 517.

—— Power to Buy Certain Land—Purchase of Real Estate.]—Where personalty is held upon the trusts of a marriage settlement, which directs the trustees, at the request of the tenant for life, to sell the settled property and invest part of the proceeds in the purchase of a particular piece of land, such personalty is "money liable to be laid out in the purchase of land" within the meaning of the Settled Land Act, 1882, s. 33, and may be applied, under s. 1, sub-s. vii. of the act, in the purchase of land other than that specified in the settlement. *Hill's Settled Estates, In re, Hill* v. *Pilcher*, 65 L. J., Ch. 511; [1896] 1 Ch. 962; 74 L. T. 460; 44 W. R. 573.

Sale of Timber at Valuation—Power to Cut Timber—Claim of Tenant for Life to Proceeds.]—A tenant for life with power to cut and sell timber, sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase money pay for the timber according to a valuation:—Held, that the amount of the valuation of the timber was an addition to the price which the purchaser agreed to pay for the estate, and must be treated as capital money payable to the trustees and not to the tenant for life. *Llewellin, In re, Llewellin* v. *Williams*, 57 L. J., Ch. 316; 37 Ch. D. 317; 58 L. T. 152; 36 W. R. 347.

Money Unconverted.]—Money bequeathed to trustees to be laid out in land in trust for persons in succession, but not yet so laid out, may, under s. 33 of the Settled Land Act, 1882, be applied as capital money arising under the act. *Mackenzie's Trusts, In re* (52 L. J., Ch. 726), and *Tennant, In re* (58 L. J., Ch. 457), approved. *Mundy's Settled Estates, In re*, 60 L. J., Ch. 273; [1891] 1 Ch. 399; 64 L. T. 29; 39 W. R. 209—C. A.

2. Whether Real or Personal Estate.

Sale in Partition Suit.]—Where real estate, to a share of which infants were entitled, was sold under a decree in a partition suit:—Held, that the proceeds of the sale must be treated as realty by force of s. 8 of the Partition Act, 1868. *Foster* v. *Foster*, 1 Ch. D. 588.

Mining Rent.]—A. appointed the surface of settled land to one, and the minerals under it to others. Under the 19 & 20 Vict. c. 120, a lease of the minerals had previously been made, and a part of the rents received had been set aside and was in the hands of trustees to be invested under the act in the purchase of other land:—Held, that the rents so set aside were land in the hands of the trustees and passed with the surface. *Scarth, In re*, 10 Ch. D. 499; 40 L. T. 184; 27 W. R. 499.

3. Application and Investment of.

a. In General.

Sanction of Court.]—The question whether any particular application of capital money under the Settled Land Acts should be sanctioned by the court must be determined entirely by the code of rules laid down in the Settled Land Acts, and not by reference to the decisions as to the application of purchase money under the Lands Clauses Act. *Gerard's (Lord) Settled Estate, In re*, 63 L. J., Ch. 23; [1893] 3 Ch. 252; 69 L. T. 393—C. A.

Discretion of Tenant for Life.]—The powers conferred by the Settled Land Act, 1882, upon a tenant for life are, pursuant to s. 53, to be exercised with a due regard to the interests of all parties entitled under the settlement, and the discretion vested in him by the act as to the application of capital moneys must not be so exercised as unduly to prejudice such parties, but where it is a matter of doubt, then the discretion of the tenant for life, if fairly exercised, ought to prevail. *Stamford's (Earl) Settled Estates, In re*, 58 L. J., Ch. 849; 43 Ch. D. 84; 61 L. T. 504; 38 W. R. 317.

Section 22, sub.-s. 2 of the Settled Land Act, 1882, entitles a tenant for life to direct the particular investment in which capital money shall be invested by the trustees. The discretion of a tenant for life honestly exercised cannot be controlled by the trustees or by the court. *Coleridge's (Lord) Settlement, In re*, [1895] 2 Ch. 704; 13 R. 767; 73 L. T. 206; 44 W. R. 59.

Under s. 33 of the Settled Land Act, 1882, the tenant for life has the same power over money in the hands of trustees liable to be laid out in the purchase of land to be made subject to the settlement as he would have over the land itself, and the section gives the tenant for life an option to direct how the money shall be applied or invested as capital money under the Settled Land Acts. *Gee, In re, Pearson Gee* v. *Pearson*, 64 L. J., Ch. 606.

Semble, s. 33 only applies to money subject to a trust to be laid out in land, and not to money subject to a discretionary power to be so laid out. *Ib.*

"When Received."] — When the sale of a farm was pending, on a summons by the trustees and infant tenant in tail for leave to raise money to carry on the farm which was unlet :—Held, that s. 21 of the Settled Land Act, 1882, only provided as to capital moneys, "when received," and the court could not charge the future purchase money of the land to meet the expenses of the trustees until the sale was carried out. The court gave liberty to renew the application on the completion of the contract. *Round* v. *Turner*, 60 L. T. 379.

Land Purchased by Sale of Heirlooms—Whether subject to Charges on Settled Land.] —Land purchased with capital money arising from the sale of heirlooms is not made subject to the charges affecting the settled land with which the heirlooms were to devolve, by reason only of the direction in s. 24, sub-s. 2, of the Settled Land Act, 1882, that land so purchased shall be conveyed to the uses, &c., of the settled land; land so purchased is to be regarded as if the purchase money had arisen from the sale of land not subject to the charges (and therefore exempt therefrom under s. 24, sub-s. 5). *Marlborough (Duke) and Queen Anne's Bounty, In re*, 66 L. J., Ch. 323 : [1897] 1 Ch. 712 ; 76 L. T. 388 ; 45 W. R. 426.

b. Payment Out.

i. *To Trustees.*

Compulsory Sale.]—Lands in settlement having been purchased compulsorily under statutory powers, an order was made to transfer the funds in court representing the purchase money to the trustees of the settlement. *Rathmines Drainage Act, In re*, 15 L. R. Ir. 576.

—— **Advances by Trustees.**]—Part of lands settled by will without power of sale was purchased by a railway company. Upon petition an order was made appointing three of the trustees of the will, omitting the fourth trustee, the tenant for life, to be trustees of the will for the purposes of the Settled Land Act, 1882 ; and the fund was ordered to be paid out to them to be held by them upon the trusts of the will. And it appearing that the trustees of the will had advanced a large sum of money on mortgage, including, by anticipation, a sum of money equivalent to the fund in court, it was ordered that the three trustees appointed by the court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum secured by the mortgage as should be equivalent to the proceeds of the fund ordered to be paid out of court. *Harrop's Trusts, In re*, 24 Ch. D. 717; 48 L. T. 937.

—— **Appointment of Trustees.**] — Where one of two trustees was beneficial tenant for life of a fund paid into court upon the compulsory purchase of the testator's property, and both trustees desired to resign their trusts, and there was no power of sale in the will, the court appointed two new trustees for the purposes of the Settled Land Act, 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *Wright's Trusts, In re*, 53 L. J., Ch. 139 ; 24 Ch. D. 662.

No Tenant for Life—Investment as Capital.]—T., by his will, devised real estate to trustees upon trust to apply the whole, or such part as they should think fit, for the benefit of his son C. or his wife or children, in the usual form of a discretionary trust, to protect the son's interest against bankruptcy, with remainders over. The trustees had no power of sale. They presented a petition under the Settled Estates Act, 1877, for approval of a conditional contract for sale, and payment of the purchase money to them, with leave to invest it as capital money arising under the Settled Land Act. The testator's son was living, and consented :—Held, that s. 33 of the Settled Land Act applied, and the money might be invested as capital money under that act, though there was no tenant for life to exercise the option given by that section. *Tessyman's Trusts, In re*, 77 L. T. 484.

ii. *To Person entitled.*

Partition—Lunacy.]—The words of s. 23 of the 19 & 20 Vict. c. 120, when imported into s. 8 of the Partition Act, 1868, apply to all sales effected under the Partition Act. *Barker, In re*, 50 L. J., Ch. 334 ; 17 Ch. D. 241 ; 44 L. T. 33 ; 29 W. R. 873.

The payment of the money into court to the credit of the lunacy was not a payment "to a person becoming absolutely entitled" within the meaning of s. 23 of the Settled Estates Act. *Ib.*

Tenant in Tail—Disentailing Deed.]—No disentailing deed is required on payment out of court under the Settled Estates Acts of a fund, to a party who would have been in the position of a tenant in tail of the land represented by the fund. *Wood, In re*, L. R. 20 Eq. 372.

The proceeds of sale of a settled estate sold under the Settled Estates Acts will not be paid out to a tenant in tail under the settlement unless he has executed a disentailing deed. *Broadwood, In re*, 45 L. J., Ch. 168 ; 1 Ch. D. 438 ; 24 W. R. 108.

Where a party entitled to a fund in court, and, being tenant in tail, executes a disentailing deed, the money cannot be paid out on petition without an affidavit of no incumbrances. *Thornhill* v. *Millbank*, 12 W. R. 523.

—— **Settled to such Uses as A. and B. should Appoint—Execution of Appointment not Required.**]—Lands settled to A. for life with remainder to B. in tail were sold under the Settled Estates Act, 1877, the purchase money was paid into court and invested, and the dividends ordered to be paid to A. for life. A. and B. executed a disentailing assurance assigning the money in court to a trustee upon such trusts as they should appoint, and discharging it of all trusts for reinvestment in land. A. and B. petitioned for the payment out of the fund to them. They had not executed an appointment to themselves :—Held, that the money might be paid out without such appointment. *Winstanley's Settled Estates, In re*, 54 L. T. 840.

Husband and Wife.]—A fund in court represented land settled upon trust for a married woman for life, with remainder in trust for her in fee, but in case she should die in the lifetime of her husband, then for the husband in fee :—Held, that the fund could not be transferred

into the joint names of the husband and wife without a deed acknowledged by her. *Belt, In re*, 37 L. T. 272 ; 25 W. R. 901.

Transmission of Proceeds of Sale to America.]—L., entitled to land in Wales, by his will devised the interest on the principal of all money received by his executors from Wales to his wife for life, and then his son was to have the whole of the money on attaining twenty-one. L. died domiciled in America, and his wife and son (who was a minor) were resident there. Trustees were appointed under the Settled Land Act of the share of L. in the land, and with the consent of the other beneficiaries it was sold :—Held, that the court had no power to allow the money to be sent to America, and that, if necessary, trustees must be appointed under the act to receive it in that country. *Lloyd, In re, Edwards* v. *Lloyd*, 54 L. T. 643.

Sale under Lands Clauses Consolidation Act.]—Trustees of a settlement had power to sell without reserving minerals. On a sale by the tenant for life under the Lands Clauses Consolidation Act, 1845, reserving the minerals :—Held, that the court has jurisdiction, under ss. 22 & 32 of the Settled Land Act, 1882, to order the money to be paid to the trustees, the tenant for life consenting. *Rutland's (Duke) Settlement, In re*, 49 L. T. 196 ; 31 W. R. 947.

Future Power of Sale.]—A will contained a trust for sale and division of the proceeds, but not being immediately exercisable by the trustees, a sale was ordered under the 19 & 20 Vict. c. 120 :—Held, that the proceeds might be paid to the trustees instead of being applied as directed by s. 23. *Hemsley, In re*, 43 L. J., Ch. 72 ; L. R. 16 Eq. 315 ; 29 L. T. 173 ; 21 W. R. 821.

Restraint on Anticipation.] — When lands settled in trusts for the separate use of a married woman for life without power of anticipation, and after her death in trust for sale, were, in the lifetime of the tenant for life, ordered to be sold under 19 & 20 Vict. c. 120, the proceeds of the sale were ordered to be paid to the trustees of the settlement, to be held upon the trusts declared of purchase money by the settlement. *Morgan, In re*, L. R. 9 Eq. 587 ; 43 L. T. 172 ; 28 W. R. 516.

Tenant in Tail Restrained from Alienation.]—Funds in court, representing the proceeds of sale of settled lands which were vested in a tenant in tail who was restrained by statute from alienating, were, on the application of the tenant in tail, ordered to be paid out to trustees appointed for the purposes of the Settled Land Acts, 1882 and 1884 ; but the court declined to direct the trustees to give notice of any intended investments to the tenant in tail next in remainder. *Bolton Estate Acts, In re*, 52 L. T. 728.

c. Costs and Expenses.

Out of Corpus.]—Costs under 19 & 20 Vict. c. 120, ordered to be paid out of corpus as the deficiency was caused by the testator. *Wheeler* v. *Tootal*, 16 W. R. 273.

—— **To Tenant for Life.**]—Costs irrecoverable from an insolvent company were ordered to be paid out of a fund in court to the tenant for life. *Navan and Kingscourt Ry., In re, Dyas, Ex parte*, 21 L. R. Ir. 369.

In 1881 a tenant for life contemplated a sale of the estate, but he was restrained from selling by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs :—Held, that in defending the action the tenant for life was entitled to be paid his extra costs of so much of the action as related to the exercise of the powers contained in the Settled Land Act as incidental to the exercise of his power of sale under the provisions of the Settled Land Act, 1882. *Llewellin, In re, Llewellin* v. *Williams*, 57 L. J., Ch. 316 ; 37 Ch. D. 317 ; 58 L. T. 152 ; 36 W. R. 347. And see *Tucker's Settled Estates, In re*, infra, col. 778.

—— **Attempted Sale—Charge on Land.**]—On a sale by tenant for life only two small lots were sold :—Held, that under the Settled Land Act, 1882, s. 21, sub-s. 10, the costs and expenses of an attempted but unsuccessful sale were properly payable out of capital moneys ; that, upon the application of the tenant for life the court had power under s. 46, sub-s. 6, and s. 47, to direct such costs and expenses to be paid out of the settled property, and to be raised by means of a charge on the land unsold. *Smith's Settled Estates, In re*, 60 L. J., Ch. 613 ; [1891] 3 Ch. 65 ; 64 L. T. 821 ; 39 W. R. 590.

Settled property was sold on the same day by private contract after attempted sale by auction :—Held, that one charge, according to the scale set out in Part I. of Sched. 1 of the General Order under the Solicitor's Remuneration Act, 1881, was payable out of the purchase money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducting the title and completing the conveyance, including the preparation of the contract ; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase money. *Beck, In re, Cartington Estate, In re*, 52 L. J., Ch. 815 ; 24 Ch. D. 608 ; 49 L. T. 95 ; 31 W. R. 910.

—— **Obtaining Consent of Mortgagees of Life Estate.**]—On a sale by a tenant for life under the Settled Land Act, 1882, the costs of obtaining the consent and concurrence of mortgagees of the life estate, although they are costs incidental to the exercise of the statutory power of sale, ought not as a general rule to be paid out of capital money produced by the sale, though there may be special cases in which they can properly be so paid. *Cardigan* v. *Curzon-Howe*, 58 L. J., Ch. 436 ; 41 Ch. D. 375 ; 60 L. T. 723 ; 37 W. R. 521—C. A.

—— **Compensation.**] — Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act, 1877, and the tenant for life suffered by reason of the sale a diminution of income, the court allowed the tenant for life the costs, as between solicitor and client, of the application for compensation. *Walsh's Trusts, In re*, 7 L. R. Ir. 554.

Mining Leases.]—Costs of application by trustees under 19 & 20 Vict. c. 120, and 27 & 28 Vict. c. 45, for powers of granting mining leases

to come out of the three-fourths of the profits which the act directed to be set apart for the inheritance. *Dorning's Settled Estates, In re*, 13 L. T. 494 ; 14 W. R. 125.

Where the court, under 27 & 28 Vict. c. 45, s. 2, amended an order made under the 19 & 20 Vict. c. 120, s. 10, by striking out a condition that certain mining leases should be settled by the judge, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside by the trustees. *Lovat* v. *Leeds* (*Duke*), 11 L. T. 442.

Person Advancing Moneys.]—The court, in approving of an agreement to demise landed estates, and in directing that the costs of the application should be a charge on the property, ordered the name of the person advancing the money necessary for the payment of such costs to be inserted in the order. *Tunstall, In re*, 14 L. T. 352.

Enfranchisement.]—Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *Adair, In re*, 42 L. J., Ch. 841 ; L. R. 16 Eq. 124.

Interim Investment.]—Held, under s. 32 of the Settled Land Act, 1882, that the costs of an interim investment in debenture stock, of money paid into court by the commissioners of sewers under their special act (which did not authorise an investment in debenture stock) must be paid by them in like manner as if the mode of investment were authorised by the special act. *Hunbury, In re*, 52 L. J., Ch. 687 ; 31 W. R. 784.

Application to Parliament.]—Estate settled on one for life, remainder to infant tenant in tail. The court declined to order that the costs of an application to parliament for a private act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful. But the tenant for life consenting, the court, being of opinion that the proposed application to parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant for life, unless an act of parliament was obtained otherwise directing. *Stanford* v. *Roberts*, 52 L. J., Ch. 50 ; 48 L. T. 262.

Protection of Settled Land.]—Under 19 & 20 Vict. c. 120, s. 30, trustees of settled estates held entitled (1) to apply moneys in hand from sales in paying solicitor and client costs of tenant for life in actions on questions of rights of common over the estates ; (2) in similarly applying sums from future sales. Under the Settled Estates Act, 1877, s. 17, application to the court for payment of all costs not above included by a charge on the estates, allowed, although no application had been made to the court before commencing proceedings. *De la Warr's* (*Earl*) *Settled Estates, In re*, 51 L. J., Ch. 407 ; 46 L. T. 340.

—— **Sewage Scheme.**]—The tenant for life of settled estates having successfully opposed a sewage scheme proposed by the sanitary authority of the parish in which the settled estates were situate, on the ground that the works would deteriorate the value of the estate, incurred certain costs. On a petition entitled in the matter of the Settled Estates Acts, 1856 to 1864, and the act 22 & 23 Vict. c. 35, the court held that the case came within s. 17 of the Settled Estates Act, 1877, and ordered that the petition should be amended by entitling it in the matter of that act, when, on the amount expended by the tenant for life not exceeding a sum named, being proved before the registrar, the court would advise the trustees to pay it. *Willan's Settled Estates, In re*, or *Twyford Abbey Settled Estates, In re*, 45 L. T. 745 ; 30 W. R. 268.

—— **Parliamentary Proceedings.**]—Proceedings successfully prosecuted before the house of lords committee for privileges to establish a claim to an earldom, the consequences of which were that the petitioner afterwards recovered estates which were subject to similar limitations:—Held to be "proceedings taken for the protection of settled land," the costs of which the court directed to be paid out of property subject to the settlement. Form of order. *Rivett-Carnac's Will, In re* (supra, col. 744), considered. *Aylesford's* (*Earl*) *Settled Estates, In re*, 55 L. J., Ch. 523 ; 32 Ch. D. 162 ; 54 L. T. 414 ; 34 W. R. 410.

Costs incurred by a tenant for life, in successfully opposing bills in parliament which were detrimental to the estate, allowed to him out of moneys which under the settlement were liable to be laid out in lands. *Ormrod's Settled Estates, In re*, 61 L. J., Ch. 651 ; [1892] 2 Ch. 318 ; 66 L. T. 845 ; 40 W. R. 490.

Surveyor's Costs.]—Costs, as between solicitor and client, of the solicitor and surveyor of the tenant for life for preparing and carrying out the necessary schemes for improvements on settled estates ordered to be paid out of capital moneys. *Stamford's* (*Earl*) *Settled Estates, In re*, 58 L. J., Ch. 849 ; 43 Ch. D. 84 ; 61 L. T. 504.

d. Discharge of Incumbrances.

Incumbrance affecting Inheritance.] — The proceeds of settled land can be applied in paying off a debt secured by a mortgage of a long term. *Frewen, In re, Frewen* v. *James*, 57 L. J., Ch. 1052 ; 32 Ch. D. 383 ; 59 L. T. 131 ; 36 W. R. 840.

Mortgage affecting Part of Settled Estate.]—Under sub-s. 2 of s. 21 of the Settled Land Act, the purchase money can be applied in discharging a mortgage which affected part of the land sold and another mortgage which affected another part of the settled estate. *Chaytor's Settled Estate Act, In re*, 53 L. J., Ch. 312 ; 25 Ch. D. 651 ; 50 L. T. 88 ; 32 W. R. 517.

Sale of Heirlooms.]—The money arising by the sale of chattels treated in a settlement as heirlooms, may be applied in the discharge of incumbrances affecting the inheritance, without keeping such incumbrances on foot for the benefit of the infant remainderman absolutely entitled to the heirlooms on attaining twenty-one. *Marlborough's* (*Duke*) *Settlement, In re, Marlborough* (*Duke*) v. *Majoribanks*, 55 L. J., Ch. 339 ; 32 Ch. D. 1 ; 54 L. T. 914 ; 34 W. R. 377—C. A. And see *Marlborough* (*Duke*) *and Queen Anne's Bounty* (*Governors*) *In re*, supra, col. 769.

Rentcharge.] — Purchase money may be applied, at the instance of the tenant for life, in redemption of rentcharges payable for loans for the drainage and improvement of other lands settled upon the like uses. *Navan and Kingscourt Ry., In re, Dyas, Ex parte*, 21 L. R. Ir. 369.

Land Drainage Charge.]—Where settled land is subject to a charge for land drainage improvements, repayable by instalments, money in the hands of the trustees of the settlement may, under the Settled Land Act, 1887, be from time to time applied in payment of such portions of the instalments as represent capital, but not in payment of such portions as represent interest. *Sudeley's (Lord) Settled Estates, In re*, 57 L. J., Ch. 182; 37 Ch. D. 123; 58 L. T. 7; 36 W. R. 162.

Charges for land drainage and improvements repayable by instalments, created before 1882, under the Improvement of Land Act, 1864, cannot be paid out of the capital of the settled estates so as to relieve the tenant for life from the payment of the instalments. Trustees who purchase such charges will hold them upon trust to receive the instalments payable by the tenant for life, and to treat them as capital. *Knatchbull's Settled Estates, In re*, 54 L. J., Ch. 1168; 29 Ch. D. 588; 53 L. T. 284; 33 W. R. 569—C. A.

Tithes subject to Annuity—Purchase with a view to Discharge Incumbrance.]—In 1804, by a marriage settlement, it was provided that an annuity of 640*l.* should issue and be payable out of certain tithes granted to persons, their heirs and assigns, for the term of 1,000 years. The tithes afterwards became vested in the trustees of a will, subject to the annuity. The trustees sold part of the tithes for 30,670*l.* On the application of the tenant for life under the will:—Held, that the tithes were an incorporeal hereditament, and included in s. 2, sub-s. 10, of the Settled Land Act, 1882. Held, also, that the annuity created by a settlement was not a rent, because it did not issue out of a corporeal hereditament; but that it was an incumbrance on the tithes, and an incumbrance affecting the inheritance within the meaning of the Settled Land Act, 1882, and, therefore, the trustees might apply the 30,670*l.* in the purchase of the annuity with a view to its discharge. *Esdaile, In re, Esdaile* v. *Esdaile*, 54 L. T. 637.

Tithe-Rentcharge — Payment of Instalments.]—A tithe rentcharge of 57*l.* 12*s.* 11*d.* on settled land repayable in instalments was redeemed by the tenant for life at 1,181*l.* 16*s.* 10*d.* for the 36 annual instalments remaining payable. The estates were sold and the money paid to the trustees of the settlement. On an application by the tenant for life:—Held, that the instalments were not merely terminal charges within s. 21 of 45 & 46 Vict. c. 38, and that he was not entitled to be repaid the full amount of his advance, but that his right of recoupment should be ascertained on the following principles, viz. that he was entitled to be repaid the 1,181*l.* 16*s.* 10*d.* out of the capital sum, but that the instalments of 57*l.* 12*s.* 11*d.* should be treated as still subsisting and payable by him to the trustees for his life or the residue of the term for which they were charged on the land; and that, inasmuch as the repayment to him out of the trust funds would diminish the capital fund, to the interest of which he was entitled for life, interest on the 1,181*l.* 16*s.* 10*d.* should be deducted from the annual sum of 57*l.* 12*s.* 11*d.* and the present value of the difference for his life ascertained, and that he was entitled to be paid the 1,181*l.* 16*s.* 10*d.*, less the value of such difference. *Leinster's (Duke) Settled Estates, In re*, 23 L. R. Ir. 152.

Different Estates.] — Where three estates which do not devolve in the same way are held by the court to constitute only one settled estate under one settlement, proceeds of sale of one of them are applicable in the discharge of incumbrances affecting the other two. *Freme, In re, Freme* v. *Logan*, 63 L. J., Ch. 139; [1894] 1 Ch. 1; 7 R. 1; 69 L. T. 613; 42 W. R. 119—C. A.

Improvement Rentcharge.]—Tenant for life paid instalment of rentcharge created between 1886 and 1890 under the Improvement of Land Act, 1864, to secure money borrowed by him for improvements:—Held, that the case did not come within s. 15 of the Settled Land Act, 1890, but within s. 1 of the Settled Land Act, 1887, and that he was not entitled to repayment out of capital money of sums paid before the date when he first required the trustees to pay the instalments. *Dalison's Settled Estates, In re*, 61 L. J., Ch. 712; [1892] 3 Ch. 522; 41 W. R. 15. And see *Bristol's (Lord) Settled Estates, In re*, 62 L. J., Ch. 901; [1893] 3 Ch. 161; 3 R. 689; 69 L. T. 304; 42 W. R. 46 (infra, col. 778). *Castle Bytham (Vicar) and Midland Ry., Ex parte*, 64 L. J., Ch. 116; [1895] 1 Ch. 348; 13 R. 24; 71 L. T. 606; 43 W. R. 156, supra, col. 725.

—— **Redemption—Bonus to Owner of Rentcharge.**]—Where a rent charge has been created upon settled land in pursuance of an act of parliament, with the object of paying off money advanced to defray the expenses of improvements authorised by the Settled Land Act, 1882, the trustees of the settlement may, out of capital money, properly pay, in addition to the amount of the unpaid principal money, a reasonable sum by way of bonus. *Sudeley's (Lord) Settled Estates, In re* (supra), disapproved. *Egmont's (Lord) Settled Estates, In re*, 59 L. J., Ch. 768; 45 Ch. D. 395; 63 L. T. 608; 38 W. R. 762—C. A.

—— **Tenant for Life — Obligation to make Payments to Sinking Fund—Validity.**]—Under a settlement trustees were enabled, at the request of the tenant for life, to raise certain sums of money for improvements, which were to a large extent those authorised by the Settled Land Act, 1882, and to hand them over to him to be applied by him for such improvement purposes, without any liability on the part of the trustees to see to their application. The tenant for life was, according to the terms of the settlement, under an obligation to replace out of income (by way of sinking fund) the moneys so handed over to him by twenty-five annual instalments. He received moneys from the trustees, applied them for improvements, and paid several contributions to the sinking fund:—Held, that the obligation to recoup did not in any way affect the right of the tenant for life to exercise any of the powers of the Settled Land Act, 1882, and consequently did not contravene s. 51 of that act. *Sudbury and Poynton Estates, In re*, 62

L. J., Ch. 539; [1893] 3 Ch. 74; 3 R. 561; 68 L. T. 707; 41 W. R. 585.

Purchase of Terminal Rentcharge before 1887—Redemption—Sale of Improved Portion of Estate.]—The tenant for life under a settlement borrowed money under the Improvement of Land Act, 1864, the repayment thereof being secured by terminable rentcharges created under the act in common form, and containing no provision for redemption. These rentcharges were in 1883 and 1885 bought up by the trustee of the settlement out of capital money subject to the settlement. In 1888 the portions of the estate on which the improvements had been made were sold, and the rentcharges were, under the powers of the Settled Land Act, 1882, shifted to other portions of the estate:—Held, that this was an investment under s. 60 of the act of 1864; and not an expenditure of capital money in providing for the payment of the rentcharges; that it was, therefore, not within the language of the act of 1887; and that the act of 1887 was not retrospective so as to apply to purchases made before it came into operation, and therefore the tenant for life was not entitled to be recouped the instalments which he had paid; but he was entitled, although the improved land had been sold, to have the instalments accrued due after the 25th of March, 1889, when the question was first raised, provided for out of capital. *Howard's Settled Estates, In re*, 61 L. J., Ch. 311; [1892] 2 Ch. 233; 67 L. T. 156; 40 W. R. 360.

And see Cases under next section.

e. Improvements.

Right of Tenant for Life—Discretion.]—A tenant for life of settled lands can require capital moneys arising under the settlement to be applied in payment for permanent improvements when the trustees have powers under which they might make the improvements themselves and pay for them out of the rents and profits. The fact that the tenant for life will derive a benefit from the exercise of any power under the Settled Land Act is not in itself sufficient to prevent him from exercising the honest discretion required of him by s. 53 of the act. *Stamford's (Lord) Estate, In re*, 56 L. T. 484.

Approval of Scheme before work commenced.]—In order that the court may sanction payment of the cost of permanent improvements out of capital money, a scheme for the proposed works must be submitted by the tenant for life to the trustees before the works are commenced. If the tenant for life executes the work at his own expense without a scheme approved by the trustees, the court cannot then authorise the repayment of the cost out of capital money. Whether the expense of improvements on lands which have been sold, and so are no longer comprised in the settlement, can be afterwards paid out of capital money, quære. *Hotchkin's Settled Estates, In re*, 56 L. J., Ch. 445; 35 Ch. D. 41; 56 L. T. 244; 35 W. R. 463—C. A.

No Scheme—Costs.]—Where a tenant for life desires to have improvements carried out on the settled land, but submits no scheme to the trustees or the court, and himself orders the improvements to be executed and pays for them, the court has power to order the trustees to reimburse the tenant for life out of capital moneys in their hands, but applications with that view by the tenant for life will not be encouraged. Semble, the court will not allow the tenant for life his costs of such an application, unless he can show that all such improvements are of a kind which ought to be charged on the settled land. *Tucker's Settled Estates, In re*, 64 L. J., Ch. 513; [1895] 2 Ch. 468; 12 R. 320; 72 L. T. 619; 43 W. R. 581—C. A. *And see next case.*

Past Expenditure.]—Whether the court had power to sanction the payment for past expenditure, quære. *Broadwater Estate, In re*, 54 L. J., Ch. 1104; 53 L. T. 745; 33 W. R. 738—C. A.

Extra Expenditure — Scheme — General Approval of Trustees.]—In carrying out a scheme, which has been duly approved by the trustees, for permanent improvements, extra expenditure, not included in the contract forming part of the scheme submitted to the trustees, may be charged on capital moneys, where such extra expenditure is incidental to and has properly been incurred in a due execution of the scheme, and where the approval of the trustees has been general, and not limited to the particular amount mentioned in the contract. *Bulwer Lytton's Will, In re, Knebworth Settled Estates, In re*, 57 L. J., Ch. 340; 38 Ch. D. 20; 59 L. T. 12; 36 W. R. 420—C. A.

Appearance by Trustees on Application.]—The court will not hear counsel for the trustees of a settlement in support of an application by the tenant for life when his interest is opposed to those of the remaindermen, it being the duty of the trustees to act as a check upon him. *Hotchkin's Settled Estates, In re*, supra.

On such an application, the trustees should appear separately. *Broadwater Estate, In re*, supra.

Future Capital Money—No Capital Money in hands of Trustees.]—When trustees have no capital money in their hands, the court has no power under s. 26 of the Settled Land Act, 1882, to authorise payments for improvements out of capital money to arise in future. *Millard's Settled Estates, In re*, 62 L. J., Ch. 761; [1893] 3 Ch. 116; 2 R. 529; 69 L. T. 202; 41 W. R. 577—C. A.

—— **Prospective Order — Discretion.**]—Where improvements authorised by the Settled Land Acts have been made upon land in settlements, and paid for with money borrowed and repayable by a rentcharge, the court cannot, under s. 15 of the Settled Land Act, 1890, direct the trustees to apply future capital moneys coming into their hands in repayment thereof. *Dalison's Settled Estate, In re* (supra, col. 776) followed. *Bristol's (Lord) Settled Estates, In re*, 62 L. J., Ch. 901; [1893] 3 Ch. 161; 3 R. 689; 69 L. T. 304; 42 W. R. 46.

Expenditure before Settled Land Act, 1882—Scheme.]—A tenant for life of settled estates advanced money for (1) improvements executed before the Settled Land Act, 1882, came into operation, but of the nature subsequently authorised by that act; (2) similar improvements executed since that act, but as to which

no scheme had been submitted under s. 26 of that act. On his death the court allowed payment to the present tenant for life as regarded (2) under s. 15 of the act of 1890, holding that this was a case of repaying a loan. As regarded (1), the court declined to allow the payment, on the ground that the expense had been deliberately incurred by the tenants for life at a time when it could not be paid out of capital. *Ormrod's Settled Estates, In re*, 61 L. J., Ch. 651; [1892] 2 Ch. 318; 66 L. T. 845; 40 W. R. 490.

Evidence as to Nature of.]—A summons asked for a declaration that trustees might apply capital in payment of such part as represented principal of a rentcharge payable under an order made on the 21st June, 1883, by the Land Commissioners. The summons was ordered to stand over for further evidence showing that the work done came within the description of improvements in s. 25 of the Settled Land Act, 1882. The inspector of works of the land commissioners had made a certificate in April, 1883, in which he stated that in his opinion the works "will produce a permanent improvement in the yearly value of the land exceeding the yearly amount proposed to be charged thereon." There was no satisfactory evidence of the nature of the works executed:—Held, that there was no evidence here that the work done was not work for which the tenant for life was liable, nor that the work came within the description of improvements in s. 25 of the Settled Land Act, 1882; that without such evidence the court could not authorise the trustees to apply capital in payment of the rentcharge. *Newton's Settled Estates, In re*, 61 L. T. 787.

Repairs.]—Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners. An annuity was to be paid to the tenant for life in possession out of the rents, and the surplus rents to be laid out in the purchase of real estates, or accumulated for twenty-one years from testator's death, and the income of the accumulations paid to the tenant for life; from the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, and also the income of the accumulated surplus. The period of twenty-one years from testator's death expired in January, 1885. The surplus rents accumulated during the twenty-one years amounted to 37,000*l.* Repairs and improvements amounting to between 4,000*l.* and 5,000*l.* were required to be made on the settled property:—Held, that the proposed improvements could be paid out of the 37,000*l.* capital money, but the repairs must be paid out of income. *Clarke* v. *Thornton*, 56 L. J., Ch. 302; 35 Ch. D. 307; 56 L. T. 294; 35 W. R. 603.

Different Deeds — Settlement of Land — Bequest of Personalty to be invested on Trusts of Settlement.]—By a settlement lands were settled by A. M. M and A. E. M. M. in strict settlement. A. M. M. by his will bequeathed to his executors the residue of his personal estate, upon trust to invest the same in the purchase of lands to be settled upon the trusts, &c., of the settlement:—Held, that the executors were authorised under the Settled Land Act, 1882, to pay the costs of improvements on the settled land out of the residuary personal estate. *Mundy's Settled Estate, In re*, 60 L. J., Ch. 273; [1891] 1 Ch. 399; 63 L. T. 311; 39 W. R. 209.

Real estate devised in strict settlement, and residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will the testator executed a deed whereby he assigned specific personalty to the same persons, whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from those of the will. The mansion house having been pulled down, and requiring to be rebuilt:—Held, that out of the specific personalty fund settled by the deed, 24,000*l.* should be advanced to the tenant for life to pay for the rebuilding, and that out of the same fund 40,000*l.* should be set aside, and the dividends accumulated for twenty years, until an amount of 24,000*l.* should be saved, with which the same fund should be recouped. *Donaldson* v. *Donaldson*, 3 Ch. D. 743; 34 L. T. 900; 24 W. R. 1037.

Where a will and a deed constitute one settlement, capital money arising under the deed may be applied towards improvements on land under the will, provided such improvements are authorised by both instruments. *Byng's Settled Estates, In re*, 61 L. J., Ch. 511; [1892] 2 Ch. 219; 66 L. T. 754; 40 W. R. 457.

Different Estates.]—Permission was given to the tenant for life of a settled estate, which had been sold under an order of the court, to apply a portion of the purchase money on the permanent improvement of another estate which had been purchased and settled upon the trusts of the original property. *Clitheroe, In re*, 20 L. T. 6; 17 W. R. 345.

Where four estates devised by will to the same tenant for life constituted one settled estate within the meaning of the Settled Land Act, capital money arising from one held applicable for improvements on another estate. *Stamford's (Earl) Settled Estates, In re*, 58 L. J., Ch. 849; 43 Ch. D. 84; 61 L. T. 504.

"Annual Rental of Settled Land."] — In calculating the "annual rental," mentioned in s. 13 (iv.) of the Settled Land Act, 1890, the income of capital money arising under the Settled Land Act, 1882, must be included. *De Teissier's Settled Estates, In re*, 62 L. J., Ch. 552; [1893] 1 Ch. 153; 3 R. 103; 68 L. T. 275; 41 W. R. 184.

In estimating the annual rental of the settled land for the purpose of fixing a limit to the amount allowed out of capital for the expense of rebuilding, the annual letting value of the mansion house and park, or even of a farm in the occupation of the tenant for life, is not to be included, but the rental value of a farm for the moment actually let is to be so included. *Walker's Settled Estate, In re*, infra.

In ascertaining the half of the annual rental of the settled land for the purposes of s. 13 (iv.), the rental of the whole of the land in settlement must be taken into account. *Gerard's (Lord) Settled Estates, In re*, infra.

Mansion House — Chapel — Stables — Agent's House.]—The following are not improvements on which capital money may be expended under the Settled Land Acts:—(1) Building additions to

the mansion house and improving its architectural appearance. (2) Building a chapel for Roman Catholic service. (3) Building new stables, the present stables being inconvenient and insufficient. (4) Building a house for the residence of the estate agent. *Houghton Estate, In re* (infra), disapproved. *Gerard's (Lord) Settled Estates, In re*, 63 L. J., Ch. 23; [1893] 3 Ch. 252; 7 R. 227; 69 L. T. 393—C. A.

Semble, the limitation of half the annual income of the settled land placed upon the expense of rebuilding a mansion house by the Settled Land Act, 1890, s. 13, sub-s. iv., refers to the whole of the land subject to the settlement, and not to the particular estate on which the house is situate. *Ib.*

—— **Rebuilding.**]—The expression "rebuilding of the principal mansion house" in s. 13 (iv.) of the Settled Land Act, 1890, will be construed strictly, and must amount to something more than structural alterations, however extensive. *De Teissier's Settled Estates, In re*, supra.

Where a tenant for life made considerable alterations in and additions to a mansion house on the settled land, and in doing so pulled down part of the house but left the main walls standing, the work is a rebuilding within s. 13, sub-s. iv., of the Settled Land Act, 1890. *Walker's Settled Estate, In re*, 63 L. J., Ch. 314; [1894] 1 Ch. 189; 8 R. 370; 70 L. T. 259.

Whether a building forms part of the principal mansion house is a question of fact in each case. A "rebuilding" of the principal mansion house under the acts is to be understood in connection with the structure, and does not include mere architectural embellishment. *Gerard's (Lord) Settled Estates, In re*, supra.

Alterations with a View to Let.]—There must be a present intention of, if not an actual contract for, letting, in order to give the court jurisdiction to authorise capital money to be applied in "making any additions to or alterations in buildings" under s. 13 (ii.) of the Settled Land Act, 1890. *De Teissier's Settled Estates, In re*, supra.

—— **Immediate or Prospective Letting.**]—Sect. 13 (ii.) of the act of 1890, only applies where the expenditure is to be made in view of an immediate or prospective letting. *De Teissier's Settled Estate, In re*, supra, approved. *Gerard's (Lord) Settled Estates, In re*, supra.

Mines — Erection of New Pumps.] — The erection of a new pumping engine and pumps for draining some mines included in the settlement:—Held, to be improvements authorised by s. 25, sub-s. xx., of the Settled Land Act, 1882. *Mundy's Settled Estates, In re*, 60 L. J., Ch. 273; [1891] 1 Ch. 399; 63 L. T. 311; 39 W. R. 209.

—— **Water Supply — Improvements to be carried out by Company—Sale of Settled Land to the Company for such Purpose—Consideration.**]—Where the evidence is clear that, under the circumstances of the case, to allow a scheme, whereby a company is to execute improvements within the meaning of the Settled Land Acts, is more beneficial to the estate than expending capital moneys thereon, the court may sanction the scheme, although one of the terms is a sale of part of the settled land, necessary to enable the company to carry out the improvements, in consideration of fully paid-up shares in the company. *Orwell Park Estate, In re*, 8 R. 521.

Additions to or Alterations in Buildings — Heating Apparatus — New Entrance — New Roof.]—By s. 13 (ii.) of the Settled Land Act, 1890, capital moneys may be expended in making "additions to or alterations in buildings"; these words include the provision of a new roof or a new entrance, but not the provision of a boiler and pipes for interior heating apparatus. *Gaskell's Settled Estates, In re*, 63 L. J., Ch. 243; [1894] 1 Ch. 485; 8 R. 67; 70 L. T. 554; 42 W. R. 219.

Drainage — Rebuilding.] — The following are improvements on which capital money may be spent under the Settled Land Acts: (1) a larger and better supply of water to a mansion house; (2) a new and improved system of drainage of the mansion house; (3) rebuilding of the stables, which were out of repair; (4) the building of an agent's house; and (5) the building of two cottages. *Houghton Estate, In re*, or *Cholmondeley's (Marquis) Settled Estate, In re*, 55 L. J., Ch. 37; 30 Ch. D. 102; 53 L. T. 196; 33 W. R. 869.

Embankment.]—Proceeds of a sale (under the direction of the court) of some settled estate, may be expended in making an embankment or side weir of a river to protect other parts of the same settled estate, the banks of the river having been damaged by floods. *Leadbitter, In re*, 30 W. R. 378.

Buildings.]—Under 19 & 20 Vict. c. 120, s. 23, money arising from timber cut under an order of the court was ordered to be expended in erecting new farm buildings and other permanent improvements of the property. *Newman, In re*, 43 L. J., Ch. 702; L. R. 9 Ch. 681; 31 L. T. 265.

Moneys which, under the trusts of a will, settlement, or private act of parliament, are to be invested in the purchase of land, as well as moneys to be invested under the Settled Estates Act or the Lands Clauses Act, may be employed in the erection of new buildings on land settled to the same uses, if it is beneficial to the estate; but repairs and permanent improvements do not come within this principle. *Drake* v. *Trefusis*, L. R. 10 Ch. 364; 33 L. T. 85; 23 W. R. 762.

Experiments—"Silos."]—The tenant for life of a settled estate after the passing of the Settled Land Act, constructed "silos" upon the estate, and proposed to construct others:—Held, that though a "silo" might come within the term "buildings" used in the act, yet, inasmuch as the construction of silos was in the nature of an experiment, the expenditure could not be sanctioned. *Broadwater Estate, In re*, 54 L. J., Ch. 1104; 53 L. T. 745; 33 W. R. 738—C. A.

Paving.]—Purchase money of part may be applied in payment of a sum assessed by a corporation upon the owners of another part of the settled estate, as their contribution towards the expenses of flagging and paving a street. *Hilliard, In re*, 38 L. T. 93.

f. Other Cases.

Interim Investment.]—An order was made for the payment of 1,200*l.* (proceeds of a sale) into

court, and for reinvestment in land, and for interim investment in consols:—Held, that the accountant-general was not bound to invest the money in consols without a written request from the solicitor who paid it in. *Woodcock, In re*, 41 L. J., Ch. 22; L. R. 13 Eq. 183; 25 L. T. 459.

—— **By Trustees.**]—Trustees may deal with the proceeds of sales sanctioned by the court under s. 24 of the 19 & 20 Vict. c. 120. *Peacock, In re*, 12 Jur. (N.S.) 959; 15 L. T. 266; 15 W. R. 100.

Money received by trustees upon a sale under the 19 & 20 Vict. c. 120, may be invested in any of the investments in which cash under the control of the court may be invested. *Cook, In re*, 40 L. J., Ch. 400; L. R. 12 Eq. 12; 24 L. T. 413; 19 W. R. 693.

Money paid to trustees upon a sale can be invested temporarily only in exchequer bills or consols as directed by s. 25 of the 19 & 20 Vict. c. 120, and cannot be invested in any of the other ways in which cash under the control of the court may be invested. *Boyd, In re*, 42 L. J., Ch. 506; 28 L. T. 799; 21 W. R. 667. S. P., *Shaw, In re*, 41 L. J., Ch. 166; L. R. 14 Eq. 9.

—— **Specified Investment.**]—In making an order for interim investment under the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, the court declined to give the trustees of the settlement authority to select the investments in which the purchase money should be laid out, and directed that the particular investment should be specified in the order. *Taylor's Settled Estates, In re*, 28 W. R. 594.

Discretion of Court.]—Upon a petition presented under the Settled Estates Act, 40 & 41 Vict. c. 18, ss. 34, 35, and 36, for the comfirmation of a contract for sale, the court, in the exercise of the discretion conferred upon it by s. 35, directed the reinvestment of the purchase money in the manner provided by s. 34, without any further application to the court. *Hoare's Settled Estates, In re*, 30 W. R. 177.

Debenture Stock.]—Where, under a will, money is bequeathed to trustees in trust to lay it out in the purchase of land, to be settled in strict settlement, the trustees may invest it in debenture stock, in accordance with the provisions of s. 21 of the Settled Land Act, 1882. *Mackenzie's Trusts, In re*, 52 L. J., Ch. 726; 23 Ch. D. 750; 48 L. T. 936; 31 W. R. 948.

Change of Investment.]—Proceeds of settled land invested in consols in the names of trustees:—Held, that the trustees might sell the consols and reinvest in securities mentioned in s. 21 of the Settled Land Act, 1882. *Tennant, In re*, 58 L. J., Ch. 457; 40 Ch. D. 594; 60 L. T. 488; 37 W. R. 542.

Investment on Mortgage.]—Proceeds of land sold under 19 & 20 Vict. c. 120, were paid into court. A petition was presented by the tenant for life, with the consent of the tenant in tail, for liberty to invest the purchase money on mortgage. The court made the order. *Wall* v. *Hall*, 8 L. T. 44; 11 W. R. 298.

Option of Tenant for Life—Power of Trustees to give Receipts.]—In 1886 the tenant for life of settled lands sold under the provisions of the Settled Land Act. Trustees had previously been appointed by the court for the purposes of the act. The purchaser refused to complete his contract, unless the purchase money was paid into court, and an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, and it was paid in accordingly:—Held, that by consenting to the order for payment of the purchase money into court, the tenant for life had exercised the option given to him by sub-s. 1 of s. 22 of the act, and that the money could not, therefore, be paid out to the trustees, but must remain in court, and be invested or applied under the direction of the court. Semble, that the power to give receipts, which is conferred on trustees by s. 40 of the act, extends to trustees appointed by the court under s. 38. *Cookes* v. *Cookes*, 56 L. J., Ch. 397; 34 Ch. D. 498; 56 L. T. 159; 35 W. R. 402.

4. Apportionment of, on Sales of Leaseholds.

Income of Purchase Money.]—Leaseholds for lives in settlement subject to a trust for renewal were, after refusal to the lessor to renew, sold under the Leases and Sales of Settled Estates Act, 1877:—Held, that the first taker was entitled only to the income of the purchase money. *Barber's Settled Estates, In re*, 50 L. J., Ch. 769; 18 Ch. D. 624; 45 L. T. 433; 29 W. R. 909.

Diminution of Income.]—Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act, 1877, and the tenant for life suffered by reason of the sale a diminution of income, the court, applying the principle of *Ashew* v. *Woodhead* (14 Ch. D. 27), directed a calculation to be obtained from an actuary of what equal half-yearly sums, for the residue of the terms, the proceeds of the sale would produce, taking interest at 3 per cent. so as to exhaust that sum at the expiration of the term, and that in each half-year the dividends on the stock then remaining, in which the proceeds of sale were invested, should be paid to the tenant for life, and so much of the stock transferred to the same person as with the cash dividend would make up the half-yearly sum so to be ascertained, the residue of the fund, if any, at the expiration of the life interest, to go to the persons absolutely entitled in remainder. *Walsh's Trusts, In re*, 7 L. R. Ir. 554.

Application of Income.]—Where the facts are similar, decisions on s. 74 of the Lands Clauses Consolidation Act, 1845, are authorities on s. 34 of the Settled Land Act, 1882. As between tenant for life and remainderman, where lands subject to a beneficial lease are sold under the Settled Land Act, 1882, the tenant for life will, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase moneys as equals the rents under the lease, and the rest of that income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired. *Cottrell* v. *Cottrell*, 54 L. J., Ch. 417; 28 Ch. D. 628; 52 L. T. 486; 33 W. R. 361. But see *Gerard's (Lord) Settled Estate, In re*, supra, col. 768.

E. E. H. B.

SETTLEMENT.

[By H. J. NEWBOLT.]

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I. OBLIGATIONS TO SETTLE.

A. INFORMAL CONTRACTS.

1. AGREEMENT TO SETTLE. STATUTE OF FRAUDS.

Insufficient Agreements — By Parol.]—An agreement not in writing before marriage by the husband is within the statute of frauds. *Montacute (Viscountess)* v. *Maxwell*, 1 P. Wms. 618; 1 Str. 236.

Invalidity of a parol agreement of the husband, prior to marriage, to settle the wife's property. *Spicer* v. *Spicer*, 24 Beav. 365.

—— **By Letters.**]—Whether a letter written during a treaty of marriage, where there are subsequent treaties and proposals, is an agreement within the statute of frauds. *Cokes* v. *Mascal*, 2 Vern. 34.

Marriage agreement reduced into writing, but not signed by either party, yet decreed to be performed. *Ib.*, 200.

A letter from a father to his daughter, by which he agrees to give her 3,000*l.* portion, and this not shown to the man who afterwards marries her, does not take the promise out of the statute of frauds. *Ayliffe* v. *Tracy*, 2 P. Wms. 65.

—— **By Memorandum.**]—On a marriage treaty, the intended husband and the young lady's father went to a counsellor's chambers to have, in consideration of the portion the father proposed to give, a settlement drawn. Minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk to be drawn up in form. The next day the father dies, and the day following the marriage was solemnised. This agreement, notwithstanding these preparations, held to be within the statute of frauds. *Bawdes* v. *Amherst*, P. C. 402.

A father having agreed to settle a certain sum for the benefit of his daughter, and the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement in conformity to the written memorandum:—Held, that the memorandum was not a complete agreement binding within the statute of frauds, and of an incomplete agreement there cannot be part performance. *Thynne (Lady)* v. *Glengall (Earl)*, 2 H. L. Cas. 131; 12 Jur. 805. Affirming *S. C.*, nom. *Glengall (Earl)* v. *Barnard*, 1 Keen, 769; 6 L. J., Ch. 25.

—— **Parol Agreement to Settle by Will where no Part Performance.**]—Prior to a marriage the intended husband and wife caused a settlement of the wife's property to be prepared in accordance with a memorandum in the husband's handwriting; but before its execution the husband verbally promised the wife that if she would forego the settlement he would give her the same benefits by his will. In accordance with this promise, he, immediately after the marriage, executed a will to that effect prepared before the marriage. Upon his death, some years afterwards, that will was not forthcoming, but a later will was found disposing of the property in a different manner:—Held, that there was no contract within the statute of frauds binding the husband to make a will, or any fraud or part performance to take the case out of the statute. *Caton* v. *Caton*, 12 Jur. (N.S.) 171; 14

L. T. 171; 14 W. R. 267. Affirmed, 36 L. J., Ch. 886; L. R. 2 H. L. 127.

—— **Payments of Interest in Accordance with Verbal Promise to Settle not Part Performance.**]—G., in anticipation of the marriage of his daughter S., had conversations with her, in which he promised her that he would after her marriage pay her the interest on a certain sum of money during her life, and he further said that her husband would have the principal after his death. G., as alleged, made several payments on account of the interest due on the principal sum, but the payments were not regular, and no settlement was ever come to during his life. In administering the estate of G., S. and her husband claimed to be entitled to a certain sum as the balance of the interest due, but, in consequence of dispositions in their favour made by the testator in his will, the principal sum was not claimed. The chief clerk allowed the claim. On motion to vary the certificate, the court held, that, even admitting the payments by G. during his life to have been made in pursuance of a virtual agreement, they did not constitute such a part performance as to take the case out of the statute of frauds, and therefore the claim must be disallowed. *Gulliver, In re, Stroughill* v. *Gulliver*, 2 Jur. (N.S.) 700; 4 W. R. 684.

—— **Part Performance Insufficient as against Creditors.**]—In consideration of B. giving security for an advance to A. of 1,000*l.* and paying off mortgages for 4,000*l.* on A.'s estate, A. agreed to settle his estate on his wife (B.'s daughter) and children. The 1,000*l.* was obtained, but nothing more was done under the agreement until A.'s death, several years after:—Held, that it did not create any charge in favour of the children of A. as against creditors. *Cubitt* v. *Blake*, 2 W. R. 604, 640.

Sufficient Agreements — By Letters.] — Promising by letter to give so much as a portion, sufficient to bring the agreement out of the statute of frauds. *Seagood* v. *Meale*, Pre. Ch. 561.

A father on treaty of marriage of his daughter, agrees by letter written to a third person, to give 1,500*l.* portion to his daughter, and to charge it upon his land; this, as it is a writing signed by the party, takes it out of the statute of frauds, and being to charge land, is properly suable in equity. *Moore* v. *Hart*, 1 Vern. 110, 201.

By Letters after and Transactions before Marriage.]—A parent, by his agent, on the marriage of his daughter, entered into an engagement in writing with her intended husband, in which his name was written but not signed:—Held, that a letter written by the parent after the marriage, referring to the memorandum as stating the terms of the engagement, was either a sufficient agreement signed by the party within the statute of frauds, or a sufficient recognition of the use made of his name in the memorandum. *De Biel* v. *Thompson*, 3 Beav. 469. Affirmed on appeal, *S. C.*, nom. *Hammersley* v. *De Biel (Baron)*, 12 Cl. & F. 45.

A. encouraged his son's courtship to B.'s daughter. B. promised, by letter, to give her 500*l.* if A. would settle 100*l.* per annum on the son, which A. refused. The son and daughter married privately. After this letter, A. consented and B. refused. On a bill for performance of this agreement, objected, that these promises were within the statute of frauds, and that the letter, being after the marriage, should not bind. But decreed contra, for the father consented to the marriage. The agreement was admitted by the answer, and was out of the statute, as if no letter had been written; but this case did not depend upon parol evidence or admission, for the letter after marriage, considering the transaction before, is sufficient. *Hodgson* v. *Hutchinson*, 5 Vin. 522, pl. 34.

—— **By Deposit.**] — Agreements since the statute of frauds are not to be part parol and part in writing, yet a deposit for performance of a written agreement, though there is no writing declaring the deposit to be a security, is not within the statute. *Hales* v. *Van Berchem*, 2 Vern. 617.

—— **By Memorial of Previous Articles.**]—A., who under a settlement entered into upon the marriage of his father in 1783, was entitled to a younger child's portion, filed his bill in 1825 for the purpose of raising the same, praying at the same time an account of all prior incumbrances, the inheritrix having set up certain prior articles executed in the year 1765 upon the marriage of the plaintiff's uncle (the elder brother of his father), and which articles had been registered in the year 1767; the plaintiff amended his bill in 1829 by bringing before the court B. and her husband, who were the only parties beneficially entitled under these articles. B. having answered the bill, a decree was pronounced in 1834, according to the terms of the prayer, and the usual reference made; B. and her husband claimed before the master, in right of her charge under the articles of 1765, the principal sum so charged by those articles, and sixty-eight years' interest thereon. The master having made his report:—Held, upon exceptions thereto, that the memorial of the articles of 1765 was good secondary evidence of those articles, possession having been shown to have gone along with them, and that execution of that memorial by the grantee was sufficient to satisfy the statute. *Peyton* v. *M'Dermott*, 1 Dr. & Wal. 148.

—— **By Memorandum and Agent's Letter.**]—Pending an arrangement for a marriage, the grandmother of the lady signed a memorandum drawn by her agent, stating that she intended to leave the lady 2,000*l.* at her death, to be secured by a bond, as a provision for her on her intended marriage. On the same day her agent by her directions wrote to the intended husband, stating that she intended giving the lady 2,000*l.* at her death, and her house at Cheltenham. The agent shortly after wrote to the grandmother, stating that the intended husband wished to have her bond, and also the house she intended giving, and that he had referred him to her solicitor. The letter was read to the grandmother, who gave it to the lady, saying that it related to her affairs. The marriage was solemnised, and the grandmother died without having executed either bond or conveyance:—Held, that there was a sufficient agreement in writing within the statute of frauds. *Saunders* v. *Cramer*, 3 Dr. & War. 87; 5 Ir. Eq. R. 12. *S. C.*, nom. *Greene* v. *Cramer*, 2 Con. & L. 54.

A contract upon marriage, as well as one upon the sale of land, may be made out from a correspondence. *Ib.*

—— **By Memorandum after Marriage of prior Agreement.**]—A written memorandum after marriage of a prior agreement is sufficient within the 29 Car. 2, c. 3, s. 4. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.

An affidavit made in chancery is a sufficient writing within the statute. *Ib.*

A plaintiff stated in his bill a verbal promise given by a testator, and a subsequent affidavit by the testator referring to the words used by him when he gave the promise:—Held, on demurrer, that the promise was sufficiently stated in the bill, and was in compliance with the requisitions of the statute of frauds. *Ib.*

The promise was one from the testator to the intended husband of his daughter, previous to her marriage, that she should share in the testator's property, equally with the rest of his children. The daughter married and died in the lifetime of the testator, leaving issue by the plaintiff two children, who survived the testator. The testator died, leaving two daughters him surviving. He gave nothing to the wife on her marriage, and by his will, after giving a legacy to one of his two surviving daughters, he bequeathed the residue of his property to the other absolutely:—Held, that the agreement might have been performed in two ways by the testator, making a provision by will for his daughter, or by dying intestate; and that though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him of dying intestate, and therefore the plaintiff was entitled to a third of the testator's residuary property in right of his deceased wife, but that her personal representative was a necessary party to the suit. *Ib.*

Part Performance sufficient to take Case out of the Statute—Money Expended on Property.]—A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband expended money upon the property:—Held, sufficient part performance to take the case out of the statute of frauds. *Surcome* v. *Pinniger*, 3 De G. M. & G. 571.

—— **Taking Possession.**]—A father verbally promised, in contemplation of the marriage of his daughter, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold, and was subject to a charge in favour of a building society, payable by instalments. The father paid those which fell due during his lifetime, and at his death there remained a balance of 110*l.*, which fell due shortly afterwards:—Held, that the verbal promise to give the house having been established, the possession was a part performance which took the case out of the statute of frauds, that the contract was to give the house free from incumbrances, and that the 110*l.* was payable out of the father's estate. *Ungley* v. *Ungley*, 46 L. J., Ch. 189; 46 L. J., Ch. 854; 5 Ch. D. 887; 37 L. T. 52; 25 W. R. 733—C. A.

—— **Jointure Surrendered—Money Raised—Agreement to Re-settle.**]—A., being tenant for life, under a settlement, with remainder to his wife for her jointure, remainder to the issue male of the marriage, remainder over, with a power to revoke all the uses, except those to his wife and her issue, agrees that in consideration of her surrendering her jointure estate so as to enable him to suffer a recovery and raise 6,000*l.* to pay his debts, he would re-settle his whole estate to particular uses. The surrender was made, and the money raised, but no settlement made according to the agreement:—Held, that this agreement, having been in part performed, the parties were entitled to a specific execution, and decreed accordingly. *Herbert* v. *Winchelsea* (*Earl*), 1 Bro. P. C. 145.

Marriage not Part Performance.] — Subsequent marriage is not part performance of a parol contract in consideration of marriage. Acts of part performance by the party sought to be charged will not prevent the operation of the statute. *Caton* v. *Caton*, supra, col. 788.

Prior to his marriage, a husband entered into a parol contract to settle his intended wife's property. The property was not settled after the marriage:—Held, that the ante-nuptial parol contract was inoperative, under the statute of frauds, that the marriage was not a part performance, that the post-nuptial settlement was voluntary, and, the husband being greatly indebted at the time, that the settlement was void as against the husband's creditors. *Warden* v. *Jones*, 23 Beav. 487; 2 De G. & J. 76; 26 L. J., Ch. 427; 3 Jur. (N.S.) 459; 5 W. R. 446.

The execution of a post-nuptial settlement in pursuance of a parol ante-nuptial agreement is not a part performance which avoids the statute. Semble, there can be no such part performance in the case of a parol agreement for a marriage settlement unless some part of the agreement is to be performed by a third party. *Ib.*

By a parol ante-nuptial agreement, it was agreed that the husband should take a certain portion of the wife's property, and that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband, but no settlement was made on the wife. The wife, subsequently to her marriage, filed her bill by her next friend, stating these facts, and praying that her interests in certain property consisting of real estate coming to her might be declared accordingly. The husband, by his answer, admitted the statements in the bill. A deed was then prepared, purporting to be a settlement on the wife, in pursuance of the agreement, and giving her a power to dispose of her property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will disposing of her property in favour of her husband and other parties, and died. The husband then filed a supplemental bill, praying, as against the heir of the wife, that the parol agreement might be carried into effect, that the want of an acknowledgment might, if necessary, be supplied, and that the will of the wife might be established as a valid execution of the power given to her by the deed:—Held, that the contract so entered into before marriage, there being nothing but marriage following, could not be carried into effect under the statute of frauds; and that the court would not supply the want of the acknowledgment, as tending to destroy the protection which the law throws

around married women. *Lassence* v. *Tierney*, 1 Mac. & G. 551; 2 Hall & Tw. 115; 14 Jur. 182.

Promise not a Contract in Consideration of Marriage.]—M. had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had been entered up, but not executed; the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee. She was on terms of affectionate friendship with M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had in early life received from the father of M. a conveyance of some property in India; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees. In truth, the money consideration was, if any, a debt of 1,200 rupees; the rest was a purely voluntary gift, and no money whatever passed when the conveyance was executed. M. was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. M.'s father told L. that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed, which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions he said that L. promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of directions by her, that she had abandoned the claim, and of a promise, often repeated, that she would never trouble M. about it:—Held, that this promise, if it constituted a contract, was not a contract made in consideration of marriage, so as to bring it within the statute of frauds. *Jorden* v. *Money*, 5 H. L. Cas. 185; 23 L. J., Ch. 865. Affirming 2 De G. M. & G. 318; 21 L. J., Ch. 893.

Bond by Husband—Non-execution by Wife—Marriage in Consequence of Instrument.]—Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c.; the wife not an executing party. After the marriage, a real estate of the wife came into possession. The husband dies; the wife marries B. and dies. Bill by a younger child against B., and the heir of his mother; it seems that the statute of frauds could not have been taken advantage of on account of the wife not having been an executing party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved, and acted under her first husband's will, which recited the bond, from whence it was held, she had bound herself at all events. *Archer* v. *Pope*, 2 Ves. 523.

2. Representations and Promises before Marriage.

Promise by Father—Letters—Parol Evidence to Explain.]—Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz. to allow Elizabeth 100*l.* a year, . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of":—Held, first, that this was a contract binding on the father. *Laver* v. *Fielder*, 32 Beav. 1; 1 N. R. 188; 32 L. J., Ch. 365; 9 Jur. (N.S.) 190; 7 L. T. 602; 11 W. R. 245.

Held, secondly, that it was not so vague as to prevent its being enforced. *Ib.*

Held, thirdly, that it did not include freehold property. *Ib.*

Held, fourthly, that the daughter was entitled to an equal share with the other children of the personal estate of which the testator died possessed, after deducting the widow's one-third share and the debts and expenses. *Ib.*

Held, fifthly, that parol evidence was inadmissible to show what was intended by the words "her share." *Ib.*

Held, sixthly, that the suit ought not to be by the daughter alone, but that her husband ought to be a co-plaintiff. *Ib.*

—— **Enforced after Death of Daughter.**]—A. by letter says he will give 1,500*l.* with his daughter; the daughter marries and A. is privy to it, and seems to approve of it. The daughter dies and the husband takes administration. The father decreed to pay the 1,500*l.* portion. *Wankford* v. *Fotherley*, 2 Vern. 322.

—— **Enforced after Death of Father.**]—A father, before the marriage of his son, stated in a letter to the father of the intended wife, "I will give C. one-third of my business, which will at present be sufficient to support them respectably and something to spare; and at my death he will have half the business and a child's share of what property I may be worth." The father, in his lifetime, in consideration of love and affection, assigned a mortgage to the son, to take effect at the father's death, with a power of revocation reserved thereby to the father, which he did not exercise. He also advanced other property to others of his children at different periods during his life. By his will he left to his son C. "one shilling in full of all claims in reference to my property, having already given to him what I consider fair and reasonable"; he directed his debts to be paid, and divided his property among his widow and other children:—Held, that by the letter the father contracted a debt payable out of the assets which he left at his death, but that the son was bound to bring into account and give credit for the value of the mortgage which the son insisted on retaining. Held, also, that the other children were not bound to bring into account the advancements made to them. *Keays* v. *Gilmore*, Ir. R. 8 Eq. 290; 22 W. R. 465.

—— **Parol—Partially Performed—Enforced after Death of Father.**]—A. verbally promised to give his daughter 200*l.*, on her marriage with B., if B.'s father would give the like amount. B. told A. that his father would do so. A. then paid the 200*l.*, after which the marriage was solemnised. B.'s father paid 50*l.* of his 200*l.*, and died, leaving B. his executor. B. claimed a right to retain 150*l.* out of his father's assets. The judge of the county court decided in his favour; and an appeal from that decision was dismissed with costs. *Williams* v. *Williams*, 37 L. J., Ch. 854; 18 L. T. 783.

Promise by Widower — Letters — Enforced after Second Marriage and Death of Father.]—Letters written by a widower previously to the marriage of his only daughter stated that he would settle all his property after his death on her and her children. The father married again, and by his will left certain benefits to his widow:—Held, that the daughter was entitled

to have the whole of her father's property settled. *Coverdale* v. *Eastwood*, 42 L. J., Ch. 118; L. R. 15 Eq. 121; 27 L. T. 646; 21 W. R. 216.

Promise of Annuity—Construction—For Joint Lives of Father and Daughter.]—Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz. "I promise to you, until it is convenient to me to do something better for you, to allow to my daughter 100*l.* a year, which you can have as you may require":—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and though no other evidence of the genuineness of the letter, held to be provable (Sir J. Cross, dissent., upon the ground that the facts required further investigation. *Annandale, Ex parte, Curtis, In re*, 4 Deac. & C. 511.

Representation by Mother—Witnessing Deed.]—The mother, who was the absolute owner of a term, is present at a treaty for her son's marriage, and hears her son declare that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death. The mother is compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death. *Hunsden* v. *Cheyney*, 9 Vern. 150.

Agreement by Second Husband in Favour of First Husband's Daughter.]—A second husband having, by letters in his lifetime, declared he was willing the daughter of his wife by her first husband should have the mother's whole fortune; as he is dead, these letters are to be taken as an appropriation of the fortune for the benefit of the infant. *Grosvenor* v. *Lane*, 2 Atk. 181.

Promise by Intended Husband—Subsequent Marriage without Settlement.]—In a letter containing proposals of marriage with a young lady, addressed to her mother, the writer said: "If your daughter has, or may have, money, my wish and intention would be, that it should be so settled for her sole and entire use." The marriage took place shortly afterwards without the mother's knowledge, and without a settlement:—Held, that the husband was bound, on the faith of the promise, to make a settlement of the whole of the wife's property, present and future, to her separate use. *Alt* v. *Alt*, 32 L. J., Ch. 52; 8 Jur. (N.S.) 1075; 7 L. T. 266.

—— **Agreement to Settle Wife's Real Estate.**]—By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that he would settle his wife's reversionary share of the real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance decreed accordingly. *Lee* v. *Lee*, 46 L. J., Ch. 81; 4 Ch. D. 175; 36 L. T. 138; 25 W. R. 225.

—— **Wife's Property—Conveyance to Husband before Marriage.**]—If there is an agreement before marriage, that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife, but not sealed, and before the marriage the wife disposes of it to the husband, who survives her, and devises the estate by will, the title of his devisee is such a doubtful equity, as cannot be set up in an ejectment against the title of the wife's heir-at-law. *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684; 1 R. R. 595.

—— **Assignment by Letter to Trustee—Settlement on Children of Former Marriage.**]—K., who in 1850 made a settlement for the benefit of himself, wife, and children of the marriage, being a widower in 1863 with four children, and about to contract a second marriage, wrote to one of the two trustees of the settlement a letter in which he said he was desirous of making a settlement upon his four children of six policies of assurance on his own life, the particulars of which he gave. Three of the policies were handed to the trustee, but the other three were deposited with the office as a collateral security, and were to be subject thereto; but he undertook to pay off the amount claimed, so as to leave the policies free for the children. The trusts and provisions of the settlement were to be similar to those of the settlement of 1850, and he undertook to execute to the trustee written to and another trustee to be named an assignment of the six policies, to contain covenants to keep up the policies, and to pay the mortgage debt, and until the settlement should be executed he was to be bound by the agreement, in the same manner as if the settlement were actually executed. In a letter written to the same trustee two days later inclosing the former letter, K. said, "The inclosed is the formal letter of assignment previous to a deed, and as binding." No notice of the letters was ever given to the offices, no formal settlement of the policies was ever executed, and no notice was ever given to the other trustee of the settlement. The trustee written to died in 1871; and the settlement of 1850, the two letters, and the three policies were returned to K., who by his will in 1875 gave the residue of his property to trustees for the benefit of all his eleven children:—Held, that what was done by K. was sufficient to make a complete assignment of the six policies for the benefit of his four children. *King, In re, Sewell* v. *King*, 49 L. J., Ch. 73; 14 Ch. D. 179; 28 W. R. 344.

Husband Binding Himself not to Receive Wife's Property.]—A document, in which a man, in consideration of his intended marriage, covenanted and agreed with his intended wife that, in the event of her becoming his lawful wife, he bound himself "from having any legal or lawful claim upon the plate, linen, furniture, or household effects, or with receiving or disbursing the rents of her tenements and cottages, or giving orders for the repair of the same, nor yet with any property whatsoever she is in possession of at the time of her marriage to him," was held to be a settlement of all the wife's pro-

perty, real and personal, belonging to her at the time of her marriage, to her separate use. *Dye* v. *Dye*, 47 J. P. 520.

Deed operating as—Covenant to stand Seised.]—A. D. L. being seised of a part of certain lands, and A. L. her daughter seised of another part, they executed a deed of settlement previously to the marriage of the daughter with R. D., by which, after reciting the seisin of A. D. L., and A. L., and the intended marriage between R. D. and A. L., they, A. D. L. and A. L., and each of them, did grant, bargain, sell, alien, enfeoff, and confirm unto L. L. and D. D., their heirs and assigns, the premises in question, to hold unto them, L. L. and D. D., their heirs and assigns, to the use of R. D. and his assigns, for life; with divers remainders over. The indenture was duly executed by A. D. L. and A. L. and R. D., and the marriage took effect soon after the execution of the deed, and R. D. had possession of the premises up to the time of the trial in July, 1836. The deed had indorsed upon it a memorandum of livery of seisin, but no names were subscribed to it, nor was any direct evidence given of livery of seisin having been made, nor was it shown that L. L. and D. D. (the trustees) were in any way related to the settlors. A. D. L. died in 1831, and A. L. in 1835:—Held, that this deed operated as a covenant to stand seised, and that a good use passed to R. D., the husband. *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 503; M. & H. 98; 6 L. J., Ex. 176.

On articles under seal, after a recital of an intended marriage between B. and C., A. (the father of B.), for the support and settlement in the world of the young couple, freely and clearly giveth and settleth upon B. his lands from Michaelmas next for life, remainder to the first son of the marriage, "and so on successively," with remainders over: this is a covenant to stand seised, and not an executory contract. *Doe* d. *Jones* v. *Williams*, 2 N. & M. 632; 5 B. & Ad. 783.

Wife's Lien on Unsettled Property.]—Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called "stocks"), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her, "neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564—C. A.

Bond by Father of intended Wife.]—A bond given by a father on the marriage of his daughter was conditioned for payment of interest of a certain sum to the husband or his executors, during the obligor's life; and also for payment of the principal to the husband or his executors, within a limited time after the obligor's death, if any of the issue of the marriage should be living at that time; there were children of the marriage who all died before the obligor, leaving grandchildren; the grandchildren were deemed to be issue of the marriage within the condition, and consequently the husband's executors were entitled to recover on the bond. *Haydon* v. *Wilshere*, 3 Term Rep. 372.

Bond by intended Wife given to Son of intended Husband.]—A woman, on her marriage with a copyholder of a manor, where the widows of husbands dying seised were entitled to their free-bench, gave a bond that the son of her intended husband, by a former wife, should have possession of part of the copyhold estate after the death of the husband on condition of his repairing the part of the house reserved for her:—Held, to be a valid bond. *Rex* v. *Lopen*, 2 Term Rep. 580.

Bond Unexecuted—Letter after Marriage—No Agreement.]—Construction of a letter as not amounting to an absolute agreement to give a marriage portion. *Randall* v. *Morgan*, 12 Ves. 67; 8 R. R. 289.

A letter subsequent to the marriage, authorising the husband to draw for interest due on a bond which was never executed, cannot prevail as evidence of a promise, which, if subsequent to the marriage, is void as nudum pactum. *Ib.*

Representation by Wife's Brother—Not Binding.]—On a treaty of marriage the husband applied to the wife's brother, to know her fortune, and how it was secured. The brother represented it fairly, as he then conceived it, and as being charged on a real estate under the father's will; and added, that the husband need not examine the will, nor the father's family deeds, for the fact was as he represented. A recital to the same effect was also made in the settlement, to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will; but this fact was unknown to all the family at the time of the marriage:—Held, that the representation of the brother would not bind him to make it good. *Merewether* v. *Shaw*, 2 Cox, 124.

Letter by Husband's Father to Wife's Mother—No Agreement.]—A., on the marriage of his son B., wrote a letter to his intended wife's mother, stating his intention to leave him certain property, and promising him an annuity in the meantime. On the marriage of E., another son, A., agreed to settle the lands of S., and to secure him 400*l.* a year if the lands should not produce so much, which agreement was afterwards carried out by a deed by which it was declared that the deficiency should be made up out of A.'s other property:—Held, first, that the letter was a mere expression of intention and not an agreement; second, that E. was entitled to have the deficiency (which arose) made up out of A.'s other freehold property; and third, that property devised by A. to B. was not exempt from contribution. *Quinlan* v. *Quinlan*, Hay & J. 785.

Representation not amounting to Warranty—Common Mistake.]—Bill by husband to have wife's portion, part of which was invested in stock, made up of money, on ground either of express contract or representation upon which the marriage took place, dismissed; the description by articles, though generally "the sum of 4,000*l.*" referring to that sum in settlement, and the representation under circumstances not

amounting to warranty, and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13; 7 R. R. 135.

Promise by Wife's Uncle in Letter disapproving the Marriage.]—A., by letter under his hand, promises 1,000*l.* with his niece, but in his letter dissuaded her from marrying the plaintiff; and though he was afterwards present at the marriage, and gave her in marriage, yet the court would not decree the payment of the 1,000*l.*, but left the plaintiff to his action at law. *Douglas* v. *Vincent*, 2 Vern. 202; sed quære. And see *Ib.* n.

Representation by Recital in Settlement—Deficiency—Husband not Bound.]—By a marriage settlement, it was recited that the husband was absolutely entitled to 7,000*l.*, part of the personal estate of a deceased person then being administered in the court of chancery. The husband settled 5,000*l.*, part of the 7,000*l.*, but the assets proved insufficient to pay the 5,000*l.*:—Held, that this was not a representation which the husband was bound to make good, and that the deficiency did not constitute a debt payable out of his assets. *Evans* v. *Wyatt*, 31 Beav. 217; 9 Jur. (N.S.) 499; 7 L. T. 86; 10 W. R. 313.

Representation by Uncle in Letter Refusing to Settle—Property not Bound.]—On a treaty respecting the marriage of H. M., who was believed to have considerable expectations from his uncle, H. E., the guardians of the lady desired a settlement; and H. M, addressed a letter to H. E., who answered, "I have made my will, and left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. H. E. of real estate upon the marriage, in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate" of the father of the lady, from whom H. M. had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to H. E., who, in September, 1815, wrote: "My sentiments respecting you continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of H. E., communicated to the guardians, who, in March, 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H. M. has reason to expect that he will, upon the decease of H. E., become entitled, by virtue of the will of H. E., to a certain portion of his estate and property, pursuant to the declaration of H. E., contained in his letter to H. M. of September, 1815." H. E. was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents, beyond the fact that he was named as one of the trustees. H. E. afterwards devised his property to other persons:—Held, affirming the decision of the court below, that H. M. could not maintain a suit to compel the trustees under the will of H. E. to convey the Tipperary estate to him, for that H. E.'s letters did not amount to a contract to settle it on him. *Maunsell* v. *White*, 4 H. L. Cas. 1039; 1 Jo. & Lat. 539; Ir. R. 7 Eq. 413.

Representation by Wife's Father in Letter to Third Party—No definite Sum named—Wife's Bill dismissed without Costs.]—P. C., while in India, made his will, leaving his daughter, who was born there, a lac of rupees. Upon the completion of her education, P. C., who had returned to England, sent her back to India, and on that occasion he wrote to a particular friend, to whose guardianship and charge he confided her, "In regard to her settlement in life I shall be naturally anxious." "You may assure the young gentleman she may choose, that, on his marriage with her, he shall have 2,000*l.* sterling; nor will that be all. She is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." H. M. having made proposals of marriage, was informed of the letter written by P. C., and also of the will he had made, and after some negotiations, the marriage was solemnised in 1826; and in 1829, H. M. and his wife returned to England. In the same year, P. C., who was a domiciled Scotchman, executed, in Edinburgh, another will, by which he gave all his real and personal property for the benefit of his wife and his two sons by her; and, in case of their dying without issue, he gave the whole to the issue of his daughter. P. C. died in 1831, without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; and upon a bill filed by his daughter, insisting that the testator had contracted to settle a lac of rupees upon her, and that the contract was contained in the letter written by him:—Held, that in construing contracts, the court must ascertain the real meaning of the words used; that when no definite or specific sum was mentioned or referred to, the court cannot enforce any contract; that the testator had not afforded means of reference to any other document; that, except from the answer of H. M., there was no evidence that he married on the faith and belief that a lac of rupees would be settled; and that it was not evidence to be acted upon in favour of the plaintiff against the estate of the testator, as previous to marriage it had been pointed out to H. M. that the letter did not state any precise sum; and that the testator had left himself unfettered by any contract; and the bill was dismissed, but without costs. *Moorhouse* v. *Colvin*, 15 Beav. 341. Affirmed 21 L. J., Ch. 782.

Representation by Wife's Father—Conditional Contract—Condition Unperformed by Husband.]—A., upon the engagement of his daughter to T., wrote a letter to T. saying that the settlement proposed by him was satisfactory, and that he, A., had made his will, dividing his property equally among his daughters. The marriage took place, T. believing, as he alleged, that the will operated as a settlement of one-third of A.'s

property on his wife. T. made no settlement, and his wife died in A.'s life, leaving children. A. died, having made another will, whereby he left all his property to H., another daughter. Upon a claim by T. and his children to a third share of A.'s estate:—Held, that the letter constituted only a conditional contract, and that T. not having performed his part of the contract, it was not binding, and that in any event the letter was too vague to be enforced as a contract, and the claim was disallowed. *Allen, In re, Hincks* v. *Allen*, 49 L. J., Ch. 553; 28 W. R. 533.

Letter by Infant Husband to Wife's Trustee—No Agreement.]—An infant wrote to the trustee of the property of his intended wife, who was an adult, begging him "as speedily as possible to arrange matters concerning her little property," and adding, "I especially wish it entirely settled on herself, lest her friends might think I had pecuniary reasons for marrying her." On the day on which that letter was written, the parties intermarried; but no further settlement was executed. The wife, however, afterwards expressed to the trustee a wish to have her property settled upon herself:—Held, that the letter was neither a settlement, nor an agreement for a settlement, binding on either the husband or the wife, and that the subsequent expression of her wishes on the subject amounted to nothing, as she was then a married woman. *Beaumont* v. *Carter*, *Carter* v. *Beaumont*, 32 Beav. 586; 8 L. T. 685.

Parol Promise by Husband's Father—Marriage not Relying thereon—No Consideration.]—A parol promise by a father, prior to the marriage of his son, to make a future provision for him, his wife and children, cannot be enforced, if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage. *Goldicutt* v. *Townsend*, 28 Beav. 445.

Covenant to Devise an equal Share to Daughter not binding on Property given to other Children during Lifetime.]—A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave and bequeath unto his (the covenantor's) daughter, an equal share with his other children, of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father having made some disposition of property in favour of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—Held, that the husband and covenantee had not, under the circumstances, any good cause of action against the executor of the father; and that if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action. *Jones* v. *How*, 7 Hare, 267; 19 L. J., Ch. 324; 14 Jur. 145. *S. C.* and S. P., 9 C. B. 1.

Parol Promise to give an equal Share by Will to Daughter—Overridden by subsequent Settlement before Marriage.]—In the course of a conversation between L. and H., with respect to the provision to be made on the marriage of L. with the daughter of H., a statement was made by H. which was thus referred to in a letter written by L. to H. shortly afterwards: "You were pleased to say, that with relation to your property, it would be equally divided between your children who survived you." H., in reply, stated, "All we possess will be divided at our decease equally among our children." Subsequent correspondence took place between L. and H. upon the subject, to the same effect, but in a settlement executed prior to the marriage there was no expression of any such intention:—Held, that all that was intended to be binding on the father was embodied in the settlement. *Lœley* v. *Heath*, 1 De G. F. & J. 489; 29 L. J., Ch. 313; 6 Jur. (N.S.) 436. Affirming 27 Beav. 523; 8 W. R. 314.

If a father, in contemplation of the marriage of his daughter, corresponds with his intended son-in-law, and makes promises which are personal to his daughter, they will not enure for the benefit of her husband or child. *Ib.*

Promise by Letter superseded by subsequent Settlement.]—The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter 2,000*l.*, and that in addition she would have 2,000*l.* on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion a formal agreement for a settlement of 2,000*l.* was executed, the letter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate 4,000*l.* under the promises contained in the letter:—Held, that the letter had, under the circumstances, been superseded by the agreement for a settlement, and claim disallowed. *Badcock, In re, Kingdon* v. *Tagert*, 17 Ch. D. 361; 43 L. T. 688; 29 W. R. 278.

Upon negotiations taking place previously to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her 1,000*l.* settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; and this I can do for A." (the intended bride). A settlement was prepared in the Scotch form, and executed, whereby the father assigned 1,000*l.* to trustees for his daughter, and also all other means and estate whatsoever to which she would be entitled to succeed on his death. The father afterwards transferred 3,333*l.* to the trustees of his daughter A.'s settlement, and he made his will, whereby he gave more property to his other daughters than to A. Upon a bill by the daughter and her husband claiming to be entitled to an equal share with the other children:—Held, that the settlement was a final instrument, and the estate of the father could not be bound by his letter, and the daughter had no right to come upon his assets for an equal share with his other children. *Sands* v. *Sodon*, 31 L. J., Ch. 870; 10 W. R. 765.

Agreement by Wife's Father enclosed in Letter to Third Party as to other Property—Letter not Binding in Addition.]—A., hearing that a marriage, to which he had not given his assent, had been fixed between his daughter and B., signed and sealed a document, by which he agreed to settle, assign, and make over to his daughter, on the occasion of her marriage with B., a house free of all rent for his own term thereof, to the purpose that it should be settled

on herself and her issue by B.; and to execute any further instrument or conveyance of the same which counsel should advise or deem necessary to carry out the assignment of the premises to his daughter, as a marriage portion. That document was enclosed in a letter to D., in which A. expressed his ultimate intentions as to the remainder of this property to be, that after the death of himself and his wife, part of it should go to his sons, and another part should be divided, share and share alike, among his three daughters. The letter reached B. on the morning of the marriage, which had been previously fixed, and which took place. B., being separated from his wife, filed a petition, in the name of himself and his wife, for a specific performance of the agreement:—Held, that the letter would not be enforced as an addition to the agreement, or as itself containing a binding agreement. *Kirwan* v. *Burchell*, 10 Ir. Ch. R. 63.

Held, also, that the letter could not be enforced as a representation, as the marriage did not take place on the faith of it; and there was a written contract executed by A. *Ib.*

Representation by Wife's Father as to Settlement already made—Incumbrance.]—Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, and that clearly, first, that sufficient representations were made; and, secondly, that the marriage took place on the faith of them. *Jameson* v. *Stein*, 21 Beav. 5; 25 L. J., Ch. 41.

A husband and wife alleged that, on their marriage, the wife's father stated, in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, and that he had settled his W. estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of 5,000*l.* They sought to have the representation made good, by payment of the 5,000*l.* out of the father's estate. The court doubted whether the principle applied to such representation, and also whether the marriage took place on the faith of it, and refused relief. *Ib.*

Representation by Wife's Brothers on Father's Authority—Intention to induce Marriage—Father's Estate Liable.]—A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a court of equity for the purpose of realising such representation. And so in proposals of marriage, if the parent or his agent deliberately holds out inducements to the suitor to celebrate it, believing it was intended that he should have the benefits so held out to him, a court of equity will give effect to the proposals. Proposals of marriage, written by the lady's brothers, acting by her father's authority, stated that "Mr. J. P. T., the father, also intends to leave a further sum of 10,000*l.* in his will to Miss T., to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject of course to revision, but they will be sufficient for Baron B. to act upon." Baron B., upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement afterwards executed, there was no mention of this sum of 10,000*l.*; and it was not left by J. P. T. in his will:—Held, that this estate was liable to the payment of 10,000*l.*, with interest from the end of one year after his death. *Hammersley* v. *De Biel* (*Baron*), 12 Cl. & F. 45. Affirming 3 Beav. 469.

Promise by Letter—Marriage following Immediately—Settlement decreed.] — Settlement decreed according to a letter previously to the marriage, though no express assignment, the marriage having taken place immediately: a distinct positive dissent would be necessary to prevent the effect of the letter, and that could be evidenced only by an actual settlement before marriage. *Luders* v. *Anstey*, 4 Ves. 501; 4 R. R. 276.

Marriage upon Faith of previous Voluntary Settlement by Father—Ex Post Facto Consideration.]—The court, having come to the conclusion, as a matter of fact, that the marriage of W. had taken place upon the faith of a previous voluntary settlement made by his father:—Held, first, that the marriage supplied an ex post facto consideration for the settlement. *Guardian Assurance Co.* v. *Aconmore* (*Viscount*), Ir. R. 6, Eq. 391.

Held, secondly, that, in such a case, there is no presumption as to whether or not a marriage had taken place on the faith of the voluntary deed, but that it is the duty of the court, in the absence of direct proof, to form a reasonable judgment, by way of inference from the circumstances shown to have existed, whether or not the parties did know of the deed and act on it. *Ib.*

Power of Appointment by Father—Promise not to Exercise—Settlement of Share as in default—Subsequent Exercise—Father's Estate Liable.]—Previously to a marriage, the solicitor to the father of the intended wife in a letter stated that the father did not propose to exercise a certain power of appointment; and the fund to which the wife would become entitled in default of appointment was comprised in the settlement made on the marriage. The father afterwards exercised his power in favour of his other children:—Held, under the circumstances, that the child of the marriage was entitled to have brought into the settlement, out of the father's estate, a sum equal to that which would have come under the settlement in default of appointment. *Walford* v. *Gray*, 11 Jur. (N.S.) 473; 12 L. T. 437; 13 W. R. 761—C. A.

Marriage without Consent of Wife's Father, but upon Faith of Representations made by him.]—The plaintiff in the suit having been advised that his daughter, then an infant, was entitled in fee to two-fourth parts of certain freehold estates, then vested in trustees, subject only to a question whether he, the plaintiff, was or was not entitled to the rents thereof for his life, as tenant by the curtesy of England, instituted, in 1826, a suit, as next friend of his infant daughter, and in 1830, obtained a decree in such suit, inconsistent with any title in himself as tenant by the curtesy, declaring his daughter to have become entitled at the death of her mother. In 1833, the father, still acting as

next friend of his daughter in the suit, obtained an order of the court approving of a deed of partition containing a conveyance by the trustees of two-fourths of the estates in question to the daughter in fee, and declaring that the father, his executors, &c., should have the use of the same for ten years, if the daughter should so long live, and remain an infant and unmarried; and from and after the happening of either of those events, to the daughter in fee; and providing that the rents received by the father should be applied at the discretion of the father, toward the maintenance of the daughter. This the father accordingly did until the daughter attained her majority in 1843; after which, until her marriage in 1847, without her father's consent, he duly accounted to her for the rents. After the marriage the daughter and her husband brought ejectment against the father, who thereupon claimed to be entitled as tenant by the curtesy to the rents of the estates in question, on the ground that his title was not concluded by the suit commenced in 1826, to which he was not a party, but which he alleged had been instituted and conducted by him as next friend of his daughter, in ignorance of his own right to curtesy:—Held, that the proceedings and conduct of the plaintiff from the commencement of the suit of 1826, were tantamount to a waiver, as against his daughter and her husband, of his right to curtesy out of the estates in question; and moreover that the representations shown in evidence to have been made by him to his daughter were such as that the marriage must be considered as having been contracted by her upon the faith of the correctness of those representations, and the plaintiff considered as liable to have that faith treated as the legitimate consequence of such representations. *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 2 Eq. R. 886; 23 L. J., Ch. 769; 18 Jur. 524.

Instructions by Father for Covenant in Settlement — Covenant Omitted — Father's Estate bound.] — H., during the negotiation which preceded the marriage of his daughter T. with the plaintiff, stated to the latter that she would have "10,000*l.* at the very least" after his own and his wife's death, and himself drew up a document as instructions for the marriage settlement, expressing his desire that a covenant upon his own part should be therein contained to the effect that his daughter should, upon his own and his wife's death, have a property of not less than that amount. A settlement, to which H. was a party, was accordingly prepared and executed, reciting that T. would, upon the death of both her parents, be entitled to 10,000*l.* and upwards; but no covenant was contained therein upon the part of H.:—Held, after the death of H. and his wife, that, upon the above representation, the same having been clearly and distinctly made, the estate of H. was bound to make good the fortune of T. to the amount of 10,000*l.* *Bold* v. *Hutchinson*, 3 Eq. R. 743; 24 L. J., Ch. 285; 1 Jur. (N.S.) 365.

Material Representations to be made Good.] —Material representations of the circumstances of a person contracting marriage, directed to be made good, even at the instance of persons concerned in fraudulently defeating such representations. *De Manneville* v. *Crompton*, 1 V. & B. 355; 12 R. R. 233.

Representation by Wife's Father—Subsequent Settlement Lost—Children of Marriage Decreed to take as Tenants in Common—Husband Excluded.]—Where it was shown, with sufficient certainty, that declarations and representations were actually made by a father to an intended husband, and to other persons, previously to, and in contemplation of and subsequent to the marriage of his natural daughter to him, and that the marriage was contracted in a confidence in such representations, that he had irrevocably settled or intended to settle an estate, and a sum of sicca rupees, as a provision for, and which would upon his death become the property of his reputed daughter and her children; and where there was evidence that certain documents, purporting to settle the estate and sicca rupees, were executed by the settlor, but there was a total want of evidence as to the contents or effect of such documents, the court gave effect to the representations by declaring that the children of the marriage were entitled to the estate and the sicca rupees as tenants in common absolutely. *Prole* v. *Soady*, 2 Giff. 1; 29 L. J., Ch. 721; 5 Jur. (N.S.) 1382; 1 L. T. 309; 8 W. R. 131.

It is essential in such a case that there should also be perfect or reasonable certainty as to the amount and nature of the property to which the representations apply. *Ib.*

The settlor having, by his will, bequeathed to trustees 4,000*l.* in trust for the children of the marriage of his daughter and her husband, the court directed a reference to the chief clerk, for him to inquire and certify whether it would be for the benefit of the children to take the estate and the sicca rupees, or to take the benefits given to them by the will. *Ib.*

Where the husband's statement, that he was himself to have a life estate, was not supported by other evidence:—Held, that he was not entitled to it. *Ib.*

A bill by infants against the devisee of their grandfather, to establish a settlement of real and personal estate, alleged to have been made or promised on the marriage of their parents. The court, on parol evidence that the marriage had taken place on the faith of representations made by the testator previously to the marriage, and on evidence of representations made by him after the marriage, directed a settlement in accordance with such representations, though the bill was not filed until seventeen years afterwards. *Ib.*

Agreement by Letter of Intended Husband—Marriage next Day on Faith thereof—Settlement Decreed.]—Previously to the marriage of the plaintiff and his wife C. W., negotiations for a settlement of her property had been going on, and on the 14th January, 1878, M., a connection of C. and trustee of her property, wrote to the plaintiff:—"I trust to you that all will be done as we should desire, and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors, contracting to settle on C. all her fortune coming to her eventually." On the 16th January the plaintiff accordingly wrote to the solicitor:—"In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to Miss W.'s fortune being settled on herself." The marriage took place next day without any settlement or any further agreement or articles having been signed:—Held, that the marriage must be presumed to

have taken place in reliance by C. W. upon the plaintiff's letter, and that there was a contract to settle C.'s property signed by the parties to be charged. Reference accordingly to chambers to settle a proper settlement. *Viret* v. *Viret*, 50 L. J., Ch. 69; 17 Ch. D. 365, n.; 43 L. T. 493.

Representation by Stranger—Bond Creditor—Representation of Intention not of Fact—Held Binding.]—During a treaty for a marriage, which afterwards took place, a bond creditor of the intended husband, who was an intimate friend of his family, and was aware of the proposed marriage, repeatedly declared it to be her determination never to enforce payment of the bond debt, and made these declarations under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife:—Held, by the Lord Justice Knight Bruce, agreeing with the master of the rolls, that the declarations above mentioned afforded possibly sufficient ground for the interposition of a court of equity to restrain proceedings at law upon the bond; and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on the part of the witness, which he performed:—Held, that the case was a proper one for a perpetual injunction, dissentiente Lord Cranworth, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor, on the ground of fraud or otherwise, and that an actual contract could not be considered proved by the evidence. *Money* v. *Jorden*, 2 De G. M. & G. 318; 21 L. J., Ch. 893.

It is a principle equally of law and of equity that if a person makes any false representation to another, who acts upon it, the person making it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. Actual knowledge of the falsity of the representation is not necessary if the party makes it under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon it. But dissentiente St. Leonards (Lord), this doctrine does not apply where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. And in this case the not adhering to the statement is not a fraud:—Held, therefore, that the representations above mentioned amounted merely to a promise not to enforce the debt, binding only in honour, and that therefore the creditor could not be restrained afterwards suing on the bond. But, è contra, per St. Leonards (Lord), it is immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do or to abstain from doing an act which would lead to the damage of the party who is thereby induced to deal in marriage, or in purchase, or in anything of that sort, upon the faith of that representation. And per eundem, the statute of frauds in such a case will have no operation, but the promise to do an act, followed by marriage, which cannot be undone, is equivalent to a binding agreement to do that act. A promise not to sue on bonds is not within the statute of frauds. *S. C.*, sub nom. *Jorden* v. *Money*, 5 H. L. Cas. 185; 23 L. J., Ch. 865.

Letter by Great-uncle of Wife after Offer of Marriage—Promise not Absolute.]—A., being informed that an eligible offer of marriage was made by the plaintiff to his grand-niece, wrote to her mother:—"I have always told you what I intended leaving her, which is 2,000*l.*, and which I am now also ready to settle on her, provided there is a proper settlement made on her, and all matters arranged to your satisfaction." He had previously desired that no communication should be made to him till the match was off or on. The plaintiff answered the letter, offering to settle an equal sum, and saying he waited A.'s reply. A. wrote immediately before the marriage disapproving of the match, and saying that the plaintiff's father should come forward, but the letter was not shown to the plaintiff till just before the marriage ceremony. The plaintiff made a suitable settlement, the lady's mother was satisfied, and the plaintiff was afterwards well received by A.:—Held, that the promise of A. had never become an absolute one, and that there was no representation on the faith of which the marriage was brought about, such as to give plaintiff a claim on A.'s assets. *Madox* v. *Nolan*, Beat. 632.

Promise by Stranger to Intended Husband only, not Binding on his Estate.]—An unattested paper signed by A. and by him handed to B., stated that as a mark of his esteem and great friendship he agreed to allow B. 500*l.* a year, and that after his (A.'s) death he had in lieu thereof bequeathed to him 10,000*l.* B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of 500*l.* a year. His will contained no provision whatever in favour of B.:—Held, that assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the paper, there was no such connection between A.'s promise or representation and the consent given by C. as to sustain a claim against A.'s estate. *Dashwood* v. *Jermyn*, 12 Ch. D. 776; 27 W. R. 868.

Promise by Stranger to Sign Bond—Supported by Marriage on Faith thereof.]—A., on the marriage of B., promised, by letter, to join him in a bond of indemnity against a rent-charge issuing out of B.'s estate. A. never signed the bond, but the marriage took effect in confidence of A.'s letter. B. died insolvent, and then A. died:—Held, the marriage is a sufficient consideration to support the undertaking to indemnify, and it will support an assumpsit at law. *Ramsden* v. *Oldfield*, 4 Vin. Abr. 453, pl. 5.

Ante-nuptial Parol Contracts—When Enforced after Marriage.]—Distinction between an ante-nuptial parol contract between husband and wife in consideration of marriage, and an ante-nuptial parol contract between a third party and the husband, for other valuable consideration. The court will enforce the latter after the marriage, but not the former. *Warden* v. *Jones*, 2 De G. & J. 76; 23 Beav. 487.

A parol ante-nuptial contract is not a good consideration to support a post-nuptial settlement, as against creditors. *Goldicutt* v. *Townsend*, 28 Beav. 445.

The fact that a parol promise had been made by a relative of a young lady to her then intended husband that he would "make a suitable provision for her" does not supply a valuable consideration for a bond for 200*l.* passed by him to the husband subsequently to the marriage. *M'Askie* v. *M'Cay*, Ir. R. 2 Eq. 447; 16 W. R. 1187.

Post-nuptial Agreement by Parents in pursuance of Ante-nuptial Parol Promise—Husband a Stranger to the Consideration.]—Parents of the contracting parties to a marriage mutually agreed in writing, after the marriage, as a mode of giving effect to the verbal promises made before, to provide a marriage portion, and the father of the woman promised to pay 200*l.* to his son-in-law, and the father of the man to pay 100*l.*:—Held, that the son-in-law, being a stranger to the consideration, could not sue the executor of his father-in-law upon the promise; and that the relation of parent and child did not create any exception to the rule. *Tweddle* v. *Atkinson*, 30 L. J., Q. B. 265; 4 L. T. 468; 9 W. R. 781.

Promise to Wife communicated to Intended Husband—Husband entitled absolutely on Death of Wife without Settlement.]—A promise to a woman about to marry of a sum of money to be settled for her benefit previous to her marriage, if communicated to her intended husband, entitles her to call for a settlement for the benefit of her children; but if she dies without exercising that right, her husband, as her administrator, is entitled absolutely, to the exclusion of the issue of the marriage. *Lovett* v. *Lovett*, 1 Johns. 118; 7 W. R. 333.

Bond in Favour of Wife's Children by previous Marriage—Discharged by Failure of Condition.]—Upon the marriage of A. with B., the widow and successor of C., a trader, A., in consideration of the stock-in-trade which he received with B., gave a bond to D., conditioned to pay to the children of B. by C., within twelve months after her death, 300*l.*, if, upon an account taken, the stock-in-trade and effects of the business, if then carried on by A., should amount to 400*l.*; but, in case upon such account the stock-in-trade should amount to less than 400*l.*, then A. should pay to such children 120*l.* A., during the lifetime of B., discontinued the trade, and ceased to have any stock:—Held, that this obligation was then discharged. *Beswick* v. *Swindells*, 5 B. & Ad. 914; 3 L. J., K. B. 88. Affirmed, 5 N. & M. 378; 3 A. & E. 868; 5 L. J., Ex. 287—Ex. Ch.

Promise by Husband's Father—Discharged by Will.]—K., in 1832, after a long correspondence with Mrs. and Miss B., in reference to making a provision for his son, the plaintiff, on the occasion of his marriage with Miss B., stated to the latter his ultimate proposals, namely, to give his son a sum, inclusive of his own property, equal in value to 5,000*l.*, of which 3,600*l.* would be settled upon him and his children before marriage, so as to make up the joint income to 600*l.* a year, till such time as their own resources rendered it unnecessary; "and, finally, to recognise his son, in common with the rest of the family, in the future provisions of his will." In November, 1832, the marriage took place. K. settled 3,600*l.* on the plaintiff, and expended about 1,000*l.* in furnishing a house on his marriage, and by his will, dated in April, 1841, after directing his trustees to pay the rents of the trust property to five of his children (not including the plaintiff) for life, with remainder for the benefit of their issue, directed that in case either of the five children should die without leaving issue at his or her decease, his or her part or share should be transferred, or paid to, or appropriated for the benefit of any other surviving child (including the plaintiff), and the issue then living of any of his sons and daughters (including the issue of the plaintiff) who might be then dead. By a codicil, dated in 1846, K. bequeathed to the plaintiff a legacy of 2,500*l.* On a bill praying that the plaintiff might be declared to be entitled to one equal sixth part of the residuary estate, or that he was entitled to one equal seventh part of the same, the plaintiff being willing, upon receiving such payment, to deal with the interest bequeathed to him by the will and codicil in such manner as the court should direct:—Held, that the provision made by the will and codicil was such a recognition of the plaintiff by K. in common with the rest of the family, as to sufficiently comply with the promise upon the faith of which the marriage took place; but inasmuch as the difficulty had been created by K. in the negotiations conducted and the representation made by him, the costs were ordered to be paid out of his estate. *Kay* v. *Crook*, 3 Sm. & G. 407; 3 Jur. (N.S.) 104; 5 W. R. 220.

Covenant by Father—Appointment—Estate not discharged by Payment to Trustees of Settlement.]—The father by his will, reciting a power contained in his own marriage settlement of appointing 10,000*l.* among his children, which sum, in default of appointment, went to them equally, appointed 2,500*l.* to his son on his marriage in full discharge of covenant. About a year after the father's death this 2,500*l.* was paid to the trustees of the son's marriage settlement by the son's direction, and several years afterwards he took from them an assignment of the benefit of the covenant:—Held, that in the absence of evidence to show that the son directed the payment of the 2,500*l.* to the trustees, with the intention of discharging the father's estate from its liability under the covenant, it was not so discharged. *Graham* v. *Wickham*, 1 De G. J. & S. 474; 2 N. R. 410; 9 Jur. (N.S.) 702; 8 L. T. 679; 11 W. R. 1009.

As to what Property.]—A bond executed on the marriage of the obligor, conditioned to settle lands "if he should become seised in possession," affects copyhold as well as freehold. *Prebble* v. *Boghurst*, 1 Swanst. 580; 1 Moore, 258; 7 Taunt. 538.

B. ARTICLES.

1. Enforcing by the Court.

Principles.]—The specific execution of articles being the most adequate justice in general, the court will not leave it to an action at law. *Jenkins* v. *Keymis*, 1 Lev. 150, 237, 238; 1 Ch. Cas. 103.

In executory articles, a provision made for a class of persons, shall not merge while any one person of the class remains. *Hynes* v. *Redington*, Ll. & G. t. Plunk. 41.

Specific Performance.]—Specific performance of marriage articles decreed after marriage. *Haymer* v. *Haymer*, 2 Vent. 343.

—— **Wife's Lien.**]—Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called stocks), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her, "neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564—C. A.

—— **Legacies in Addition.**]—A., before marriage, covenants to settle lands, in consideration of 2,000*l.* portion, on himself for life, remainder to the first and other sons in tail, remainder to the daughters in tail, remainder to himself in fee, with a power of revocation reserved to the wife's father, then beyond sea. The marriage is had and a daughter born, and the husband, being taken sick, devises 1,500*l.* to his daughter, and, if his wife (being enceinte), should have a posthumous daughter, she to have 500*l.* of the 1,500*l.*, and if either should die before twenty-one, or marriage, the survivor to have the whole; and gives all his lands to his wife and her heirs, and the surplus of his personal estate, after debts paid, to his wife, her executors, &c., and makes his wife executrix; then another daughter is born, and the husband dies without any alteration of his will, or any settlement made:—Decreed, that a settlement be made, with a power of revocation to the father, and the legacies be likewise paid the children, the youngest daughter being a posthumous child, within the intent of the will. *Jaggard* v. *Jaggard*, Pre. Ch. 175.

—— **Fraud of Husband.**]—Agreement on marriage to settle stock and other property of the wife, to the use of the wife, husband having by fraud made her transfer the stock to him; decreed upon a bill for performance, to transfer the stock and assign the rest, under the direction of the master, to trustees for her use, who should receive the dividends due and to become due till the transfer and assignment: costs on account of fraud. *Lampert* v. *Lampert*, 1 Ves. 21.

—— **After Death of Wife.**]—Marriage articles entered into between an intended husband and the father of the wife, whereby each party covenanted to settle funds on the usual trusts, were enforced by the husband against the father's estate after death of the wife without issue, although the husband had always neglected and refused to fulfil his part of the agreement. *Jeston* v. *Key*, 40 L. J., Ch., 503; L. R. 6 Ch. 610; 25 L. T. 522; 19 W. R. 864—C. A. See also *Baker* v. *Ker*, 11 L. R., Ir. 3.

Claim by Husband to Wife's Property included in Articles—Non-performance of Contract by Husband.]—H. by marriage articles, contracted to settle his property specified therein upon certain trusts, and by the same articles J., then a minor, contracted to settle, in certain events which happened, her interest in the trust funds for H. absolutely. H. failed to perform his part of the articles, and no settlement was ever executed in pursuance thereof. J. died and H. became bankrupt:—Held, that neither H. nor his trustee in bankruptcy was entitled to receive any benefit out of J.'s property (the subject-matter of the articles), unless and until H. performed his part of the contract. *Smith's Trusts, In re*, 25 L. R., Ir. 439.

Breach of Covenant by Husband.]—The breach of covenant in articles for settlement was held not to deprive the covenantor of the estate he was to take under them. *Wallace* v. *Wallace*, 2 Dr. & War. 452; 1 Con. & L. 491.

Heirs Bound though not mentioned.]—A. covenanted by articles to convey lands, but did not covenant for his heirs; yet the heirs shall be bound. *Gell* v. *Vermeden*, 2 Freem. 199.

Spoliation made Good.]—Spoliation of marriage articles made good by decree. *Bates* v. *Heard*, Dick. 4.

Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold* v. *Barrington*, Dick. 5.

A marriage is treated between the plaintiff and defendant's daughter, and the articles are signed by the plaintiff, but not by the defendant, who tears the articles on pretence of being dissatisfied, though not on material objections; defendant permitting the plaintiff to court his daughter, and not declaring his dislike to the marriage, and permitting the young couple to live with him, decreed to pay the plaintiff the portion according to the articles. *Halfpenny* v. *Ballet*, 2 Vern. 373.

Lost Agreement enforced—Wife's Claim not Barred by Partial Settlement.]—A pre-nuptial agreement to settle property on a wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and an inevitable accident, and if the existence and substance of the letters can be clearly established by the evidence. *Gilchrist* v. *Herbert*, 26 L. T. 381; 20 W. R. 348.

A wife who in ignorance of her right in equity to enforce a pre-nuptial agreement for a settlement, accepted a settlement of a far inferior sum, is not by doing so debarred from enforcing her claim to the full amount of property agreed to be settled upon her. *Ib.*

Covenant against Incumbrances — Incumbrance discovered before Execution.]—In articles, there was to be a covenant in the conveyance, that certain lands were free from incumbrances. Lord Chancellor said this is not a covenant that the lands are free, and if any incumbrance is discovered between the execution of the articles and sealing the conveyance, whereof the party had no notice, that incumbrance shall be discharged before the sealing of the conveyance; as the concealment of it would be a fraud; though against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane* v. *Bernard (Lord)*, Gilb. Eq. R. 6.

Specific Performance refused—Articles unintelligible.]—Specific performance of marriage

articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks* v. *Martin*, 1 Eden, 309.

—— **Article contrary to Powers.**]—Equity will not decree specific execution of an article which is contrary to the powers in a settlement. *Stratford* v. *Aldborough*, 1 Ridgw. 281.

Post-nuptial Settlement—Sale—Articles missing—Not enforced against Purchaser.]—Where marriage articles limited a joint estate to the intended husband and wife, and, after the death of the survivor, to the use of the heirs of the body of the husband, begotten on the wife, and the settlement after marriage pursued the words of the articles, husband and wife levy a fine, and first mortgage, and then agree to sell; the articles not being produced, the court would not decree them to be carried into execution by strict settlement against the purchaser, who had notice of them. *Cordwell* v. *Mackrill*, Ambl. 515; 2 Eden, 344.

—— **Waiver of Articles by Husband.**]—One, by articles previously to his marriage, covenants, in consideration of £3,500 portion, and on his intended wife's conveying her lands to him and his heirs, when she came of age, to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage, the husband settles his lands mentioned in the articles, and recites the settlement to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife (to bar her of dower) and their issue, but never requires her to convey her lands to him. The wife is a party to and executes this settlement. After the husband's death, she enters on the settled lands. This settlement is a waiver by the husband of the proposed conveyance by the wife, and she shall hold as well her own estate as also the lands settled. *Lucy* v. *Moore*, 4 Bro. P. C. 343.

Voluntary Settlement by Articles—Complete or Incomplete—Volunteers.]—M., by voluntary articles under seal, covenanted with his two daughters that he would at such time in his lifetime as he thought fit, or, failing his so doing, his executors should within six months after his decease, settle certain securities specified in the schedule and standing in M.'s name, or other securities of equivalent value, upon certain trusts, as to one moiety in favour of his daughter Isabel and her issue, which trusts were stated at length, and as to the other moiety in favour of his daughter Edith and her issue, which trusts were stated by reference to those of the other moiety. The articles reserved a life interest to M., and provided that M., whilst sole trustee, and the trustees or trustee for the time being, might sell any of the securities "for the time being constituting the settled fund," or such part as "might from time to time be subject to the intended trusts aforesaid," and invest the proceeds of sale as therein mentioned; also, that M. during his life, and after his death his daughter Isabel, in the event of her marriage, might revoke the intended trusts of her moiety and resettle the same by way of marriage settlement giving a life interest to her husband; with a similar power in the case of Edith's moiety declared by reference to the other moiety; also, that after M.'s death the statutory power of appointing new trustees of either moiety should vest in Isabel and Edith respectively; and defined the "settled fund" as meaning the securities specified in the schedule or the investments representing the same. The schedule specified the securities, and provided that any allotments of new shares or stocks in virtue thereof were not included in the settlement, but were to belong to M.:—Held, that the articles constituted a complete settlement, which the court would enforce at the instance of the daughters. *Johnstone* v. *Mappin*, 60 L. J., Ch. 241; 64 L. T. 48.

Construction — Advances — Deduction of.]—The articles also provided that advances made by M. to his daughters during his lifetime (not being merely annual allowances for dress and other ordinary expenses) should be deducted from the amount agreed to be settled:—Held, that payments made by M. to Isabel after her marriage by way of allowance, though acknowledged by her to be on account of her settled share, must not be so treated, and that the entire fund must be secured. *Ib.*

C. COVENANTS TO SETTLE.

1. Specific Property.

a. Covenants to Bequeath.

Construction — Survivor to Settle.] —Under an agreement executed previously to the intended marriage, "that in case one or either of the parties survives the other, the survivor shall, in case of issue, leave the said issue two-thirds of whatever property may remain, retaining one-third, or, to be more specific, that if the husband survived he should settle two-thirds of the property he may possess; and if the wife survived, she should settle and hand over two-thirds of any property remaining at the time":—Held, that the wife surviving was entitled to one-third of all the property, and was bound to hand over two-thirds immediately to the children. *M'Donnell* v. *M'Donnell*, 2 Con. & L. 481; 4 Dr. & War. 376.

If the husband had survived, his obligation would have been confined to a disposition by will. *Ib.*

—— **Child's Share.**]—A father joined in a settlement executed on the marriage of his daughter, which contained a recital that he was desirous to give her, as a marriage portion, such sum or child's share as he might be entitled to dispose of, which child's share it was calculated would be at the least 5,000*l.*, but the same or the precise amount could not be ascertained until his death, and the intended husband, who had a power to jointure to the amount of 10*l.* per cent. on the fortune which he should receive with his wife, appointed a jointure of 500*l.* a year, which was also collaterally secured on other land not the subject of the power. The daughter died in the father's lifetime:—Held, that the recital amounted to an absolute covenant that his daughter should have, on his death, an equal share of his personal estate with his other children. *Duckett* v. *Gordon*, 11 Ir. Ch. R. 181.

Held, also, that the obligation was not discharged by the daughter's death in his lifetime. *Ib.*

Held, also, in calculating the amount payable under the covenant, sums advanced to other

children by the father in his lifetime should be taken in account, and be added to the assets. *Ib.*

Held, also, that interest should not be calculated on the sums so advanced. *Ib.*

—— **One-fourth Part.**]—Covenant by A. to bequeath to B. by will "one full fourth-part of the real and personal estate whatsoever of or to which A." should, at the time of his death, be entitled, and in default, that his heirs and executors should immediately after his death convey "one full fourth-part" of it:—Held, upon the context, to mean one-fourth in value, and not one undivided fourth of every item of property in specie. *Bell* v. *Clarke*, 25 Beav. 437; 27 L. J., Ch. 674; 4 Jur. (N.S.) 499; 6 W. R. 476.

—— **Particular Sum — Share Deficient.**]—Where a settlor intimated his wish to settle a certain sum, part of a particular share of property, which he specified, but that share did not prove of so much value as the sum he wished to settle, his general estate held not liable to make good the difference. *Evans* v. *Wyatt*, 31 Beav. 217; 8 Jur. (N.S.) 449; 7 L. T. 86; 10 W. R. 813.

Covenant without Prejudice to other Dispositions.]—A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons. *Stocken* v. *Stocken*, 4 Myl. & Cr. 95; 4 Sim. 152; 7 L. J. Ch. 305; 2 Jur. 693. *And see* 2 Myl. & K. 489.

—— **To Leave as upon Intestacy.**]—Covenant to leave a portion of the personal estate, as upon an intestacy, does not prevent the covenantor's expending the whole; or admit his reserving part for his own benefit, nor consequently vesting it in land. *Cochran* v. *Graham*, 19 Ves. 66.

—— **For Equal Division at Death—Power of Disposition during Life.**]—Father, under covenant for an equal division at death, of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. *Fortescue* v. *Hennah*, 19 Ves. 67; 12 R. R. 137.

What Property included—Time of Computing.]—Covenant in marriage articles, "to leave wife a moiety of personal estate at death":—Held, to apply to his property at the time of the articles. *Webster* v. *Milford*, 2 Eq. Abr. 362.

—— **Personalty as upon Intestacy.**]—A letter, addressed to the intended husband of the writer's daughter, contained the words, "she shall be entitled to her share in whatever property I may die possessed of":—Held, that the daughter and her husband were entitled only to the share of the personalty which the daughter would have taken in case of intestacy. *Laver* v. *Fielder*, 1 N. R. 188; 33 Beav. 1; 32 L. J., Ch. 365; 9 Jur. (N.S.) 190; 7 L. T. 602; 11 W. R. 245.

—— **Life Interest given to other Daughter—Not Furniture.**]—A father, on the marriage of his daughter A., gave her husband 1,500*l.* for her present portion or fortune, and he covenanted that, in case he should give his other daughter B., on her marriage or otherwise, a greater portion or fortune than 1,500*l.* in money or value, his executors would, within a year after the death of himself and wife, pay or deliver to the husband of A. such further or other sum or property as would be equal with the portion or fortune given to B. The father, on the marriage of B., gave her a portion of 1,500*l.*, and by his will, after charging his real estate with the payment of his debts, gave B. his furniture and a life interest for her separate use in some freehold and leasehold property:—Held, that the life interest was within the covenant, but the furniture not; and, secondly, that a debt of this nature was charged on the real estate. *Eardley* v. *Owen*, 10 Beav. 572; 17 L. J., Ch. 67; 11 Jur. 1047.

—— **Stock given to other Child with Life Interest Reserved.**]—A father covenanted, at his daughter's marriage, to leave her at his death a full and equal share of his personal estate with his son; he began and continued for some years to sell real estates, and vested the produce in bank stock, together with the produce of his personal estate, the whole of which he transferred into his son's name, who verbally promised to pay the father the dividends for life. The son sold out the bank stock, and invested produce in India stock, which produced a greater interest, but paid his father only the amount of former interest. The father died, and left personalty only to a small amount. The India stock held liable to the articles. *Jones* v. *Martin*, 6 Bro. P. C. 437.

—— **Advancement to Other Children.**]—Covenant on her marriage, to make provision for daughter, by will or otherwise, as great as testator should, by will or otherwise, provide for his other children:—Held, that proportion did not extend to any advancement made for other children during lifetime of testator. *Willis* v. *Black*, 1 Sim. & S. 525; 2 L. J. (O.S.) Ch. 131.

P. B., on his daughter's marriage, settled a sum of money on her and her husband, and their issue, and, after reciting that he had agreed to make a further provision for his daughter equal to his younger children, covenanted to settle, by his will or otherwise, on the husband and wife, and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and wife; and if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as any of his younger children should in that event become entitled to:—Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death. *S. C.*, on appeal, 4 Russ. 170; 7 L. J. (O.S.) Ch. 3.

—— **Residue only after Payment of Debts.**]—A covenant in a marriage settlement that the

wife shall, out of the property of which the husband shall die seised or possessed, receive an annuity, only binds the residue of his property after payment of debts. *Rowan* v. *Chute*, 13 Ir. Ch. R. 169.

By marriage articles M. S. covenanted that he would, at his death, leave and devise to W. S., his heirs, executors, &c., all such property, real and personal, as he should then be possessed of, or entitled unto, charged with a jointure for his wife, and with pecuniary legacies not exceeding 1,000*l.*; and that the eldest son of the marriage should have and be entitled under 400*l.* a year, to issue out of, and be charged upon all and singular the real and personal estates which M. S. or W. S., or either of them, should be seised and possessed of or entitled unto, subject to sum of 2,000*l.* for the younger children of the marriage:—Held, that by the proper construction of this covenant, it bound only the estates real and personal of M. S. at his death after payment of his debts, and the jointure and the legacy of 1,000*l.* *Ennis* v. *Smith*, Jon. & C. 400.

Who is Entitled—Children Living at Death.]—By covenant in a marriage settlement, the husband was bound to give, by his last will or otherwise, to his children in equal shares, all his real estates other than a settled estate and personal property:—Held, that the covenant bound only such real estate as he should die seised of; and that the covenant bound shares of the settled estate, which the husband became entitled to by a devise from a child who died in his lifetime. The children living at the death of the husband were alone entitled to the benefit of the covenant. *Needham* v. *Smith*, 4 Russ. 318; 6 L. J. (O.S.) Ch. 107; 28 R. R. 107.

—— **Grandchild Dying under Age in Testator's Life.**]—By articles executed on the marriage of his daughter, a father covenanted to give, by will, to trustees, a child's share or equal part of all the real and personal estate of which he should die possessed, to the use of the husband for life, remainder to the daughter for life, remainder to the children of the marriage as the husband and wife or the survivor should appoint, and, in default of appointment, to the children in equal shares, with benefit of survivorship in case of the death of any one or more of the children under twenty-one without issue, and if but one such child the whole to such one child, with remainder over. The father made his will in the terms of the covenant. Only one child of the marriage attained twenty-one, and he died intestate and unmarried before the testator:—Held, that this child took no interest under the will or under the covenant. *Brookman, In re*, 18 W. R. 199. Reversing 38 L. J., Ch, 585.

How Satisfied—Legacy Subject to Debts.]—Covenant in settlement to leave by will satisfied by legacy to amount, though followed by general direction for payment of debts. *Wathen* v. *Smith*, 4 Madd. 236, 325; 20 R. R. 302.

—— **Formal Bequest — Appointment under Power.**]—A covenant to bequeath a sum of money constitutes a specialty debt against the covenantor's estate, and is not satisfied by the mere insertion of such a bequest in his will. *Graham* v. *Wickham*, 31 Beav. 447; 2 N. R. 410; 1 De G. & S. 474; 9 Jur. (N.S.) 702; 8 L. T. 679; 11 W. R. 1009.

The covenantee being the son of the covenantor, the covenant is not satisfied by an appointment under a power to appoint to children contained in the covenantor's marriage settlement. *Ib.*

—— **Legacy—Estate Insufficient.**]—A., on the marriage of his daughter, covenanted that in certain events (which happened) he would by his will, or otherwise, in his lifetime, give or charge upon all his real or personal estate (except his share in certain real hereditaments), of or to which he might be seised, or possessed, or entitled at or immediately before his decease, 3,000*l.*, upon certain trusts, for the benefit of his daughter and her issue. He accordingly bequeathed to the trustees, in satisfaction of this covenant, a legacy of 3,000*l.* Upon his death his estate proved insufficient:—Held, that the trustees were entitled, not as legatees merely, but as specialty creditors against the estate. *Eyre* v. *Munro*, 3 K. & J. 305; 26 L. J., Ch. 757; 3 Jur. (N.S.) 584; 5 W. R. 870.

A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

A testator had covenanted to leave by will or otherwise provide for his daughter one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ib.*

—— **Vague Promise—Substantial Provision—Unequal Share.**]—A father, on a treaty for his eldest son's marriage, promised, by letter, to settle a sum of money forthwith, and to recognise his son, in common with the rest of his family, in the future provisions of his will. The sum of money was settled and the marriage took place on the faith of the representation in the letter. By his will the testator made a substantial provision for his son, but much less than equal to those made for his other children:—Held, that the promise was so vague as to the amount, that, consistently with it, the testator might leave all his property to a stranger, and that the promise was satisfied by the provision in the will and codicil. *Kay* v. *Crook*, 3 Sm. & G. 407; 3 Jur. (N.S.) 104; 5 W. R. 220.

—— **Life Interests with Cross Remainders—Absolute Interest.**]—The testator, upon the marriage of his daughter C., covenanted to make her fortune equal to that of any one of his five other daughters. By his will he gave to C. absolutely a provision equal to that which he gave to any one of his other five daughters and their issue: but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue; and in case any of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares. One of the five died without issue:—Held, the provision for C. being given to her absolutely, she thereby takes an

equivalent in value to the contingent interests which the five daughters took in each other's share, and she is therefore not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter, who died without issue. *Clegg* v. *Clegg*, 2 Russ. & M. 570.

—— **Daughter Dying in Testator's Lifetime—Gift to Surviving Daughters.**]—A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave, and bequeath unto his (the covenantor's) daughter, an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favour of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—Held, by the court of common pleas, and by this court, concurring in the certificate, that the husband and covenantee had not, under the circumstances, any good cause action against the executor of the father; and that if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action. *Jones* v. *Howe*, 7 Hare, 267; 19 L. J., Ch. 324; 14 Jur. 145. And see *S. C.*, at law, 9 C. B. 1.

—— **Bond—Penalty no Satisfaction.**]—A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. *Logan* v. *Wienholt*, 1 Cl. & F. 611; 7 Bligh (N.S.) 1.

S. conveyed certain real estate to M., his natural daughter, and covenanted for payment after his death by his heirs, executors, and administrators to M. of 500*l.* out of his real and personal estate, thereby charging all his real and personal estate with the payment; and in case the personal estate should prove insufficient, and default should be made in payment within a reasonable time, M. was empowered to enter upon all or any part of the real estate of which he should die seised, and retain the rents until the 500*l.* had been satisfied. S. subsequently conveyed the remainder of his real estate to his son J., in consideration of natural love and affection:—Held, that the real estate conveyed to J. was not liable to payment of the 500*l.*, and that M. was entitled to payment out of the personal estate, and if that was insufficient out of the real estate (if any) of which S. died seised. *Watson* v. *Argile*, 30 L. T. 215.

Satisfaction of, in Case of Children.]—*See* PORTION.

b. Covenants by Husband or Wife.

i. *What Property Included.*

Chattels Real—Freehold Leases for Lives.]—A., on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, &c., to and for such issue one-third part of all his chattels, real and personal, which at the death of his wife he should be possessed of, to be divided between them; if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives:—Held, that these leases were included in the covenant, but that daughters were not entitled to a division till after father's death, he being ordered to give security. *Hankes* v. *Jones*, 5 Bro. P. C. 136.

Land Purchased with Borrowed Money.]—Effect of a contract on marriage by bond, to devise, convey, or assure all such goods, personal and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital, not income, unless laid up as capital; admitting, therefore, expenditure and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. *Lewis* v. *Maddocks*, 17 Ves. 48; 7 R. R. 10.

"Seised in Possession"—Copyhold.]—Bond executed on marriage of obligor conditioned to settle lands, "if he should become seised in possession," affects copyhold as well as freehold. *Prebble* v. *Boghurst*, 1 Swanst. 580; 1 Wils. Ch. 161.

"Become Seised"—Lands in Possession.]—A bond conditional to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond. *Id.* 321.

J., on his marriage with S., executed bond in penalty of 2,000*l.*, with condition to be void if, in event of S. surviving J., his executors, &c., should, within three months after his decease, pay to trustees 1,000*l.* in trust for S.; and if, in event of J. surviving S., and there being any child or children of marriage living at decease of J., his executors, &c., should, within three months after his decease, pay to trustees 1,000*l.* in trust for such child or children; and further, if J. should, at any time during his natural life, become seised of any messuages, &c., in possession, and should settle same upon S. and issue of intended marriage, by such good conveyances in law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought re-

quisite, better to make a provision for S. in case she should happen to survive J.; after death of S., J. having married again, and then, and not before, become seised of real estates, and having, at his death, left issue by both marriages, all real estates of which he became seised during his life were subject to obligation, and settled on issue of first marriage as tenants in common in fee. *S. C.*, 1 Swanst. 309; 1 Wils. Ch. 161.

Husband's Share in Right of Wife—Independent Interest of Husband.]—A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great-uncle's will. Under the will, the fund was limited to the husband, in case of his surviving his wife and her father, and of there being no issue:—Held, that the husband's interest was not comprised in his covenant. *Ibbetson* v. *Grote*, 25 Beav. 17.

Share under Subsequent Appointment.]—Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appointment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, and thereupon H. by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment:—Held, that inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement. *Sweetapple* v. *Horlock*, 48 L. J., Ch. 660; 11 Ch. D. 745; 41 L. T. 272; 27 W. R. 865.

Property named but eventually Acquired Aliunde.]—Where a man in a marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" in two pieces of land shall become vested in possession he will convey it to the uses of the settlement, if he becomes possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it. *Smith* v. *Osborne*, 6 H. L. Cas. 375; 3 Jur. (N.S.) 1181; 6 W. R. 21.

A marriage settlement of C. contained a recital that he was entitled, under the will of his grandfather, to a contingent remainder in property. In a subsequent part of the deed there was a covenant by him, "as soon as the remainder should become vested in possession in him," to assure the same to the uses of the settlement. The settlement incorrectly recited the effect of the will, the interest of C. under it being that of an expectant heir in tail. The tenant in tail, however, barred the entail, and subsequently devised the property to the covenantor. On a bill to enforce the covenant:—Held, that C. having acquired the estate under a title aliunde, and not under the will of his grandfather, the covenant did not attach, and he was not therefore bound to convey the estate. *Ib.*

Wife's joint Estate in Remainder—Husband's Covenant—Property not Specified.]—A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the covenant of the husband and not of the wife, and though the recitals in the settlement specified property to which the wife was entitled in expectancy, but did not allude to this particular interest. *Caldwell* v. *Fellowes*, 39 L. J., Ch. 618.

Reversionary Interest—Amount.]—A marriage settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of 400*l.*, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement, the wife was entitled, on the death of her mother, to a share in stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above 400*l.*, but the value of the wife's reversionary interest in them at the date of the settlement was much less than 400*l.* On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage. *Mackenzie, In re*, 36 L. J., Ch. 320; L. R. 2 Ch. 345; 16 L. T. 138; 15 W. R. 662.

Held, secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it. *Ib.*

Held, thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately. *Ib.*

ii. *Lien.*

On Specified Lands.]—One agrees, before marriage, to settle certain lands on his wife for life, and afterwards devises these lands for payment of his debts; the covenant is a specific lien on the lands; secus, had it been only an agreement to settle so much per annum without any lands in certain. *Fremoult* v. *Dedire*, 1 P. Wms. 429.

Extinguished by Joining in Fine.]—A., on his marriage, gave a bond of 600*l.*, with a warrant of attorney to confess judgment thereon, defeasance on payment of 300*l.* to his wife, if she survived. Afterwards, she joined him in conveyance by fine of his real estate:—Held, that this extinguished her right, or any lien created by this judgment on the real estate. *Goodrick* v. *Shotbolt*, Pre. Ch. 333; Gilb. Eq. R. 18.

Covenant not to Suffer Recovery—Land afterwards Devised.]—By a settlement A. is made tenant for life, remainder to the heirs of his body by his wife; and in the same deed A. covenants not to suffer a recovery, but that the

lands shall be enjoyed according to those limitations; afterwards A. suffers a recovery, and devises the lands. On a bill brought for specific performance of the covenant, it was decreed that the lands devised were not affected, though the covenant was good to bind the assets; and such covenant being at first accepted, equity ought not to vary or alter it. *Collins* v. *Plummer*, 1 P. Wms. 104. See also *Boswil* v. *Brander*, *id.* 461.

Covenant no Lien on Lands after-acquired Aliunde.]—A party entitled as equitable tenant in tail, under a settlement, in which is a covenant to convey lands to the uses of such settlement; afterwards, and upon his own marriage, covenants also to convey lands of less value. Though he obtains a decree for the execution of the first-mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. *Gardner* v. *Townsend* (*Marquis*), C. P. Cooper, 301.

Where after-acquired Property specifically Charged.]—On a bill filed to raise a sum of 2,000*l*., which A. had on his marriage specifically charged not only on the real estates which he then had in his possession, but also on all his after-acquired real and personal estate, Lord Manners decreed that the same was a valid charge affecting the after-acquired property in the event of the lands specifically named in the settlement (which were declared to be the primary fund) not being sufficient, and was given a priority accordingly. *Gubbins* v. *Gubbins*, 1 Dr. & Wal. 160, n.

Remedy of Covenantees against general Creditors.]—A. being entitled to a moiety of an estate covenanted to settle it on himself for life, with remainder to his wife and children. He afterwards acquired the other moiety, and mortgaged the entirety to B., who having no notice, obtained priority over the wife and children of A. By the will of B. the mortgage was given to C. for life, with remainder to A. absolutely. A. died, and C., by virtue of the mortgage, received the rents of the entirety to the disappointment of the wife and children of A. C. afterwards died:—Held, that the widow and children of A. had no equity as against the general creditors of A. to have a lien on the second moiety of the estate, to recoup the loss sustained by them by C.'s receiving the rents of the moiety of the estate bound by the settlement from the death of A. to the death of C., but that they must come in as specialty creditors under the covenant. *Aldridge* v. *Westbrook*, 5 Beav. 188.

Covenant confirmed by Will—Will revoked by Deed.]—Where the husband, having estates in the counties of O. and B., covenanted, on his marriage, to settle such part of them, of the value of —*l*., as should secure a jointure to the wife of 800*l*., to be charged thereon; but never having executed the settlement, he, by his will, confirmed the covenant, and devised his estates in O. and B. to his wife for life, but afterwards, by deed, revoked his will as to the estates in O., which descended, on his death, to the heir-at-law:—Held, that the covenant operated to charge, and that the estates both in O. and B. were liable to contribute ratably in satisfaction of the covenant, and that the jointress could not claim to be entitled to the estates in B., exempt therefrom, in the absence of any intention on the face of the will to benefit her to that extent. *Eyre* v. *Green*, 2 Coll. C. C. 527; 10 Jur. 184.

Lien of Trustees on Bankrupt's Interest under Trust.]—Where a bankrupt had an interest in a trust fund settled on his marriage, and was also under a covenant to pay a sum to the trustees of that fund upon the trusts of the settlement, the trustees may make his interest in the fund settled available in satisfaction of his covenant, and if that interest is contingent they may sell it. *Gonne*, *Ex parte*, *Marsh*, *In re*, 3 Mont. & Ayr. 166; Deac. 278; 6 L. J. (N.S.) Bk. 57.

A., upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at S.: for securing to them a sum of 15,000*l*., the trusts of which were declared to be for A. for life, and afterwards for the benefit of his wife and children. A., not having paid this sum at the time specified in the bond, without notice to the trustees assigned his life interest therein to B.; as a security for the repayment of a debt due from A. to B. A. having afterwards become bankrupt, B. filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of security; and a decree was made in that suit, directing the life interest of A. in the 15,000*l*. to be sold, and the produce to be paid to B. In the course of the proceedings in the bankruptcy, the assignees sold the S. estates, but the proceeds of the sale did not amount to 15,000*l*.:—Held, that the trustees were entitled, as against B., to retain the annual produce of the sum for which the S. estates were actually sold, until the whole of the 15,000*l*. should be reinstated. *Smith* v. *Smith*, 1 Y. & C. 338.

—— **On Wife's Remaining Property to answer Husband's Misappropriation of Part.**]—Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called "stocks"), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her, "neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564—C. A.

iii. *Further Security by Husband.*

Court will not add to Agreement.]—One covenants on marriage articles to pay 1,000*l*. within six months after his death, and, after growing old and infirm, covenantee would have obliged him to have given security; but the court held that it could not alter the agreement of the parties, or make it better than they themselves had; and though executors might be obliged to give better security for legacies payable in future, that is because they are in nature of trustees, and there is no agreement one way or another. *Warrington* v. *Langham*, Pre. Ch. 89.

Covenant for Further Assurance.]—Covenant by a trader, on his marriage, in case of death or failure in his circumstances, to repay the trustee 1,000*l.*, which was his wife's fortune, which was paid to him, with the usual covenant for further assurance. Being applied to by the trustee before the event, he granted a mortgage to secure the 1,000*l.*, and soon after a commission of bankruptcy issued against him:—Held, on petition in the matter, by the mortgagee, to take the account on foot of his mortgage, that the mortgage, even if not affected by contemplation of bankruptcy, was void as nudum pactum, the trustee having no right to sue, except in the two events, the covenant for further assurance not extending to a new security, but only to effectuate the actual agreement; and the deed not containing a provision that the trader should be at liberty, if so minded, to give a further security; but the petition was not dismissed; but to terminate the question, the order that the petitioner should be at liberty to prove, and take a dividend ratably with the other creditors, was made, without requiring another petition to be presented. *Robinson, Ex parte*, 1 Moll. 291.

iv. *How Enforced.*

Specific Performance.]—Covenant in consideration of marriage, to settle lands of 350*l.* per annum on husband and wife, and issue male of the marriage, remainder to the brothers of the husband, equity will enforce specific performance, and not put party to an action of covenant in the trustees' name. *Vernon* v. *Vernon*, 2 P. Wms. 594.

—— **Void Bond as Evidence.**]—Feme gives a bond to her intended husband, that in case of their marriage, she will convey her lands to him in fee; they intermarry; the wife dies without issue, and then husband dies. The bond, though void in law, is yet good evidence of an agreement in equity, and the heir of the husband shall obtain specific performance against the heir of the wife. *Cannel* v. *Buckle*, 2 P. Wms. 243.

A feme seised in fee, on marriage with consent of her guardians, covenants in consideration of a settlement to convey her inheritance to her husband: if done in consideration of a competent settlement, equity will enforce it, though no action would lie at law to recover damages. *Ib.*

—— **Contingency not Happening.**]—In agreements, no relief in equity where an action at law would not lie by reason of a substantial defect, such as a contingency not happening. Husband covenants in marriage articles, in six months after the death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, &c. He dies in his mother's life, having no issue. The estate comes to his heir, who shall not be compelled by the wife to a specific performance. *Whitmel* v. *Farrel*, 1 Ves. Sen. 256.

—— **Lands—Value how Computed.**]—Covenant by husband in consideration of —*l.* (the purchase-money of an estate of his wife) within two years, to convey lands in the county of N., of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed against his representatives, by laying out, in the purchase of lands so to be settled, a sum equal to the present value of the estates in N., which (at the time when the covenant ought to have been performed) should have been worth the amount of the purchase-money, with interest at 4 per cent. from the death of the covenantor. *Suffield (Lady)* v. *Suffield (Lord)*, 3 Mer. 699.

—— **Against Wife's Heir-at-Law.**]—By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that he would settle his wife's reversionary share of the real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share. The wife predeceased the husband, and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance decreed accordingly. *Lee* v. *Lee*, 46 L. J., Ch. 81; 4 Ch. D. 175; 36 L. T. 138; 25 W. R. 225.

—— **Bond—Procedure.**]—Where obligee sues in equity for specific performance of bond to settle estates, defendant, obligor, cannot insist on his suing at law to recover the penalty merely. *Hopson* v. *Trevor*, 1 Stra. 533.

—— **Money to be Paid into Court.**]—Defendant who had covenanted to pay a sum of money to trustees of his marriage settlement, but had omitted to do so, ordered on motion in suit for performance of trusts, to pay money into court. *Rothwell* v. *Rothwell*, 2 Sim. & S. 217.

Annuity charged on Land—Personal Assets held Liable.]—By an ante-nuptial settlement, reciting that the husband had agreed to secure to the wife, after his death, an annual sum or rent-charge of 300*l.* to be issuing out of the hereditaments thereinafter charged therewith, and of or to which he was entitled or seised in fee simple, the husband granted the annual sum or rent charge of 300*l.* to the wife in case she should survive him, to be issuing out of specified hereditaments and all other the hereditaments in specified parishes, of or to which he, or any persons in trust for him, was or were seised or entitled for any estate of inheritance at law or in equity; and he covenanted that it should be lawful for the grantee, when the rent charge was in arrear, to distrain on the premises. He also granted and demised the premises for a term to secure the annuity:—Held, that the terms of the deed amounted to a covenant, and created a debt payable out of the husband's personal assets. *Monypenny* v. *Monypenny*, 3 De G. & J. 570; 28 L. J., Ch. 303; 5 Jur. (N.S.) 253; 7 W. R. 276.

Further Assurance—Specialty Debt.]—On an assignment by way of settlement of a reversionary interest in trust funds, the settlor covenanted that he and all persons claiming through him would, upon the request of the

trustees of the settlement, do all acts necessary for further assuring the premises to the trustees. The settlor afterwards obtained possession of the premises, and died, after applying the same for his own use:—Held, that the trustees were entitled to prove for the amount of the settled funds, as for a specialty debt. *Dickson, In re, Blackburn* v. *Dickson*, 40 L. J., Ch. 707; L. R. 12 Eq. 154; 25 L. T. 118.

Covenant for Value of Lands.]—A. covenants by marriage articles, that estate agreed to be settled is worth 500*l.* per annum, and to purchase other lands worth 300*l.* per annum, and settle them to the same uses. The new purchase was never made, and the estate settled was incumbered beyond its value:—Held, that, out of the purchase money of A.'s estate not settled, so much shall be paid to eldest son as is equivalent in value to 800*l.* per annum computed at twenty-two years' purchase. *Barker* v. *Ivers*, 5 Bro. P. C. 127.

Alternative Covenant.]—A. covenanted, on marriage, that within a month he would surrender his copyhold to his wife for life, remainder over; and if he neglected, then that he would leave his wife 500*l.* at his death. The husband made no surrender, but died after the month without assets:—Decreed, the heir to surrender. *Wood* v. *Pesey*, 5 Vin. Abr. 547, pl. 36.

Covenant for Fine of Freeholds and Surrender of Copyholds.]—One, upon his marriage, covenants to levy a fine of his freehold lands, and to surrender his copyhold to the use of himself and wife for their lives, remainder to the heirs male of his body, and dies, leaving issue a son and a daughter, before any fine levied, or surrender made. The son, for securing money, covenants to levy a fine of freehold, and to surrender copyhold, and by will devises his lands for payment of his debts, and dies without issue, having surrendered copyhold, but levied no fine of freehold. On a bill by daughter to have lands settled according to marriage agreement, decreed both freehold and copyhold to the daughter. *White* v. *Thornburgh*, 2 Vern. 702.

Upon a re-hearing before Lord Chancellor Cowper, he confirmed the decree as to the freehold, but for different reasons; and as to the copyhold, there appearing no particular custom within the manor for suffering a recovery, he was of opinion the surrender would bar the entail, in case the copyhold had been well settled, and dismissed the bill as to the copyhold. *Id.* 704.

—— To Purchase and Settle Lands—Executor—Heir.]—A. covenants for himself and his heirs, that he will purchase lands, and settle the same on himself for life; remainder to wife for life; remainder to himself in fee. Equity will compel the executor to lay out the money, though the heir is both debtor and creditor. *Lechmere* v. *Carlisle*, 3 P. Wms. 224.

—— Wife's Election—Right of Children notwithstanding.]—A man, on his marriage, covenants to purchase and settle lands of 400*l.* a year, to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he died before a settlement, the wife might elect either to have the 400*l.* a year, or 3,000*l.* in money, in lieu of dower and thirds. The husband dies before a settlement made. On a bill by the creditors, the wife, by answer, elects the 3,000*l.*, and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted:—Decreed, a settlement to be made on the wife and children, notwithstanding the election. *Hancock* v. *Hancock*, 2 Vern. 605.

Settlor's Election—Option of Alternative Payment—Both Unexercised.]—The testator, in the settlement of an estate, reserved to himself an election as to parcels, and afterwards, by indenture, he was to have an option of paying a certain sum within twenty-four calendar months. Not having elected in his lifetime, and his personal estate being inadequate to payment of his debts, the estate covenanted shall be conveyed. *Tyssen* v. *Benyon*, 2 Bro. C. C. 5.

Lands—Prior Incumbrance.]—A., being indebted 700*l.*, agrees on his marriage, to settle lands of 100*l.* a year on himself for life, remainder to his wife for her jointure, remainder in tail upon their issue:—Decreed, the land to be sold to pay the 700*l.*, and the surplus of the money to be laid out in the purchase of lands, to be settled on the wife and her children; but this decree was reversed on a bill for review, there being no provision made for the husband in the lands to be purchased. *Carpenter* v. *Bennet*, 1 Vern. 203.

Wife's Contingent Portion — Not called in during Husband's Life.]—A husband by a deed to which the wife was a party, covenants to assign a contingent portion of the wife's to the uses of the marriage. The husband dies without calling in the portion. The wife is bound by the covenant. *Bush* v. *Dalway*, 1 Ves. Sen. 19.

By settlement on the marriage of A. with C., in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one, or be married, then such daughters should have 2,000*l.* a piece. There were three daughters and no sons. Defendant, one of the daughters, married D., and previous to his marriage, he covenanted to assign (with the wife's consent) 500*l.* to trustees in trust, after the death of D. and the defendant to pay it amongst the children of the bodies of defendant and D., and that he should, after the marriage, assign to the trustees all the moneys and securities for it, then due and belonging to defendant. A. died in 1744. D. died in 1745 intestate, to whom defendant administered and received the 2,000*l.*:—Held, that the children, who were a son and daughter, have a right to the portion, which was decreed to be secured for their benefit, though under the articles the real estate was in the mother's power and vested in her in tail, yet in equity it is to be carried into strict settlement to the wife for life, then to the first, &c., sons in tail, and in default of issue male to daughters. *S. C.*, nom. *Bush* v. *Dalway*, 3 Atk. 530.

Parties necessary to Suit.]—To a bill seeking performance of a general covenant to charge real estates with a sum of money and an annuity, the trustee to whom the money was covenanted to be paid, and the equitable incumbrancers on

the covenantor's real estates, are necessary parties. *Paterson* v. *Wellesley*, 6 L. J., Ch. 191.

v. *Proof on, in Bankruptcy.*

See BANKRUPTCY.

c. Covenants by Parents.

i. *Lien.*

—— **On Lands though not Specified—Heir not Mentioned.**]—A., on the marriage of his son, covenants for himself and his executors, without naming his heirs, to settle lands of 150*l.* a year on his son, and the issue of the marriage, but dies before any settlement made. The son enters on the rent estate as heir to his father, and settles it for the jointure of a second wife, who has no notice of the articles:—Decreed, the articles to be a lien upon the lands, whereof the father was then seised, though no particular lands are mentioned in the articles. *Roundell* v. *Breary*, 2 Vern. 482.

—— **On Lands—Annuity—Alternative Covenant.**]—A father being seised of estates in tail and in fee, on his daughter's marriage covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter out of the rents and income of his real and personal estates, and by deed or will to settle an estate of 200*l.* a year, or, at his own election, 4,000*l.* in lieu of it, on certain trusts for the benefit of his daughter, and her husband, and their issue. By a subsequent deed the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates, and to sell them, and also the fee-simple estates, and that out of the proceeds the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son for their own use; and that 4,000*l.* should be paid, and provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and in consideration of the son covenanting to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery:—Held, that the covenant for payment of the annuity created a charge on the estates, and that the mortgagee having had notice of that covenant, the premises were subject to the annuity, but that the covenant to settle the estate, or 4,000*l.* in lieu of it, created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary, and was fairly abandoned by them. *Ravenshaw* v. *Hollier*, 7 Sim. 16 n.; 4 L. J. Ch. 119—L.JJ.

—— **On Stock.**]—A father covenanted at his daughter's marriage to leave her at his death a full and equal share of his personal estate with his son; he began and continued for some years to sell real estates, and vested the produce in bank stock, together with the produce of his personal estate, the whole of which he transferred into his son's name, who verbally promised to pay the father the dividends for life. The son sold out the bank stock, and invested produce in India stock, which produced a greater interest, but paid his father only the amount of former interest. The father died, and left personalty to a small amount. The India stock held liable to the articles. *Jones* v. *Martin*, 6 Bro. P. C. 437.

—— **On Mortgage Debt.**]—Where a father, being entitled to a sum of money on mortgage, covenanted, on the marriage of his daughter, that a certain specific part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in the meantime, such covenant was held to amount to an actual assignment. *Brownlow* v. *Meath* (*Earl*), 2 Dr. & Wal. 674; 2 Ir. Eq. R. 383.

—— **On Interest Purchased from Trustees of Daughter's Settlement.**]—By a settlement executed on the marriage of A. with B., the daughter of W., trusts were declared of two several sums of 5,000*l.*, whereof one was secured by the bond of W., and the other by the covenant of A., and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payment of the latter sum, A. assigned to the trustees certain policies of assurance which he had effected on his own life to the value of the principal money comprised in his covenant. The trusts declared of the former sum were for B. for life, for her separate use, and after her death for A. for life, and after the death of both, and in default of children of the marriage, for the benefit of B.'s estate. The trusts of the latter sum were for B. for life, and after her death, failing children of the marriage, for the executors, administrators, and assigns of A. After the marriage A. became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividends received under that proof in the purchase of 431*l.* consols. At the same time W. purchased of A.'s assignees all A.'s interest in the settlement, and took from them an assignment of that interest. A. afterwards died, whereupon the trustees received the produce of the policies, and invested it in 5,992*l.* consols. Ultimately W. became bankrupt and died:—Held, that notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and assignment from A.'s assignees, the assignees of W. could take no interest in the 5,992*l.* stock, without first satisfying to the trustees of the settlement what was due to them in respect of W.'s bond for 5,000*l.* And quære, whether, notwithstanding the assignment to W. of A.'s interest under the settlement, A.'s assignees had not a right to recall the dividends which produced the 431*l.* consols. *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583. Affirmed, 13 L. J., Ch. 173; 9 Jur. 299; but they afterwards disclaimed in court.

—— **On Insurance Premium under Special Act.**]—A fund was established under a special act as a provision, upon the principle of a life insurance, by officers of the custom for their widows, children and relatives. Under the act, directors of the fund were appointed, with power to frame rules for the management of the fund, and with discretion to admit nominees of the subscribers, other than relatives, to the benefit

arising out of any subscriptions. By the act a restriction was placed on alienation of the benefit provided for them by the fund, by widows, children, and other claimants without consent of the directors. By the rules, each subscriber had power to direct how his portion of the fund should be applied for the benefit of his widow, children, or relatives, or his nominees, who should have been duly admitted by the directors. A subscriber, a widower, made on the occasion of his daughter's marriage an appointment of his share of the fund to the trustees of his daughter's settlement, the trusts being for his daughter for her life, remainder to her husband for life, remainder to the children of the marriage. The trustees were never formally admitted under the rules, though their names were sent in for that purpose by the settlor. The daughter predeceased her father. On his death, the directors paid his share into court, one moiety of it being claimed by the surviving son of the subscriber :— Held, that the settlement on the daughter's marriage was such a settlement for the benefit of his daughter as the subscriber had a right to make, and did not require the consent of the directors to complete the title of the trustees to the fund, and that therefore their formal admission by the directors as the nominees of the settlor was unnecessary, and, consequently, that the fund must be paid to them. *Pocock's Policy, In re*, 40 L. J., Ch. 681; L. R. 6 Ch. 445; 25 L. T. 233; 19 W. R. 801.

By a private act a fund was directed to be raised for the conditional benefit and relief of widows, children, and other relatives of the officers and others employed in the department of customs in England; and that rules and regulations should be made for the formation of such fund, and directors and other officers appointed who were to have the management of the same. The code of rules in force at the time of the execution of the following instrument was dated 28th July, 1836. The rules provided, that the admission by the directors of a nominee of a subscriber should take place during the lifetime of such subscriber; and that the subscriber should have power to direct, by any instrument in writing, to be deposited with the directors, or by his will, that the whole capital money insured or forthcoming at his death should be paid, in any manner he might think proper, for the benefit of his widow, children, or relatives, or of his nominee who should have been duly admitted. P. was in July, 1826, admitted as a subscriber to the fund for 1,200*l.* In March, 1840, a letter was sent from the fund office to P., in which his attention was drawn to the rules of 1836, and acquainting him that if he gave directions by will as to the manner in which the sum insured was to be appropriated at his death, he must make specific mention of his insurance in the Customs Fund: that "relatives," used in the rules, included only relations by blood, and not sons-in-law or daughters-in-law; and if he had disposed of his insurance to a son-in-law, or to any other party who was not a relation by blood, the directors must, at his instance, during his lifetime, admit him his nominee, to entitle him to receive the sum set apart for his benefit. In October, 1845, P., in pursuance of the rules, signed an instrument, in which he directed, that the capital money forthcoming at his death should be invested in the purchase of 3*l.* per cent. stock, and the interest applied for the benefit of his wife during her life, if she should survive him, and at her death the stock should be divided between his two daughters, B. and C., in equal proportions; and in the event of either of them marrying and leaving issue, then her or their shares to her or their children respectively; and in case both his daughters should die without issue, then over to his son. P. directed, that if he survived his wife, the whole sum forthcoming should be paid to his daughters B. and C. or their children, or to his son. This instrument was in October, 1845, deposited by P. with the directors of the fund, and he died in December, 1855. In May, 1852, P. by will bequeathed all his estate and effects unto his daughters B. and C., and appointed them executrices, but he made no specific mention of the fund. The wife of P. died in 1847, and the son died intestate and unmarried in 1851. B. and C. applied to the directors for payment to them of the fund, but were informed that G., who in November, 1826, intermarried with L., another daughter of P., had given notice to the directors not to pay it to them. G. alleged, that by an indenture of the 13th August, 1832 (after reciting that on his marriage no settlement was made, but that upon the treaty for such marriage it was agreed that upon the decease of P., G. and L. his wife should take a share, equal with J. P.'s other daughters who should be living at his decease, of and in all his property), P. covenanted with G. and L. his wife, that they, or such of them as should be living at his decease, should immediately after his decease take a share equal to his other daughters of all the property which he might be seised or possessed of, or in any manner entitled unto or interested in, at the time of his death; and that he would forthwith make his last will, whereby he would give, devise, and bequeath all his property in such manner as to effectuate the intentions thereinbefore expressed, and would not revoke or alter such will. L., the wife of G., died in 1852. The capital money was, under the 10 & 11 Vict. c. 96, paid by the directors of the fund into court. On petition presented by B. and C. :—Held, first, that the covenant of P. did not affect the particular fund in question, as it was not a part of his general estate, and therefore the claim of G. must be rejected. *Powell's Trusts, In re*, 2 Jur. (N.S.) 799.

Held, secondly, that under the instrument of nomination B. and C. were, in the events which had happened, entitled to take the fund absolutely. *Ib.*

ii. *How Enforced.*

Specific Performance — Covenant to pay Incumbrances.]—Father on the marriage of his eldest son settled certain lands, and covenanted to pay all incumbrances affecting them. The court will decree a specific performance without an inquiry whether any or what damage has been sustained, incumbrancers having actually instituted suits, and the lands being in danger of being sold. *Vereker* v. *Gort* (*Lord*), 1 Ir. Eq. R. 1.

—— **Agreement to Charge.**]—A father, on his daughter's marriage, agreed by a memorandum in writing to charge his property with 1,000*l.* as her fortune to be settled in trustees for her benefit, she to receive the interest at 5 per cent. on her sole and separate receipt during the term of her natural life; but if she had a family, she was to have the power of disposing of it amongst

her children as she and her husband might think proper: the father to have the power to lodge the 1,000*l.*, with her consent and that of her trustee, in any security they might agree upon. No settlement was executed, and the wife died without issue:—Held, that the husband, who survived and who took out letters of administration to his wife's effects, was entitled to the 1,000*l.*; and the court directed specific performance against the father to effectuate payment of the 1,000*l.* to the husband as such administrator. *Dennehy* v. *Delany*, Ir. R. 10 Eq. 377.

—— **Agreement to Settle Land — Bond — Breach of Condition.**]—A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of 2,000*l.* and interest. It was recited in the condition, that, in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property, then let on lease at a rent of 50*l.* per annum, to the uses thereinafter mentioned; and if such surrender should not be so made within eighteen months after the marriage, the husband and wife, or the survivor, should receive, after the death of the obligor, 1,000*l.*; and he was, in the meantime, to pay the husband and wife 50*l.* a year for the interest thereof, until the said principal sum should be fully discharged. The condition was to the effect of the recital, and that if the estate should be so settled in substance, to the use of the husband and wife for life, remainder to the survivor, remainder to their issue; and if the 1,000*l.* and interest should be paid, or if the obligor should make such surrender in his lifetime, and pay the arrears of interest up to the time of the surrender, the obligation to be void. The obligor died without making the surrender, having regularly paid the 50*l.* per annum, and by his will he devised the copyhold estate to his daughter, the wife of the obligee:—Held, that the bond was not forfeited by reason of the breach of the condition; that it was merely an agreement to settle the land, and as such satisfied by the devise, although absolute to the wife; and that it was an agreement of which equity would enforce the specific performance; the penalty being only meant to secure the settlement recited in the condition. Time for the performance of the condition is not of the essence of the contract. The obligor held to have no power to elect either to pay the money, or settle the land. *Roper* v. *Bartholomew*, 12 Price, 796.

—— **Consideration.**]—Where a father, being the heir of a lunatic, who might be induced to make a disposition of his estate injurious to him, was in embarrassed circumstances, and incapable of bearing the expenses of suing out a commission, agreed, in consideration of his son's prosecuting it, that in the event of the lunacy being established, and the estate descending upon him, he would execute a settlement in favour of his son and issue, the circumstances wholly repelling fraud or inadequacy of consideration, decree for specific performance of the settlement, reversing the judgment below. *Persse* v. *Persse*, 1 West, 110; 7 Cl. & F. 279.

Marriage articles entered into between an intended husband and the father of the wife, whereby each party covenanted to settle funds on the usual trusts, were enforced by the husband against the father's estate after death of the wife without issue, although the husband had always neglected and refused to fulfil his part of the agreement. *Jeston* v. *Key*, 40 L. J., Ch. 503; L. R. 6 Ch. 610; 25 L. T. 522; 19 W. R. 864—C. A.

—— **Conditional Covenant—Breach of Condition.**]—Marriage articles recited that L., the father of the intended husband, had agreed, in case the marriage should take effect, to pay 200*l.*, and also to settle the lands of T. in the manner, to the uses, and upon the trusts thereinafter mentioned; and that S., the father of the intended wife, who was an infant, had agreed to convey the lands of G., in the manner, at the time, to the uses, and upon the trusts thereinafter mentioned, and also to pay to the intended husband 100*l.* upon the marriage. It was then covenanted by L. that, in case the marriage should take effect, and S. should, as soon as the intended wife came of age, settle the lands of G. to the uses therein expressed, he, L., would settle the lands of T. to his own use until the marriage, and, from and after the marriage, to his own use for life, with remainder, upon certain trusts, for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by S. that, in case the marriage should take effect, and L. should perform his covenant, he, S., would settle the lands of G. to the use of himself for life, with remainder, upon certain trusts, for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age, but S. failed to settle the lands of G.:—Held, nevertheless, that L. was bound to perform the covenant on his part. *Lloyd* v. *Lloyd*, 2 Myl. & C. 192; 5 L. J., Ch. 191; 6 L. J., Ch. 135.

Specific Performance Refused—Uncertainty—No Mutuality.]—A., on the marriage of his daughter to B., covenants that B. should have his land, called C., for 1,500*l.* less than any other would give for it, and afterwards devises the premises to his grandson for life, with remainder over, and dies. Court refused to decree a specific performance of this agreement, by reason of the uncertainty and want of mutuality in it. *Bromley* v. *Jefferies*, 2 Vern. 415; Pre. Ch. 138.

—— **Covenant by Tenant for Life on Behalf of Infant.**]—Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed; and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the court would not have interfered. *Howarth* v. *Deem*, 1 Eden, 351.

—— **Where Plaintiff's Title might have been Barred.**]—A., on the marriage of his son, covenants to purchase lands, and settle them to the use of his son B. for life, remainder to the heirs male of the body of B. The son dies, leaving issue a son, who brings a bill against the executor of A., for the performance of the covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Cann* v. *Cann*, 1 Vern. 480.

—— **Inconsistent Proposals—Other Party not bound to Execute.**]—Where funds came to the wife after marriage, the husband being in India, a contract of settlement of those and of other funds, by her father, was prepared and executed by the latter, and sent out for execution by the husband, who in the meantime had given instructions for a settlement in different terms:—Held, that the husband not being bound to execute the former, the father was not bound by it, although executed by him, and containing covenants for the benefit of an infant. *Woodcock* v. *Monckton*, 1 Coll. C. C. 273.

Damages—Value of Lands, how Computed.]—A father, in contemplation of the marriage of his son, proposed, in writing, to settle an estate in a specified parish, "worth 200*l.* a year," free from incumbrances, on himself, for life, with successive remainders to his son and his intended wife, and the children, charged with 50*l.* a year to his own widow, for life. By a settlement, not referring to the proposal, the father conveyed an estate, held in fee, worth 57*l.* a year, and an estate of which he was tenant for life, with limitation to his son in tail, of the yearly value of 190*l.*, both in the specified parish, to the proposed uses, and absolutely covenanted that the conveyed hereditaments were of the annual value of 200*l.*, and that he was absolutely seised in fee of them. The marriage took effect, and both the son and his wife died, leaving an infant daughter; the son had married a second time, and left a son, who became tenant in tail of the hereditaments worth 190*l.* a year. In a suit by the infant daughter and the trustee of her settlement, against the representatives of her grandfather, the settlor, for damages for the breach of his covenant:—Held, that the proposals could not be looked to as defining the value of the property to be settled; and that the plaintiffs were entitled to damages to the full extent of the value of the settled land, though that would create a total income under the settlement of 247*l.* instead of only 200*l.* *Wace* v. *Bickerton*, 3 De G. & Sm. 751; 19 L. J., Ch. 254; 14 Jur. 784.

Proof in Administration—Specialty Debt.]—A. B. covenanted in the settlement, made in contemplation of his son's marriage, that upon certain events he would, by will or otherwise, in his lifetime settle out of all his real and personal estate, subject, to his wife's life estate, 3,000*l.* or property to that amount, so that the same should immediately after the death of the survivor of himself and his wife be well and effectually vested in trustees upon trusts for the benefit of his son's intended wife and the issue of the marriage:—Held, that the trustees were entitled to prove as specialty creditors in respect of the 3,000*l.* in the administration of A. B.'s estate. *Eyre* v. *Monro*, 3 K. & J. 305; 26 L. J., Ch. 757; 3 Jur. (N.S.) 584; 5 W. R. 870.

Executors to Account to Bankrupt Covenantee's Incumbrancer.]—Before the marriage of G. his wife's father covenanted to pay 1,000*l.* on the marriage, and that his heirs, executors, &c., should pay G. 500*l.* six months after his death, and G., by same deed, contracted to give security by specialty, to pay 1,000*l.* six months after his death, to his wife if she survived. Accordingly, three days after marriage, he gave a bond, and then became bankrupt, but before bankruptcy, and after the father's death, he assigned the 500*l.* to plaintiff as a security for a debt. Upon a bill by plaintiff against the father's executors and the husband's assignee, lord chancellor directed the executors to account to plaintiff for the 500*l.*, which was never the wife's money but the husband's, and said, if he were to stand neuter, the husband's assignees, who had the legal estate, and less equity than the plaintiff, might receive the money. *Brett* v. *Forcer*, 3 Atk. 403.

Where a wife has a demand in her own right, and the husband applies in her right, if there be no agreement on her behalf before marriage, the court will take care of her. *Ib.*

If the husband had not been a bankrupt, and had brought a bill for performance of the father's covenant, he could only have been compelled to give a bond, and the wife must have taken her chance, and an assignee shall not be in a worse condition than an assignor, but it has often been held he should be in a better. *Ib.*

Failure of Charge—No Personal Covenant.]—A settlement, to which A., B. and T. were parties, executed previously to the marriage of A. (B.'s daughter) with T., recited T.'s title to certain estates, and that B. agreed to give and appoint to A. a portion of 3,000*l.*, of which the sum of 1,000*l.* was to be paid in cash, and the remainder to be charged on the estates of B., and that T. had agreed to secure a jointure of 400*l.* a year for A., and to charge his estates with 3,000*l.* for the younger children of the intended marriage; and that, subject to such jointure and charge, T.'s estate should be settled on the first and other sons of the marriage, in tail; further, that B. had under a power charged his estates with 3,000*l.* portions for his younger children (of whom A. was one), and that it had been agreed that B. should pay 1,000*l.*, part of the marriage portion to A., immediately to T., and that B. should appoint 2,000*l.* the residue of the 3,000*l.*, a charge on his estates, the two sums to be in full for the marriage portion of A. B. appointed 2,000*l.* out of the 3,000*l.*, and directed it to be raised and paid to A. at his death, and T. charged his estates with a jointure of 400*l.* a year, and 3,000*l.* for younger children. By another deed, reciting the appointment of the 2,000*l.* by B., which with the 1,000*l.* was to be in full for the portion of A., A. and T. released B. and his heirs, and his property real and personal, from all claims in respect of certain provisions out of other funds provided for his younger children:—Held, that the deeds contained no personal covenant by B. to pay the 2,000*l.* even though it should turn out that the amount was not well charged on the estates by reason of a bad execution of the power by B. *Borrowes* v. *Borrowes*, Ir. R. 6 Eq. 368.

iii. *Proof on, in Bankruptcy.*

See BANKRUPTCY.

d. Covenants by other Persons.

By Brother—Specific Performance.]—W. M., on the death of his father, became entitled to considerable estates, subject to a charge of 5,000*l.* for his eight brothers and sisters, who were also entitled to a share of the personal estate of their father. Their portions being small compared with his fortune, he entered into correspondence with a common friend, in which it was agreed that they should give up all their present

rights, in lieu of which they should have a charge upon the estate for a sum of 4,000*l.* each. An arrangement having thus been effected, he actually paid interest on the amount agreed to be charged. The sister afterwards married, and, upon the treaty for the marriage, the intended husband was informed by the common friend that her fortune was 4,000*l.*, charged upon W. M.'s estates. The marriage took effect:—Held, that this was an agreement of which a court of equity will decree specific performance as to all the younger children. *Montgomery* v. *Reilly*, 1 Bligh (N.S.) 383; 1 Dow & Cl. 62. Affirming Hay & J. (App.) liv.

e. Deficiency of Fund Covenanted to be Settled.

Deficiency in Pension—Covenantor's Estate Liable.]—In a marriage contract the husband covenanted to secure to his wife the benefits of the pension or annuity payable to the widows of subscribers to a certain fund to which he was a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to her, saving and excepting only through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude her from all benefit thereby," to pay a yearly sum equal to the pension. At his death he had secured to her 365*l.* a year, on the Bombay Military Fund. A deduction from this was first made, and finally, on her second marriage, the allowance was stopped:—Held, that the first husband's estate was bound under his covenant to make good the deficiencies. *Taylor* v. *Hosack*, 5 Cl. & F. 380.

—— **In Annuity Charged on Lands—Personal Estate not Liable.**]—By a settlement reciting an agreement to provide a jointure for the intended wife, but not stating the amount, the intended husband covenanted with the trustees to convey to them certain lands, then held in trust for him, upon trust, after his death, to permit the intended wife, during her life, to take out of the land an annuity of 220*l.*, with power of distress and right of entry; and the settlor covenanted to do all such other acts as should be necessary for the further and better assuring the annuity, according to the true intent and meaning of the deed; the lands having proved, after the husband's death, insufficient to pay the annuity in full:—Held, that there was nothing in the settlement amounting to a covenant for or warranty of the adequacy of the lands for payment of the annuity in full, and that the personal assets of the settlor were not liable to make good the deficiency. *Weldon* v. *Bradshaw*, Ir. R. 7 Eq. 168.

—— **In Share of Specified Property—General Estate not Liable.**]—Where a settlor intimated his wish to settle a certain sum, part of a particular share of property, which he specified, but that share did not prove of so much value as the sum he wished to settle, his general estate held not liable to make good the difference. *Evans* v. *Wyatt*, 31 Beav. 217; 8 Jur. (N.S.) 499; 7 L. T. 86; 10 W. R. 813.

—— **In Wife's Portion—No Warranty—Common Mistake.**]—Bill by husband to have wife's portion, part of which was invested in stock, made up money, on ground either of express contract or representation upon which the marriage took place dismissed; the description by articles, though generally "the sum of 4,000*l.*" referring to that sum in settlement, and the representation under circumstances not amounting to warranty, and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13; 7 R. R. 135.

—— **In Interest on Stock reduced by Acts of Parliament.**]—By a marriage settlement executed in 1797, reciting that S., the intended husband, was entitled to real estate on the decease of his father, and to certain sums in the English funds, as residuary legatee of his grandmother, S. covenanted with the trustees that he would, as soon as he could after the execution of the settlement, transfer to them the money, and invest in such funds as should be thought most advisable, in the names of the trustees, such further sums, the interest of which should amount to 600*l.* a year, free from all deductions, in trust for S. for his life, and after his death upon trust to pay the interest to A., his intended wife, as a jointure, with a power to S. to revoke the trust of the fund so to be invested, on conveying to the trustees real estate of the value of 600*l.* a year, to be held on the same trusts. S. died in 1798, leaving one son, who died in 1812. In 1799 and 1801, his executors transferred to the trustees of the settlement 4*l.* per cent. stock, then producing 600*l.* a year, but which was, by successive acts of parliament, ultimately reduced to 3 per cent. stock, and became insufficient to pay the 600*l.* a year:—Held, that A. was not entitled to have the deficiency made good out of the assets of S., the covenant having been performed by the transfer of stock, which, in 1801, produced 600*l.* a year. *Napier* v. *Staples*, 10 Ir. Ch. R. 344.

A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l.* 4 per cent. bank annuities; the only 4 per cent. bank annuities then existing, were afterwards reduced to 3½ per cents.; but there was existing at the time of his death a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents. The bond is satisfied by a transfer of 10,000*l.* 3½ per cents. *Sheffield* v. *Coventry* (*Earl*), 2 Russ. & M. 317.

By a marriage settlement, the husband covenanted to secure to the wife for her life, if she survived him, the dividends of a sum of 4,000*l.* navy 5 per cent. annuities. The husband had no stock in the navy 5 per cents. at the date of the settlement, or at any subsequent period. By an act of parliament, the navy 5 per cents. were converted into new 4 per cents., and by another act it was provided that all obligations for the transfer of the navy 5 per cents. should be satisfied by a transfer of 106*l.* in the new 4 per cents. for every 100*l.* in the navy 5 per cents. By a subsequent act, the new 4 per cents. were converted into new 3½ per cent. annuities, and it was provided that all obligations to transfer the new 4 per cents. should be satisfied by transferring an equal sum of new 3½ per cents. The widow under her settlement is entitled only to a transfer of 105*l.* in the new 3½ per cents. for every 100*l.* of the navy 5 per cents. under her husband's covenants. *Milward* v. *Milward*, 3 Myl. & K. 311; 3 L. J., Ch. 141.

—— **In Wife's Portion—Proportional Reduction in Settlement.**]—A father, in consideration of 2,600*l.* to be paid him on his son's marriage, as the wife's portion, articles to settle 600*l.* a year on the marriage; and it being after discovered that she had only 1,600*l.*, the father was decreed to make a settlement for the 1,600*l.* only, in proportion to what he was to have made for the 2,600*l.*, and not to deduct out of the 600*l.* per annum 1,000*l.* worth of land, viz. 50*l.* per annum, as was urged he should. *Baskerville* v. *Gore*, Pre. Ch. 186; 2 Vern. 448.

Covenant by Settlor for Payment of Sum of Money during his Life or after his Death—"Free from all Deductions"—Succession Duty.]—The father of a married woman covenanted with trustees for payment to them at such time or times during his life as he should think fit, or within twelve calendar months after his death, of the sum of 10,000*l.* "free from all deductions whatsoever," and for payment to them in the meantime of an annuity of 200*l.*, the principal sum and the annuity to be held upon the trusts therein mentioned for the daughter and her family. The covenantor did not pay any part of the 10,000*l.* in his lifetime, but after his death his executor paid to the trustees the full sum of 10,000*l.* The crown claimed succession duty from the trustees, who paid it, and claimed repayment from the executor on the ground that the 10,000*l.* was to be paid free from all deductions. Both parties agreed that the fund was liable to succession duty, and argued the case on that footing:—Held, that if the duty was payable it must be borne by the fund, for that the relation between the trustees and the executor was simply that of creditors and debtor, that the executor was not liable to be called on by the crown for the duty, and that when he had paid the 10,000*l.* in full to the trustees, he had discharged his testator's obligation, and was not concerned with the question whether succession duty was payable. Whether any succession duty was payable on the death of the covenantor, quære. *Higgins, In re, Day* v. *Turnell*, 55 L. J., Ch. 235; 31 Ch. D. 142; 54 L. T. 199; 34 W. R. 81—C. A.

2. Covenants to Insure and Settlement of Policies.

a. In General.

Construction—Inconsistent Clauses.]—Principles on which the court proceeds in putting a construction upon inconsistent clauses in a settlement. *Bush* v. *Watkins*, 14 Beav. 425.

By the terms of a marriage settlement, 1,000*l.*, secured by policy of insurance on the life of the intended wife's father, was to be paid to the intended husband, provided he had previously effected an insurance on his own life for a similar amount; if not, it was to be paid to the wife. It then directed that, if the insurance should not have been effected, or if the husband and wife should be both dead when the 1,000*l.* should be received by the trustees, it should be paid to the issue of the marriage. The husband covenanted to effect an insurance within six months after the decease of the wife's father, to secure the payment of the said sum of 1,000*l.* at his decease. By a clause at the end of the settlement, it was directed that in default of the husband effecting the insurance, the 1,000*l.* should be invested and the interest paid to the husband until he effected it, and then he was to receive the principal. The insurance was not effected within the time mentioned:—Held, that the husband might effect the insurance at any time during his life; that the trusts in favour of the wife did not arise till the close of the life of the survivor of her father and husband, and that the trusts in favour of the children did not arise till after the death of all three—viz. the father, the husband, and the wife. *Ib.*

The dividends of the 1,000*l.* were therefore directed to be paid, during the life of the husband, to his mortgagees, or until he should effect the insurance; and if he effected an insurance, the principal was to be applied in payment of the mortgage debt, and the residue to be paid to the husband, or the parties claiming under him. *Ib.*

Policy effected with Friendly Society—Covenant not Fulfilled.]—In a suit against trustees by a husband, who covenanted to effect a policy of insurance with a respectable insurance company and to assign the same to trustees, but who insured with a friendly society, the rules of which subjected the insured to the danger of expulsion, and did not allow an assignment, but allowed a nomination nearly tantamount to it, and whose capital was not proved, it was referred to the master to ascertain whether the covenant was fulfilled, the plaintiff to pay the costs. Semble, the covenant was not fulfilled. *Courtenay* v. *Courtenay*, Ir. R. 9 Eq. 329.

By marriage settlement the husband covenanted with the trustees that he would forthwith effect a policy of assurance upon his life with some respectable assurance company, for the sum of 1,000*l.*, and assign the same to the trustees. A policy of assurance effected with a friendly society, if it be not assignable, or if it be less beneficial than a policy effected with an ordinary assurance company, is not within the meaning of the covenant, and a reference was directed on the subject. *S. C.*, 3 Jo. & Lat. 519.

Semble, that a friendly society is not an assurance company within the meaning of such a covenant; and that, if the covenantor rely upon an assurance with a recently established friendly society (supposing such to be an assurance company within the covenant), as a performance of his covenant, he ought to show that the society is possessed of capital, and is solvent. *Ib.*

Failure of Health — Insurance becoming Impossible—Covenant held Absolute.]—A., on his marriage in August, 1873, covenanted with the trustees of his marriage settlement that he would, on or before the 2nd July, 1875, insure his life in the sum of 10,000*l.*, which when received was to be held by them on trusts for the benefit of his wife and children. At the time of his marriage, and until shortly before July, 1875, A. was and continued to be in good health, but after that he fell ill, and consequently was unable to effect an insurance. He remained in ill-health thenceforward until his death. In an action for the administration of his estate:—Held, that the contingency of A.'s health failing was in the contemplation of the parties, and, consequently, that the covenant was absolute. *Arthur's Estate, In re, Arthur* v. *Wynne*, 49 L. J., Ch. 556; 14 Ch. D. 603; 43 L. T. 46; 28 W. R. 972.

Wife Surviving with General Power of Appointment not Compelled to Keep up Policy.]—By a marriage settlement, some property, to the principal part of which the intended wife was entitled for life, was conveyed to trustees for her separate use; and it was agreed that the trustees should effect an insurance on her life, and pay the premium out of the trust money, and should invest the amount assured when received, and pay the dividends to the intended husband for life; and after his decease, pay as the wife should appoint, and, in default, to the persons entitled under the statute of distribution of intestate's estate. The wife survived her husband:—Held, that she had then a right to refuse to keep up the policy; and that this court would not consider her bound to perform the agreement for the benefit of mere volunteers. *Godsal* v. *Webb*, 2 Keen, 99; 7 L. J., Ch. 103.

b. Premiums and Duty of Trustees.

Covenantor Unable to Pay — Surrender or Sale Authorised.] — A husband, by his marriage settlement, covenanted to keep up policies on his life for the benefit of himself, wife and children. He became wholly unable to pay the premiums. The court authorised the trustees to surrender the policies. *Beresford* v. *Beresford*, 23 Beav. 292. And, in another case, under similar circumstances, the court authorised the trustees to sell the policy, and accumulate the produce. *Hill* v. *Trenery*, 23 Beav. 16.

Trustees not Liable for Loss.]—By a marriage settlement, a husband assigned a policy on his life to trustees, and covenanted to keep it up. The trustees neglected either to obtain possession of the policy, or give notice to the office, and the policy was mortgaged by the husband, and afterwards sold and surrendered. The husband appearing to have been in insolvent circumstances and unable to keep up the policy, and the trustees having no available funds for the purpose:—Held, that the trustees were not liable for the loss. *Hobday* v. *Peters*, 28 Beav. 603.

Wife's Lien for Premiums Paid by Her.]—The rule of equity, which prevents a party from receiving any interest under a settlement until he has discharged those obligations or covenants to which he is liable under it, applied to the case of a policy of assurance assigned to the trustee as a security for the payment of a sum which the husband had covenanted that his representatives should pay after his death, and against a purchaser of the husband's interest under the settlement, from his assignees under a fiat in bankruptcy. Feme covert, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as a collateral security for a provision settled upon her under that instrument by the covenant of her husband:—Held, upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid. The voluntary payment of premiums on a policy of assurance confers on the payer no interest in the policy. *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583. Affirmed, 13 L. J., Ch. 173; 9 Jur. 299.

Premiums Paid by Trustees — Amount Recoverable.]—By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay; and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at 2,052*l.* 8*s.*, and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10*s.* was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to 766*l.* 5*s.*:—Held, that the settlement trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums, with such interest as the dividend had been actually making. *Miller, In re, Wardley, Ex parte*, 6 Ch. D. 790; 37 L. T. 38; 25 W. R. 881.

3. Covenants to Settle After-acquired Property.

a. Construction.

General Words Rejected.]—Covenant to settle whatever should come to a wife from her mother, or otherwise, held not to bind property coming unexpectedly from other quarters. *Williams* v. *Williams*, 1 Bro. C. C. 152.

A settlement was made of A.'s one-fifth share in stock, and all her interest, "by survivorship or otherwise," in the same. A. was one of five children, and in an event, which had then become impossible, there might have been accrual by survivorship among them:—Held, that an interest which A. afterwards took in the stock as next of kin to a deceased brother was not bound. *Edwards* v. *Broughton*, 2 N. R. 476; 32 Beav. 667; 11 W. R. 1038.

Words Supplied.]—A covenant to settle the wife's after-acquired property will, in the absence of a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted. *Edwards, In re*, 43 L. J., Ch. 265; L. R. 9 Ch. 97; 29 L. T. 712; 22 W. R. 144. S. P., *Holloway* v. *Holloway*, 25 W. R. 575; *Campbell, In re*, 46 L. J., Ch. 142; 6 Ch. D. 686; 25 W. R. 268; *Carter* v. *Carter*, 39 L. J., Ch. 268; L. R. 8 Eq. 551; 21 L. T. 194.

Restriction by Reference to Recitals, &c.]—A marriage settlement recited an agreement to settle all property derived from H. to which the wife or husband in her right should become entitled, and contained a covenant by the husband to settle upon the same trusts all property which should come to husband and wife, or either of them, under the will of H. or otherwise:—Held, that the covenant was restrained by the recital to property derived from H. *Neal's Trusts, In re*, 4 Jur. (N.S.) 6.

An intended husband and wife assigned to trustees all legacies, and other personal property to become payable to the wife, under her father's

will, "or otherwise howsoever," upon trusts for her separate use for life, without anticipation, with trusts in remainder in favour of children. By the next part of the settlement, it was agreed that in case any property should during the coverture be given or bequeathed to the wife, the husband should settle it so that the wife should have sole power of disposing of the same:—Held, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for children, the latter part of the settlement showing that the former must be read in a restricted sense. *Stephenson, Ex parte*, 3 De G. M. & G. 969.

Share of an unappointed fund over which A. had had power of appointment by will coming to B., held bound by covenant to settle whatever B. should take under or by virtue of the wills of A. and X., or either of them, or otherwise howsoever, the court refusing to cut down these words by reference to the recital in which the expression was "under the wills or otherwise of the said two testators." *Owen's Trust, In re*, 1 Jur. (N.S.) 1069.

Exception of Property settled by Instrument under which it was Derived.]—A marriage settlement made in January, 1877, contained a covenant by the husband and wife that all property not thereinbefore settled to which the wife or the husband in her right then was or should during the intended coverture become beneficially entitled, except jewels, trinkets, &c., and except also any property which might be settled by the instrument under which it was derived, should be assured and transferred to or otherwise vested in the trustees upon certain trusts. Under an appointment made by an indenture dated 30th July, 1883, the wife had become entitled to a sum of 10,000*l*., which by such indenture was declared should be for her sole and separate use, and should not be subject to any trust or agreement for settlement contained in any settlement executed upon or in contemplation of her marriage:—Held, that the 10,000*l*. was settled by the instrument under which it was derived, and was not within the covenant. *Kane* v. *Kane* (post, col. 860), followed. *Beren's Settlement Trusts, In re*, 59 L. T. 626.

Intention of Donor.]—Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant. *Mainwaring's Settlement, In re*, (post, col. 860), observed upon. *Scholfield* v. *Spooner*, 53 L. J., Ch. 777; 26 Ch. D. 94; 51 L. T. 138; 32 W. R. 910—C. A.

Power of Appointment—Appointment to Self.]—By a marriage settlement, made in 1878, it was agreed that if M., the intended wife, or her husband in her right, should at one and the same time, and from the same source, become entitled to any real or personal property of the value of 500*l*. or upwards, then and in every such case the husband and wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property assigned by M. By his will, made in 1884, the father of M. bequeathed to the trustees of the will a sum of 4,000*l*. upon trust for such persons and purposes as M. should appoint in writing, and in default of or subject to any such appointment in trust for her sole and separate use, and the testator declared it to be his intention that M. might be able, by exercising her power of appointment, to defeat the operation of the covenant contained in her marriage settlement for the settlement of her after-acquired property. The testator died in 1887. M. appointed that the sum of 4,000*l*. should be held in trust for her separate use by nine separate appointments, made on separate days, and each under 500*l*. in amount:—Held, that the sum of 4,000*l*. had been properly appointed by M., and was payable to her, and was not bound by her covenant to settle after-acquired property. *Gerard* (*Lord*), *In re, Oliphant* v. *Gerard*, 58 L. T. 800.

Settlement of Real Estate on "the like Trusts" with Personal Estate.]—By a marriage settlement a sum of 360*l*. belonging to the wife was settled, after the deaths of husband and wife, and in default of appointment by the wife, upon the wife's next of kin "of her own blood and family in due course of distribution, the same as if she died a feme sole and intestate possessed thereof or entitled thereto." The settlement contained a clause providing that after-acquired real or personal property of the wife should be settled "upon and for the like trusts, intents, and purposes as were thereinbefore declared of and concerning the said principal sum of 360*l*. thereby assigned." The wife afterwards acquired real and personal property, and died without having exercised the power of appointment, and the husband also died:—Held, that the wife's personal estate passed to her next-of-kin according to the Statute of Distributions, the half-blood sharing equally with the whole blood; and that her real estate passed to her heir-at-law. *Brigg* v. *Brigg*, 54 L. J., Ch. 464; 52 L. T. 753; 33 W. R. 454.

Agreement of even Date.]—By an ante-nuptial settlement a lady and her intended husband, after reciting a settlement of even date, and that the parties had agreed to settle other property to which the lady "may be entitled," covenanted that, in case the lady "should be entitled to any property other than that in the settlement, the same should be settled upon similar trusts to those contained in the settlement":—Held, that the agreement included after-acquired property of the lady. *Blockley, In re, Blockley* v. *Blockley*, 49 L. T. 805; 32 W. R. 385.

Absolute Gift of Personalty—Separate Use attached only to Income.]—On the 5th of June, 1860, A. and B., in exercise of the power of appointment in favour of children contained in their marriage settlement, dated in 1830, appointed 3,500*l*. to their daughter M. (afterwards M. S.). By the marriage settlement of N. S. and M. S., dated the 6th June, 1860, M. S. assigned the 3,500*l*. to the trustees, upon trusts under which N. S. had the first life interest, and, in default of children, M. S. had a general testamentary power of appointment. There was also a covenant by N. S. and M. S. that if they, or either of them, should during the coverture become entitled to any real or personal property (except certain specified interests) the same

should be forthwith assured to the trustees. On the 20th June, 1860, A. and B. appointed that a moiety of the residue unappointed of the trust funds under the settlement of 1830, should, after the decease of the survivor of them, go to M. S., during her coverture, for her sole and separate use, without power of anticipation, her receipt to be a sufficient discharge for the payment thereof. There was a proviso that if M. S. should die in the lifetime of N. S., leaving no children, the same moiety should go to the brother of M. S. absolutely, and that if M. S. should survive her husband, the same moiety should go to M. S. absolutely. M. S. died in 1887, leaving children, and having by her will appointed and bequeathed all her property to N. S., and appointed him sole executor. A. and B. had both pre-deceased M. S.:—Held, that the appointment by A. and B., of the 20th June, 1860, showed an intention to exclude N. S., and any interest which he would take if the fund was caught by his marriage settlement; that though the restraint on anticipation must be rejected (*Fry* v. *Capper*, Kay, 163), yet taken together with the gift over in default of children and the receipt clause, it showed an intention that the separate use should apply only to the income accruing during the particular coverture, and that M. S. should have no power of disposition over the corpus. Held, also, that such a limitation was clearly good; and that, therefore, the fund having accrued during the coverture, the corpus was caught by the after-acquired property clause. *Shute* v. *Hogge*, 58 L. T. 546.

Wife's Property — Covenant by Husband—Fund falling into Possession after Wife's Death.]—A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives. *Fisher* v. *Shirley*, 59 L. J., Ch. 29; 43 Ch. D. 290; 61 L. T. 668; 38 W. R. 70.

—— **After Husband's Death.**]—Covenant to settle after-acquired property of the wife:—Held, to extend to property acquired after the death of the husband. *Stevens* v. *Van Voorst*, 17 Beav. 305.

Leasehold and Chattels—Conversion by Trustees.]—A settlement contained the usual covenant by the husband and wife to assign after-acquired property of the wife to trustees, with a proviso that it should be lawful for the trustees, at the request of the husband and wife during their joint lives, and of the survivor during his or her life, and afterwards, at the discretion of the trustees, to sell and dispose of such property, and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and specific personal chattels:—Held, that the trustees were not for the present to convert these things without the request in writing of the husband and wife. *Hope* v. *Hope*, 1 Jur. (N.S.) 770; 3 W. R. 617.

Ambiguous Words—"The said Lands."]—A. having, in his marriage settlement, conveyed leasehold estates, of which he was possessed, to trustees, to hold to his own use during his life, and after his decease to the use that his intended wife should receive thereout a jointure, covenants to charge all the lands of which he was seised at the time of his execution of the settlement, or of which he should at any time thereafter become seised, with the payment of the jointure, the settlement proceeded: "And, further, that the said land, after the decease of the survivor," should be to the use of the children of the marriage:—Held, that the words "the said lands" referred to the lands then conveyed to the trustees, and that the children of the marriage did not, under the settlement, acquire any interest in the after-acquired property. *Hammersly, In re, Smith, Ex parte*, 12 Ir. Ch. R. 319.

Realty—Power of Sale Introduced.]—A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts:—Held, that a power of sale might be introduced into a settlement of subsequently acquired real estate. *Elton* v. *Elton*, 27 Beav. 634.

b. Property Included.

i. *Property vested in Interest or Possession at Date of Marriage.*

Property not Mentioned.]—A husband covenanted to settle any property which his wife, or he in her right, should acquire during coverture. Property vested before the marriage in trustees upon trust for the wife for life with remainder (in the events which happened) for her executors, administrators, or assigns:—Held, to be bound though not mentioned. *Graftey* v. *Humpage*, 1 Beav. 46; 8 L. J., Ch. 98; 3 Jur. 622.

A settlement recited an agreement that specified property of the wife and all other personal estate which she then had, or at any time during the marriage should become entitled to, exceeding 200*l.*, should be settled, and the husband covenanted to settle any personal estate exceeding 200*l.*, in which he should thereafter become interested in her right. Shares in waterworks, exceeding 200*l.* in value, belonging to the wife at marriage:—Held, subject to the settlement, though not mentioned in it. *James* v. *Durant*, 2 Beav. 177.

An intended husband covenanted to join with his wife in assigning to the trustees all property to which she should become entitled. At the date of the settlement the wife had an absolute vested interest in 1,935*l.* stock expectant on her father's death, but it was not mentioned in the settlement. The husband became bankrupt, and then the wife's father died:—Held, that the 1,935*l.* stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant. *Blythe* v. *Granville*, 13 Sim. 190; 12 L. J., Ch. 82; 6 Jur. 961.

A testator made one will of English, another of American property, neither referring to the other. His daughter, who was entitled to personal property under both wills, executed on her marriage a settlement, including specifically her property under the English will, but not mentioning the American will. A clause providing for settlement of such further personal estate (if any) as should during her life become vested in, or be assignable by her and her husband:—Held, not to affect her American property. *Hoare* v. *Hornby*, 2 Y. & C. C. C. 121; 12 L. J., Ch. 151; 7 Jur. 424.

A covenant in an ante-nuptial settlement

that all the personal estate "to which the wife shall become entitled" should be subject to the trusts of the settlement:—Held, not to extend to property to which, without the knowledge of the intended husband or the trustees, she was then absolutely and immediately entitled. *Otter* v. *Melville*, 2 De G. & Sm. 257; 17 L. J., Ch. 345; 12 Jur. 845.

A covenant in a marriage settlement, that in case, at any time "thereafter" any real or personal estate should "descend, come to, or vest in" the wife, it should be settled:—Held, to include the proceeds of real estate taken by a public company to which the wife was then entitled in remainder. *Blake, Ex parte*, 16 Beav. 463.

In a marriage settlement the husband covenanted to settle all the estate and effects to which the wife should become entitled. The wife was at the time entitled to a moiety of a leasehold house, and to a third part of the proceeds of sale of real estate, which real estate was not sold for many years after:—Held, that these were present titles, and not included in the covenant. *Wilton* v. *Colvin*, 3 Drew. 617; 25 L. J., Ch. 850; 2 Jur. (N.S.) 867; 4 W. R. 759.

Personal property, belonging to a wife at the time of marriage, but not noticed in her settlement, held to be bound by a covenant with A. by her husband to settle any personal property, exceeding 200*l.*, in which he might thereafter in her right become interested. *James* v. *James*, 9 L. J., Ch. 85.

By a marriage settlement 10,000*l.* were settled to the separate use of the wife for life, but a share in 3,333*l.* 9*s.* 8*d.* consols, to which she was entitled, was not mentioned. The husband covenanted to settle on the wife her future acquired property, "except such as she is now entitled to, in possession, reversion, remainder, or contingency":—Held, that her share in the consols was purposely omitted, and that she was not entitled to a settlement thereout against the mortgages thereof. *Brooke* v. *Hickes*, 10 L. T. 404; 12 W. R. 703.

By a settlement made in June, 1842, the husband covenanted that if any real or personal estate should "descend or devolve to or vest in" his wife, or in him in her right, he would settle it. In August, 1842, a sum, which formed part of the share of the wife in the estate of her father (who died in 1821), but had been overlooked, was recovered and paid to the trustees, and the husband received the income for twelve years:—Held, that it was not within the covenant, and that the husband had not so acquiesced as to make it subject to the settlement. *Churchill* v. *Shepherd*, 33 Beav. 107.

A marriage settlement contained an agreement that if the wife then was, or if she or her husband in her right, should, under the will of her father, become entitled to any real property of the value of 300*l.* or upwards, for any estate or interest whatsoever in possession, reversion, remainder or expectancy, then the husband and wife and all other necessary parties would convey the said property to the trustees. The wife's father was dead at the date of the settlement, having by his will devised real estate upon trust for his said daughter in tail:—Held, that the estate tail was not within the agreement in the settlement. *Hilbers* v. *Parkinson*, 53 L. J., Ch. 194; 25 Ch. D. 200; 49 L. T. 502; 32 W. R. 315.

By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees to settle all personal estate (save certain excepted particulars) to which the wife or the husband in her right should become entitled. Before marriage a sum of money not mentioned in the settlement was handed by the wife to the husband, in the opinion of the court simply as a loan:—Held, that this sum was subject to the trusts. *Hamilton* v. *James*, Ir. R. 11 Eq. 223.

Increase of Value.]—When property existing at date of marriage is increased in value by the death of other persons (as in the case of tontine debentures), such increment is not after-acquired property within the meaning of a settlement. *Browne's Will, In re*, 38 L. J., Ch. 316; L. R. 7 Eq. 231.

Chose in Action of Wife existing before, but falling into Possession after, Marriage.]—By a marriage settlement 10,000*l.*, part of a share of residue to which the wife was entitled under her uncle's will, was settled upon trusts therein declared. The settlement contained a covenant by the husband and wife to settle all property exceeding 300*l.* which the husband and wife or either of them in her right, should at any time or times subsequent to the solemnisation of the marriage and during the coverture become seised or possessed of, or entitled to, either at law or in equity, under any gift, devise or bequest in her favour, or by descent, representation, or any other means whatsoever. Previously to the date of the settlement the wife, who was of full age, had executed a general release to the executors of her uncle's will in respect of all her claims against the estate. It subsequently appeared that the release had been executed under a mistake, common to all the parties to it, as to the amount of the share of residue, and that the wife was in fact entitled to a large additional sum. The release was set aside in proceedings instituted for that purpose:—Held, that the additional share of residue was an equitable chose in action, which until the release was set aside, could not have been recovered against the executors, and was therefore practically gone; that upon the setting aside of the release the chose in action revived and must be treated as having come into existence, or at least into possession at that date; and that therefore the additional sum was after-acquired property within the meaning of the covenant. The additional sum which had been recovered by reason of the setting aside of the release consisted in part of capital and in part of income:—Held, that the whole sum was bound by the covenant. But held, on appeal, that the setting aside of the release did not give the wife any new right, but merely removed a bar which prevented her enforcing an existing right to property, and that the additional sum was not subject to the settlement. *Garnet, In re, Robinson* v. *Gandy*, 55 L. J., Ch. 773; 33 Ch. D. 300; 55 L. T. 562—C. A. Reversing 34 W. R. 434.

Chose in Action of Wife existing before, but falling into Possession after, Determination of Coverture.]—A. by will directed his trustees to pay the income of one-fourth of his residuary estate to his grand-daughter B. for life, and after her death to stand possessed of her share for her children, and directed that an annual sum, not exceeding 200*l.*, should be allowed for B.'s maintenance. The trustees in-

vested the surplus income during B.'s minority, and on her attaining age paid her the interest on the accumulations, as if they were part of her one-fourth share. B. afterwards married C., and put in settlement property to which she was entitled under her father's will. There was no reference to her grandfather's will, save a recital that, pursuant to a power contained in that will, B. had appointed an annuity to C., in the event of his surviving her. The settlement provided that in the event of B., during the continuance of the marriage, or C. in her right, thereafter becoming entitled to any further property exceeding 400*l.*, either under her father's will or otherwise, the property so acquired should be held on the trusts of the settlement. C. afterwards died, and the accumulated fund being claimed both by B. and by the trustees of the settlement, the trustees of the will paid it into court, under the Trustee Relief Act:—Held, that the fund was not bound by the trusts of the settlement, and that B. was entitled to have it paid out to her. *Atkinsons' Trusts, In re, Fitzroy, Ex parte*, [1895] 1 Ir. R. 230.

Property to which Wife or Husband in her Right "shall become entitled."]—In a settlement made before marriage there was an agreement to settle upon certain trusts all real and personal property to which the wife or the husband "in her right at any time during her now intended coverture shall become entitled (except jewels and" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use"). The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed and declared concerning such part of the personal estate of and to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid":—Held, that on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; and therefore that jewels given to the wife before marriage were within the exception, and belonged to the wife for her separate use. *Williams* v. *Mercier*, 54 L. J., Q. B. 148; 10 App. Cas. 1; 52 L. T. 662; 33 W. R. 373; 49 J. P. 484—H. L. (E.)

—— **Proceeds of Sale of Wife's Separate Estate.**]—An ante-nuptial settlement contained a covenant by the wife to settle any property to which during the marriage she should become entitled. At the time of the marriage she was entitled to leasehold property and shares in a company which were not included in the settlement, and which she sold during the coverture. With the proceeds of sale and accumulations of her income under the settlement she bought certain debentures, and partly with such moneys and partly with money lent by her husband she bought a leasehold house:—Held, that the debentures were subject to the trusts of the settlement, and that the house formed part of her own estate subject to a charge in favour of the trustees to the extent to which it had been bought with her money. *Lewis* v. *Madocks* (post, col. 879), discussed and distinguished. *Bendy, In re, Wallis* v. *Bendy*, 64 L. J., Ch. 170; [1895] 1 Ch. 109; 13 R. 95; 71 L. T. 750; 43 W. R. 345. But see *Finlay* v. *Darling*, post, col. 866.

By marriage settlement made in 1841, certain property belonging to the wife (who was a minor) was settled, and it was agreed and declared and the husband covenanted with the trustees that if the wife, or he in her right, should become entitled to any other property whatsoever, the same should be settled on the trusts of the settlement. At the date of the marriage the wife was, under a settlement made in 1833, entitled to a vested interest in an unascertained share of a settled fund in reversion expectant upon the death of the survivor of certain persons. The wife died in 1852, leaving the husband her surviving, and the reversionary fund did not become divisible until 1888, when the husband was still living:—Held, that the wife's share in the fund was bound by the husband's covenant and must be paid to the trustees of the marriage settlement. *Fisher* v. *Shirley*, 59 L. J., Ch. 29; 38 W. R. 70.

Moneys of which Husband "should be or become Possessed."]—By an ante-nuptial settlement a trader covenanted with the trustees of it to pay them 3,000*l.* out of the first capital moneys, or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in any wise entitled after the solemnisation of the marriage, within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock in trade and effects exceeding in value 3,000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months:—Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove. *Evans, Ex parte*, 2 De G. M. & G. 948; 22 L. J., Bk. 5; 1 W. R. 69.

ii. *Reversionary Interests in Personalty.*

Absolute Interest in Reversion.]—By a settlement, 3,000*l.* was assigned by the father of the intended wife to trustees, to be held after his decease as to 2,000*l.*, for the wife, her husband, and children, and as to the residue, for her husband absolutely; and it was covenanted that all the property to which the wife, or the husband in her right, should become entitled, should be settled upon the trusts therein declared of the premises thereby settled:—Held, first, that the property to which the wife became absolutely entitled in reversion during the coverture, was bound by the covenant; and secondly, that the sum given by the settlement in trust for the husband absolutely was not "thereby settled." *Hughes* v. *Young*, 1 N. R. 166; 32 L. J., Ch. 137; 9 Jur. (N.S.) 376.

Interest vested before Marriage.]—An intended husband and wife severally covenanted to settle "all property (if any) not hereinbefore settled," to which the wife, or the husband in her right, "shall at any time or times during the intended coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from" J. A fund bequeathed by J., to which the wife was then entitled subject to the life interest of a person who outlived her held not subject to the covenant. *Jones, In re*, 45 L. J., Ch. 428; 2 Ch. D. 362; 35 L. T. 25; 24 W. R. 697.

On agreement before marriage, that every-

thing which should come to the wife by her father's death, should go to the husband and wife for their respective lives, and after the death of the survivor to the heirs of the body of the wife by the husband begotten :—Held, that 6,000*l.*, to which the wife was entitled under the settlement of her father and mother, vested in her only, and, the husband consenting, the 6,000*l.* was decreed to be settled on the younger children. *Green* v. *Elkins*, 2 Atk. 474.

By their marriage settlement the intended husband and wife each covenanted to assign and settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in expectancy on the death of a person who died during the coverture :—Held, that the marriage and the covenant to settle each operated to sever the joint tenancy. *Baillie* v. *Treharne*, 50 L. J., Ch. 295 ; 17 Ch. D. 388 ; 44 L. T. 247 ; 29 W. R. 729.

Property falling into Possession after Coverture.]—By a settlement before marriage, part of the wife's fortune was settled, and it was stipulated, "that all other the personal estate to which she was, or might be or become entitled, should be permitted to vest absolutely in the husband by right of marriage" : the wife survived the husband :—Held, that a contingent reversionary interest of the wife which continued reversionary and contingent during the whole coverture, belonged to her and not to the executors of the husband. *Farrer* v. *Grant*, 7 L. J. (o.s.) Ch. 95.

In a settlement, it was agreed between the parties and the husband covenanted, that if any personal property should, during coverture, come to or vest in the wife, or in him in her right, the same should be settled. The wife became entitled to a reversionary interest, which did not fall into possession until after the death of the husband :—Held, that she was bound to settle it. *Butcher* v. *Butcher*, 14 Beav. 222.

A settlement contained a covenant to settle any property which should come to or devolve upon the wife, or her husband in her right, "at any time or times after the solemnisation of the said intended marriage and during the continuance thereof." The intended wife was then entitled to a reversionary interest, subject to the life interest of her mother. The wife died before the tenant for life, leaving the husband surviving :—Held, that her reversionary interest was bound by the covenant. *Rose* v. *Cornish*, 16 L. T. 786.

A covenant, by husband and wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, and falling into possession during the coverture, but not property to which they were entitled only in reversion during the coverture, and which fell into possession after the coverture. *Clinton's Trusts, In re, Hollway, Ex parte, Weare, Ex parte*, 41 L. J., Ch. 191 ; L. R. 13 Eq. 295 ; 26 L. T. 159 ; 20 W. R. 326.

A widow entitled to a life interest in a fund, and also to a moiety of the capital, subject thereto, married again. On her second marriage, she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled :—Held, that the moiety of the fund was subject to the covenant. *Viant, In re*, 43 L. J., Ch. 832 ; L. R. 18 Eq. 436 ; 30 L. T. 544 ; 22 W. R. 686.

H. was entitled, before marriage, to a reversionary interest in personal property. In her settlement the husband and H. and her husband jointly and severally covenanted that if at any time during the marriage the husband and she, or either of them in her right, should, by gift, "descent, succession, or otherwise howsoever, become entitled to any real or personal property," the same should be settled. After the death of H. and her husband, the property fell into possession :—Held, that it was included in the covenant. *Hill, In re*, 9 Jur. 942 ; 8 L. T. 825 ; 11 W. R. 930.

Covenant by husband and wife to settle "all real or personal estate, property, or effects to which the wife or the husband in her right shall by gift, descent, succession, or otherwise become entitled" :—Held, to include reversionary interests which fell in after the decease of both husband and wife. *Hughes' Trusts, In re*, 4 Giff. 432.

By a marriage settlement it was agreed and declared by the parties thereto, and the husband covenanted with the trustees of the settlement that all such property as the wife at the date of her marriage, or as she should become during coverture, seised, possessed of, or entitled to, should, so far as their respective rights, interests or powers over the same would allow, be conveyed and assigned to the trustees of the settlement. The wife was entitled at the date of her marriage to a vested reversionary interest. The reversion fell in after the death of the husband and wife :—Held, that the covenant was a covenant of the wife as well as by the husband, and that the reversionary interest was included therein. *D'Estampes, In re, D'Estampes* v. *Crowe*, 53 L. J., Ch. 1117 ; 51 L. T. 502 ; 32 W. R. 978.

Property not Reduced into Possession.]—A testator bequeathed his personal estate to his daughter, the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof ; but in case she should die without attaining twenty-one, or without disposing of it by will, then it was to be subject to the disposition by will of his wife. The daughter married under twenty-one, and by articles previously to her marriage the husband covenanted to settle all property left her by the testator upon her and himself for life, and then for their children :—Held, that she took the property for life only, with power to dispose of it by will, and that her husband not having reduced it into possession, the articles were not binding upon the wife. *Borton* v. *Borton*, 16 Sim. 552 ; 18 L. J., Ch. 219 ; 13 Jur. 247.

A settlement recited an agreement to settle all moneys to which the wife then was or thereafter during the coverture, or to which her husband in her right might become entitled, and that the husband should enter into the covenant to that effect thereinafter contained. The covenant was by the husband only :—Held, that the wife was entitled after her husband's death to receive a sum vested in her at the marriage, but not reduced into possession during the coverture. *Webb, In re*, 46 L. J., Ch. 769.

Covenant by Husband only.]—A settlement

recited an agreement that if any property should descend or devolve to the wife, it should be settled, and contained a covenant to the same effect but by the husband only. Reversionary property of the wife falling into possession after the husband's death held not subject to the settlement. *Young* v. *Smith*, L. R. 1 Eq. 180; 35 Beav. 87; 11 Jur. (N.S.) 963.

Executory Covenant by Husband.]—W., an intended husband, by articles covenanted with the intended wife and her trustee that he would, on demand in writing by either of them, settle any property to which she should become entitled, upon trust, during her life, as she should appoint; and in default, upon certain trusts. During the coverture reversionary property of the wife fell into possession, one moiety of which was realised by W., and the other moiety was invested by the former trustees, who took a release as to the moiety from the husband. W. died in the lifetime of his wife, without leaving issue of the marriage:—Held, that as the covenant was only the covenant of the husband, and merely executory, the widow was absolutely entitled to the moiety in the hands of the trustee, freed from the trusts. *Cramer* v. *Moore*, 3 Sm. & G. 141; 1 Jur. (N.S.) 915; 3 W. R. 347.

Husband's Covenant not Binding on Wife.]—A settlement contained an agreement between the parties and a covenant by the intended husband that the wife's after-acquired property, defined in wide terms, should be settled. After the husband's death sums of money, in which the wife during coverture had a reversionary interest, fell into possession:—Held, that they were not bound by the covenant which applied only to property to which the marital right attached. *Reid* v. *Kenrick*, 3 Eq. R. 1031; 24 L. J., Ch. 503; 1 Jur. (N.S.) 897; 3 W. R. 530.

Release by Wife Inoperative.]—A husband covenanted to settle future-acquired property on trust for himself for life, and after his death for his wife for life. He became entitled to a sum of money as next of kin, and his wife acquiesced in his receiving such sum, and signed a memorandum, by which she undertook not to take proceedings against the intestate's administrator:—Held, that the wife being under coverture could not bind her reversionary interest, or release the administrator from his breach of trust. *Cresswell* v. *Dewell*, 12 W. R. 123.

Covenant by Husband and Wife.]—A. being entitled to a reversionary interest for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to. The above interest having fallen into possession was held to be subject to the settlement. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., Ch. 319.

Where a woman joins in a covenant with her future husband to settle after-acquired property to which she or he in her right shall become entitled in possession, reversion, remainder, or expectancy, that covenant does not apply to a general power of appointment or to a life interest under a will, but does apply to a reversionary interest under the same will so far as her husband, in the event of his surviving her, would be entitled in her right. *Townshend* v. *Harrowby*, 27 L. J., Ch. 553; 4 Jur. (N.S.) 353; 6 W. R. 413.

Property Omitted Unintentionally.]—Upon marriage of a ward, the intended husband proposed to settle the whole of her fortune, and covenanted to settle any property to which she, or he in her right, "should at any time during the marriage" become entitled:—Held, that a reversionary interest omitted by oversight of the master ought to be included. *Bute (Marquis)* v. *Harman*, 9 Beav. 320.

Contingent Interest.]—An intended husband and wife covenanted that if they or either of them in her right, should at any time during the coverture "be or become entitled to any personal property the same should be settled." The wife was at the time interested in a legacy, bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry. The wife's father survived her husband:—Held, that the interest of the wife in the legacy during the coverture was contingent and not within the covenant. *Atcherley* v. *Du Moulin*, 2 K. & J. 186.

Covenant by an intended husband to settle all property which he and his wife, or either in her right, should at any time become possessed of or entitled to under any gift, devise, or bequest, or by any other means whatsoever, held to include property to which the wife at time of marriage was entitled under a will contingently on attaining twenty-one. *Worsley, In re*, 16 L. T. 826.

Covenant to settle after-acquired property held to bind a contingent interest liable to be divested to which the wife was at the time entitled, and which afterwards fell into possession. *Brooks* v. *Keith*, 1 Dr. & Sm. 462; 7 Jur. (N.S.) 482; 4 L. T. 541; 9 W. R. 565.

A settlement contained a covenant by the husband that if during the joint lives of the husband and wife any future portion, or real or personal estate, should come to or devolve upon the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling the same. The wife was then entitled to a contingent reversionary interest which, during the coverture, became vested, but did not come into possession until after the death of the wife:—Held, that it was not within the covenant. *Michell, In re*, 9 Ch. D. 5; 38 L. T. 462; 26 W. R. 762—C. A. Reversing 47 L. J., Ch. 12.

A mother had an exclusive power of appointment in favour of her children, over a fund which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed 10,000*l.* to her son on his marriage. His settlement recited an agreement to settle the 10,000*l.* and "all other his part, share, and interest, as well vested as contingent," in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one, and died, and the mother afterwards appointed the residue of the fund to her son:—Held, that such residue did not pass under his settlement. *Childers* v. *Eardley*, 28 Beav. 648.

Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled, held to bind a rever-

sionary interest to which the wife was then entitled contingently on her dying without issue. *Cornmell* v. *Keith*, 45 L. J., Ch. 689 ; 3 Ch. D. 767 ; 35 L. T. 29 ; 24 W. R. 633.

Reversionary Interest vesting in Wife liable to be divested by Exercise of Power of Appointment.]—A marriage settlement contained a covenant by the intended husband for the settlement of all personal estate which at any time during the coverture should come to or vest in him in right of his intended wife, or in her by bequest, gift, or otherwise :—Held, that a reversionary interest which during the coverture became vested in the wife, liable to be divested by the exercise of a power of appointment, was included in the covenant. *Ware, In re, Cumberlege* v. *Cumberlege-Ware*, 59 L. J., Ch. 717 ; 45 Ch. D. 269 ; 63 L. T. 52 ; 38 W. R. 767.

An intended husband and wife covenanted "that if at the time of the solemnisation of the intending marriage the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate, or effects, for any estate or interest whatsoever, then the husband and wife and all other parties shall, as soon as circumstances will permit," settle such property :—Held, that a reversionary interest vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant. *Jackson's Will, In re*, 49 L. J., Ch. 82 ; 13 Ch. D. 189 ; 41 L. T. 499 ; 28 W. R. 209.

Post-nuptial Settlement.]—By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled :—Held, that a contingent interest in a fund in court which fell into possession after the coverture, was bound by the covenant. *Agar* v. *George*, 2 Ch. D. 706 ; 34 L. T. 487 ; 24 W. R. 696.

By post-nuptial settlement in 1848, W. covenanted that if at any time he should by gift, descent, succession, or otherwise from or through M. become entitled to any real or personal estate, the same should be settled. W. was entitled to various interests in remainder subject to the life interest of M., who died in 1857, and to property under the will :—Held, that the covenant did not amount to a declaration of trust, or to an assignment so as to render the property derived from M. liable to the settlement. *Wilkinson* v. *Wilkinson*, 4 Jur. (N.S.) 47.

iii. *Remainders and Contingent Interests in Real Estate.*

Property not mentioned.]—A covenant to settle all the property of the wife of which she was then possessed includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was by the husband only, and though the recitals in the settlement specified other property in expectancy, but not this. *Caldwell* v. *Fellowes*, 39 L. J., Ch. 618 ; L. R. 9 Eq. 410 ; 22 L. T. 205 ; 18 W. R. 485.

An intended wife and husband severally covenanted that all property which the husband and wife, or either of them in right of the wife, "shall at any time during the coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture :—Held, that the land was not subject to the settlement. *Pedder's Settlement, In re*, 40 L. J., Ch. 77 ; L. R. 10 Eq. 585.

Wife bound by Assent.]—By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their live interest and appointment) to the wife, and the husband agreed to settle the same. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share :—Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law. *Lee* v. *Lee*, 46 L. J., Ch. 81 ; 4 Ch. D. 175 ; 36 L. T. 138 ; 25 W. R. 225.

Reversionary Interest of Wife.]—On the marriage of a lady, who was entitled under her father's will to interest in his residuary estate and two sums of cash in reversion expectant on her mother's death or marriage, and to no other property, a settlement was executed whereby the intended husband and wife covenanted that if at any time during the life of the lady any real or personal estate should be given or devised, descend or devolve, be bequeathed to come to her or her husband in her right, it should be settled. The property was to be held by the trustee upon trust to pay the income to the wife or her appointees, to the intent that the same might be and remain a separate personal and inalienable provision for the wife during the coverture ; and upon further trust to pay, assign or otherwise dispose of the same from time to time to the wife's appointees by deed or will :—Held, first, that the reversionary interest of the wife was bound by the covenant. *Spring* v. *Pride*, 4 De G. J. & S. 395 ; 10 Jur. (N.S.) 646 ; 10 L. T. 473 ; 12 W. R. 892.

Held, secondly, that the wife could not during the coverture affect against herself by way of anticipation any portion of the income arising from them. *Ib.*

The reversionary interests in question, whilst still reversionary, were assigned by the wife by a deed duly acknowledged to the trustees of the settlement by way of sale, he having been removed from his office by deed of even date ; the consideration was in fact in part made up of advances made by him to the husband. The wife received no explanation of her rights when she executed the assignment :—Held, that the sale must be set aside. *Ib.*

A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession ; and the intended husband and wife covenanted, if they should thereafter acquire any other share or interest in the farm, they would convey it upon the same trusts. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, but subject to a life interest :—Held, nevertheless, that it was also saleable under the power. *Giles* v. *Holmes*, 15 Sim. 359.

Remainder in Fee.]—A remainder in fee, which would vest in the intended wife immediately upon her father's decease, if he died

without having had other issue, was settled upon the intended husband for life upon the death of the wife "if she ever became entitled thereto, but not otherwise":—Held, that the husband's life estate vested in him, although the wife did not survive her father. *Wallace* v. *Wallace*, 1 Con. & L. 491; 2 Dr. & War. 452.

Contingent Remainder falling into Possession.]—Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and her settlement did not mention either, but contained a covenant to settle any real or personal property to which the husband and wife, or either of them in right of the wife, should "by gift, descent, succession, or otherwise howsoever become entitled," and the wife's remainder in the real estate fell into possession during the coverture:—Held, that the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but that the stock did not, there having been no change in her interest in that. *Archer* v. *Kelly*, 1 Dr. & Sm. 300; 29 L. J., Ch. 911; 6 Jur. (N.S.) 814; 8 W. R. 684.

Defeasible Interest.]—A covenant by husband and wife to settle all property which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture, become seised or possessed of or entitled to, only includes indefeasibly vested interests, and therefore does not include an estate tail which, at the date of the settlement, stood limited to the wife in remainder after other estates tail and came into possession after the husband's death. *Dering* v. *Kynaston*, L. R. 6 Eq. 210; 18 L. T. 346; 16 W. R. 819.

Failure of Contingency.]—A. being under a settlement tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement, containing a covenant, by which it is agreed that in case she shall in her lifetime become entitled to any such estate, the same shall be settled. The brother afterwards suffers a recovery, and died intestate, without issue; the fee simple thereupon descending upon her as co-heiress, held not to be within the covenant. *Taylour* v. *Dickenson*, 1 Russ. 521.

iv. *Property acquired after Termination of Coverture.*

Included.]—Covenant to settle after-acquired property of the wife:—Held, to extend to property acquired after the death of the husband. *Stevens* v. *Van Voorst*, 17 Beav. 305.

By a post-nuptial settlement, a husband and wife covenanted to settle all property which the wife might become entitled to during the coverture on themselves for life, with remainder to their children. Part of such property was paid to the trustees; the other part was not reduced into possession at the husband's death:—Held, that originally the settlement was binding on neither party, that the part paid over had been made subject to the trusts, and that the wife refusing, after the death of her husband, to perform her covenant, was not entitled to a life interest in the portion settled, which was applicable to recoup the children. *Anderson* v. *Abbott*, 23 Beav. 457; 3 Jur. (N.S.) 833; 5 W. R. 381.

Under a deed poll dated in 1833 A. was entitled, subject to certain successive life interests, to a share of certain sums thereby settled. By a settlement dated in 1841, made on the marriage of A. with B., B. covenanted to settle any property to which A., or B. in her right, should subsequently become entitled. A. died in 1852. B. was still living, but had assigned his interest. There were children of the marriage living. The last surviving tenant for life under the deed of 1833 having recently died, the funds thereupon became distributable:—Held, that the covenant of the husband, being in general terms, was not to be confined to property falling into possession during the coverture, and that the trustees of the settlement of 1841 were therefore entitled to A.'s share of the funds. *Fisher* v. *Shirley*, 59 L. J., Ch. 29; 38 W. R. 70.

Not Included.]—Covenant in a settlement that in case the wife, or the husband in her right, "should at any time thereafter, by descent, devise, bequest, or under the Statute of Distributions, acquire, succeed to, or become possessed of or entitled to any property, real or personal," the same should be settled, held to apply only to such property of the wife as she became entitled to during coverture, and not to money to which she became entitled after the death of her husband. *Alleyne* v. *Hussey*, 22 W. R. 203.

A marriage settlement made in 1839 recited an agreement by the husband and wife to covenant in manner thereinafter mentioned as to any personal property which during their joint lives should be given or bequeathed to the wife or the husband in her right, and contained a joint and several covenant by the husband and wife that if at any time after the marriage and during the wife's life any personal estate should be given or bequeathed or come to or devolve upon the wife or the husband in her right, then the husband and wife would vest such property in the trustees of the settlement on the trusts therein expressed for the husband and wife during life and thereafter for the children of the marriage:—Held, that personal property which after the husband's death came to the wife as next-of-kin of an intestate was not bound by the covenant. *Edwards, In re*, (ante, col. 842), followed. *Coghlan, In re, Broughton* v. *Broughton*, 63 L. J., Ch. 671; [1894] 3 Ch. 76; 8 R. 384; 71 L. T. 186; 42 W. R. 634.

Property under Husband's Will.]—A settlement contained a covenant by husband and wife to concur in settling all property which the wife, or the husband in her right, might thereafter become entitled to or interested in, under the will of the wife's father, or any other person whomsoever:—Held, that the covenant did not apply to property acquired by the wife under the husband's will subsequently made; but did apply to a reversion under a subsequent will of the father which did not fall into possession till after the husband's death. *Dickinson* v. *Dillwyn*, 39 L. J., Ch. 266; L. R. 8 Eq. 546; 22 L. T. 647; 17 W. R. 1122.

A joint and several covenant by an intended husband and wife, that if the wife, her executors or administrators, or her husband, his executors or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective

executors or administrators, would bring it into settlement, does not apply to real and personal estate coming to the wife under the husband's will. *Carter* v. *Carter*, 39 L. J., Ch. 268 ; L. R. 8 Eq. 551 ; 21 L. T. 194.

Effect of Divorce.]—A husband and wife covenanted to settle any property which the wife, or the husband in her right, should at any time become possessed of during the coverture. A decree nisi for the dissolution of the marriage was pronounced ; but pending the decree being made absolute, the husband and wife appointed a new trustee, and property fell into possession : —Held, not bound by the covenant. *Pearson's Trusts, In re*, 26 L. T. 393 ; 20 W. R. 522.

Judicial Separation—Effect of, upon Covenant.]—Where a marriage settlement contained a covenant to settle all property (except jewellery and money up to 200*l.*) which the wife, or her husband in her right, might acquire "during the intended coverture," and after a decree for judicial separation the wife became entitled to certain stocks :—Held, that by virtue of s. 25 of the Divorce Act, 1857, the stocks belonged to her as a feme sole, and that the covenant to settle "during the coverture" had become inoperative. *Dawes* v. *Creyke*, 54 L. J., Ch. 1096 ; 30 Ch. D. 500 ; 53 L. T. 292 ; 33 W. R. 869.

Legacy under s. 33 of Wills Act.]—A testator gave a legacy to his daughter, who predeceased him, leaving her husband and issue surviving : —Held, that notwithstanding the fictitious survivorship created by s. 33 of the Wills Act for the purpose of preventing a lapse, the legacy was not acquired during her coverture. *Pearce* v. *Graham*, 1 N. R. 507 ; 32 L. J., Ch. 359 ; 9 Jur. (N.S.) 568 ; 8 L. T. 378 ; 11 W. R. 415.

v. *Property settled to Separate Use of Wife.*

In General—Not Included.]—Covenant to settle after-acquired property held not to include property afterwards settled to separate use of wife with proviso against alienation. *Brookes* v. *Keith*, 1 Dr. & Sm. 462 ; 7 Jur. (N.S.) 482 ; 4 L. T. 541 ; 9 W. R. 565.

In a marriage settlement in which there were no recitals, the intended husband covenanted with the intended wife and the trustees that he would, at the request of the trustees or trustee for the time being, join with the wife in, or otherwise do, all such acts as might be required on his part in settling the after-acquired property of the wife. And it was thereby agreed and declared that, in the meantime until such settlement should be made, the property should be held upon the trusts upon which the same was thereby covenanted to be settled :—Held, that property to which the wife had become entitled during the marriage for her separate use was not bound by the covenant. *Macpherson, In re, Macpherson* v. *Macpherson*, 55 L. J., Ch. 922 ; 55 L. T. 346.

Gift with Restraint on Anticipation.]—A restraint on anticipation is equivalent to a restraint on alienation, and accordingly the shares of married women in residuary real and personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements ; and the capital of the personal estate is not payable to them on their separate receipt. *Currey, In re. Gibson* v. *Way*, 55 L. J., Ch. 906 ; 32 Ch. D. 361 ; 54 L. T. 665 ; 34 W. R. 541.

Where expressly Excepted.]—Covenant to settle the wife's after-acquired property (save and except "any estate or effects already settled to her separate use") :—Held, not to include a legacy afterwards bequeathed to her for her separate use. *Whitgreave* v. *Whitgreave*, 33 Beav. 533. S. P., *Coventry* v. *Coventry*, 32 Beav. 612 ; 2 N. R. 349 ; 9 Jur. (N.S.) 613 ; 8 L. T. 819 ; 11 W. R. 868.

A settlement, in which the wife's property was vested in trustees for her separate use, without anticipation, contained a covenant by the husband and wife that if at any time during the joint lives of them any further portion or estate should come to either of them, under any will, or otherwise, they would settle it (except such future estate as should be otherwise settled previously) upon the same trusts :—Held, that a legacy to the wife for her separate use, free from the debts, control, and engagements of her husband, was excluded from the covenant. *Kane* v. *Kane*, 50 L. J., Ch. 72 ; 16 Ch. D. 207 ; 43 L. T. 667 ; 29 W. R. 212.

Where Covenant by Husband Only.]—A covenant, by a husband alone, to settle the after-acquired property of the wife, does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition. *Coventry* v. *Coventry*, 32 Beav. 612 ; 2 N. R. 359 ; 9 Jur. (N.S.) 613 ; 8 L. T. 819 ; 11 W. R. 868.

In a settlement the husband alone covenanted to settle any property which his wife, or he in her right, might thereafter acquire :—Held, that property afterwards given to the wife for her separate use, was not affected. *Travers* v. *Travers*, 2 Beav. 179. S. P., *Ramsden* v. *Smith*, 2 Drew. 298 ; 2 Eq. R. 660 ; 23 L. J., Ch. 757 ; 18 Jur. 566 ; 2 W. R. 435 ; *Mainwaring's Settlement, In re*, L. R. 2 Eq. 487 ; 14 W. R. 887 ; *Hammond* v. *Hammond*, 19 Beav. 29 ; 3 Eq. R. 119 ; 2 W. R. 36 ; *Townsend* v. *Harrowby*, 27 L. J., Ch. 553 ; 4 Jur. (N.S.) 353 ; 6 W. R. 413 ; *Gataker* v. *Reynardson*, 12 L. T. 134 ; 13 W. R. 417.

A covenant by a husband to join his wife in settling all property to which she should become entitled :—Held, not to bind a legacy subsequently given to the wife to be at her own disposal and not subject to the jus mariti, or liable to be affected by his debts or deeds. *Grey* v. *Stuart*, 2 Giff. 398 ; 30 L. J., Ch. 884 ; 7 Jur. (N.S.) 989 ; 5 L. T. 200.

By a Scotch settlement all future property of the wife was settled on the husband for life, with remainder to the wife. A legacy of 2,000*l.* was afterwards bequeathed for the wife's separate use for life, without anticipation, with trusts over for the husband and children. The husband having become bankrupt :—Held, that his assignees had no interest in the dividends on the 2,000*l.* which were ordered to be paid to the wife during her life. *Duncan* v. *Cannan*, 4 W. R. 2.

Where it was agreed by an intended husband, that any money which he might devolve to the wife, should be settled on her and his children

by her, he drawing the interest, and the wife's father afterwards bequeathed a legacy for her separate use, as to which she died intestate :—Held, that the legacy was not subject to the trusts, but that the husband took it jure mariti, and that a settlement which had been prepared at his instance, by which the interest was settled upon himself for life, and the principal upon the children, should be carried into execution. *Drury* v. *Scott*, 4 Y. & C. 264 ; 5 Jur. 405.

To an action for money had and received, a plea, by way of defence on equitable grounds, that, by a marriage settlement, the plaintiff covenanted to settle any personal estate he might acquire in his wife's right, and that this money was bequeathed to her separate use, is bad, such a covenant not applying to money bequeathed to the separate use of the wife. *Sloper* v. *Cottrell*, 6 El. & Bl. 497 ; 26 L. J., Q. B. 7 ; 2 Jur. (N.S.) 1046.

Where Covenant by Husband and Wife.]—A feme being entitled to a reversionary interest for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to : the above interest having fallen into possession was held subject to the settlement. *Tawney* v. *Ward*, 1 Beav. 563.

Husband and wife covenanted to settle "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use" :—Held, that the property bequeathed to her "for her separate use absolutely" was bound by the covenant, and that chattels bound by the covenant were to be enjoyed in specie. *Milford* v. *Peile*, 17 Beav. 602 ; 2 W. R. 181.

F. was entitled, as the only child of her father and mother, subject to their life interests and to a power of appointment in favour of children, grandchildren, or other issue given to them or the survivor of them, to 7,500*l*. In the settlement made on the marriage of F. with D. was a covenant by D. and F. to assure to the trustees all real and personal estate vested in F., or which should become vested in D. in her right, and all real and personal estate which F. and D., in her right during the coverture, might become entitled to. D. died, leaving two children ; then F.'s father died, without having exercised the power. F.'s mother then died, having by her will appointed the whole fund to F. absolutely for her separate use :—Held, that the fund was subject to the covenant. *Frowd, In re*, 4 N. R. 54 ; 13 L. T. 367.

In a settlement it was declared, and the husband covenanted, that in case during the coverture any real, personal, or mixed estate should come to or vest in the wife, or the husband in her right, by devise, descent, gift, or otherwise, it should be settled by the husband, his executors and administrators, and the wife : Held, that a legacy given to the separate use of the wife was within the covenant. *Campbell* v. *Bainbridge*, 37 L. J., Ch. 634 ; L. R. 6 Eq. 269 ; 19 L. T. 254 ; 17 W. R. 5.

An intended husband and wife covenanted to settle all property to which the wife then was, or during the coverture she or her husband in her right should become, entitled by devise, bequest, or otherwise "for any estate or interest whatsoever." During the coverture the wife's father died, having by his will devised and bequeathed a moiety of his residuary real personal estate to her "for her separate use, and independently of any husband" :—Held, that the moiety was bound by the covenant. *Mainwaring's Settlement, In re* (supra, col. 860), not followed. *Allnutt, In re. Pott* v. *Brassey*, 52 L. J., Ch. 299 ; 22 Ch. D. 275 ; 48 L. T. 155 ; 31 W. R. 469.

Where Covenant by Wife.]—A covenant by the intended wife to settle property which shall afterwards devolve upon her, binds all property to which she may subsequently become entitled to her separate use for an interest exceeding an estate for her own life, and not subject to restraints on anticipation. *Portadown, Dungannon and Omagh Junction Ry., In re*, Ir. R. 1 Eq. 293.

Property settled to the separate use of a married woman will not be bound by a covenant by her to settle after-acquired property if there are directions showing the donor's intention that it should not be so bound. *Young, Ex parte*, 15 W. R. 975.

An intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during coverture, become entitled, upon the trusts thereby declared, for herself, the husband, and the children of the marriage. The wife, during coverture, in exercise of a power contained in and conferred by a will, appointed to herself, for her separate use, a sum of 1,000*l*., and an annuity of 100*l*. for her life, reserving a power of revocation :—Held, that upon the appointment of the 1,000*l*. for her own absolute use, that sum became bound by the settlement, and the power of revocation was ineffectual : — Held, also, that the interest in the annuity of 100*l*. for her own life, for her separate use, which the wife took under her appointment (an interest in conformity with that which she would have taken under the settlement if the annuity had been otherwise acquired), was not disturbed by the settlement, inasmuch as it was not the intention that any after-acquired property should be taken otherwise than in the state in which it should be so acquired. *Ewart* v. *Ewart*, 11 Hare, 276 ; 1 Eq. R. 536 ; 17 Jur. 1022 ; 1 W. R. 466.

Covenant by Wife under Age.]—A married woman having, by her settlement, executed when a minor, covenanted to confirm the settlement, and also to settle future property ; and having acquired, by bequest, personal property to her separate use :—Held, bound to elect either to bring the bequest into settlement, or to make compensation out of reversionary personalty, and other property to which she would be entitled under the settlement, for her separate use, with a restraint on anticipation. *Willoughby* v. *Middleton*, 2 J. & H. 344 ; 31 L. J., Ch. 683 ; 8 Jur. (N.S.) 1055 ; 6 L. T. 814 ; 10 W. R. 460.

An agreement by husband and wife, in an ante-nuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. She may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, but in electing to confirm the covenant, she thereby binds only that separate

property to which she is entitled at the date of the confirmation, and not that to which she may subsequently become entitled. Semble, the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation. *Willoughby* v. *Middleton*, supra, questioned on this point. *Smith* v. *Lucas*, 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

Effect of Recital.]—A settlement recited an agreement that the intended husband and wife should covenant for the settlement of such property as should devolve upon the wife or the husband in her right through C.; and the husband and wife severally covenanted that if they or the husband in right of the wife should become possessed of or entitled to any such property, except interests given to the wife for her life, and which, as was thereby stated, should, unless settled to her separate use, be so settled, then such property should be settled:—Held, that the covenant did not include property bequeathed by C. to the wife absolutely for her separate use, and that the construction was not altered by the recital or the words of exception. *Burn-Murdoch* v. *Charlesworth*, 23 W. R. 743.

By a settlement, after a recital that it was agreed that all property which during the coverture should devolve upon the wife or the husband in her right should be settled, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted that if during the coverture any real or personal estate should devolve on the wife or the husband in her right, he would join and concur in settling the same. A sum afterwards became payable to the wife for her separate use:—Held, that as the operative part of the deed was clear, the recital could not control it—that there was, therefore, no covenant by any one but the husband—and the wife was not bound to bring into settlement property given to her separate use. *Dawes* v. *Tredwell*, 18 Ch. D. 354; 45 L. T. 119; 29 W. R. 793—C. A.

No Covenant by Wife—Recitals.]—A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, and that the husband should enter into the covenant in that behalf thereinafter contained. The corresponding operative part of the deed was a covenant by the husband alone (without the usual words "It is hereby agreed") that he and his wife would settle such property, and that until such settlement the husband and wife should stand possessed of the same upon the trusts of the settlement. The wife as well as the husband executed this settlement, and during the coverture property was given to the wife for her separate use:—Held, that the operative words were sufficiently ambiguous to enable the court to look at the recitals, and that on the whole instrument the wife's after-acquired separate property was bound by the covenant. *De Ros' Trust, In re, Hardwicke* v. *Wilmot*, 55 L. J., Ch. 73; 31 Ch. D. 81; 53 L. T. 524; 34 W. R. 36.

Effect of Married Women's Property Act.]—A settlement made in 1862 contained an agreement for settlement of any future-acquired property of the wife (except interests settled to her separate use). The wife, after the Married Women's Property Act, 1882, became entitled absolutely to a bequest without any limitation as to separate use:—Held, that by s. 19 of the above act the settlement was exempted from the 5th and other sections; and that the bequest came within the covenant to settle future-acquired property, and must be dealt with as if the act had never been passed. *Stonor's Trusts, In re*, 52 L. J., Ch. 776; 24 Ch. D. 195; 48 L. T. 963; 32 W. R. 413.

By ante-nuptial settlement of 1873 the husband and wife covenanted to settle after-acquired property of the wife other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case the value of 1,000*l*., "or any property belonging, or which may be given or bequeathed to or settled upon her for her separate use, all which accepted articles and property shall belong to the said (wife) and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture." Under the will, made in 1844, of her father, who died in the same year, the wife became entitled to a share of personalty exceeding 1,000*l*., and not limited to her separate use:—Held, that having regard to s. 19 of the Married Women's Property Act, 1882—the effect of which is to limit the operation of s. 5 by preventing the provisions of marriage settlements from being interfered with or affected by withdrawing therefrom property, which independently of the act must have been brought into settlement—the share of the wife under her father's will had not been made separate estate so as to fall within the exception, but was bound by the covenant to settle after-acquired, other than separate, property. And, semble, per Cotton, L.J., upon the construction of the covenant, independently of s. 19, the property in question was not within the exception. *Stonor's Trusts, In re* (supra), approved. *Whitaker, In re, Christian* v. *Whitaker*, 56 L. J., Ch. 251; 34 Ch. D. 227; 56 L. T. 34; 35 W. R. 217—C. A.

By a post-nuptial settlement made in 1847, it was agreed and declared by and between the husband, wife, and trustees, and the husband covenanted, that all property to which the wife, or her husband in her right, was then or should during the coverture become possessed of or entitled to, should be assured upon trust for the wife for life to her separate use without power of anticipation, and after her death upon trusts in favour of the husband and issue of the marriage. During the coverture, property of the wife was reduced into possession by the husband, and settled upon the trusts of the settlement. In 1883 the wife became entitled, as one of the next-of-kin of a deceased testator, to a share of undisposed-of personalty:—Held, first, that the operation of s. 5 of the Married Women's Property Act, 1882, conferring on women married before the 1st of January, 1883, the right to hold and dispose of as their separate property all real and personal property accruing after that date, was not displaced by s. 19 of the act, which saves "any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman"; but that s. 19 referred only to settlements made by and binding upon married women; and, therefore, that the settle-

ment, so far as it purported to be made by the wife, being void, the wife was entitled to the undisposed-of personalty as her separate property. *Stonor's Trusts, In re* (supra), distinguished. Secondly, that the wife could be put to her election, notwithstanding that the compensating fund was subject to restraint on anticipation. *Queade's Trusts, In re*, 54 L. J., Ch. 786 ; 53 L. T. 74 ; 33 W. R. 816.

The effect of s. 19 of the Married Women's Property Act, 1882, is so to modify the operation of s. 5, that the persons interested under a settlement of the property of a married woman are not by s. 5 deprived of any benefit to which they would have been entitled under the settlement in case s. 5 had not been enacted. *Hancock* v. *Hancock*, 57 L. J., Ch. 396 ; 38 Ch. D. 78 ; 58 L. T. 906 ; 36 W. R. 417—C. A.

An ante-nuptial settlement executed in 1870, contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, on the death of the wife's mother, the wife became entitled under her will to a share of the mother's personal estate, which was not limited by the will to the separate use of the wife :—Held, that this share was, notwithstanding the act of 1882, bound by the covenant in the settlement. *Queade's Trusts, In re* (supra), disapproved. *Ib.*

Infancy of Wife—Subsequent Repudiation—Married Women's Property Act, 1882.]—Any property of a woman married after the Married Women's Property Act, 1882, which would have been bound, apart from the Act, by an assignment of the husband alone in a settlement, is still bound by such assignment under s. 19, notwithstanding s. 2, which makes the property of a woman married after the act her separate property. *Hancock* v. *Hancock* (supra) applied and followed. *Stevens* v. *Trevor-Garrick*, 62 L. J., Ch. 660 ; [1893] 2 Ch. 307 ; 3 R. 468 ; 69 L. T. 11 ; 41 W. R. 412.

vi. *Other Property.*

Under Power of Appointment.]—A covenant by husband and wife to settle after-acquired property to which she or he in her right shall become entitled in possession, reversion, remainder, or expectancy, does not apply to a general power of appointment and a life interest given to her under a will. *Townshend* v. *Harrowby*, 27 L. J. Ch. 553 ; 4 Jur. (N.S.) 353 ; 6 W. R. 413.

Assignment of property to be acquired by wife will not make property over which she acquires a power only, subject to the settlement, unless she exercise the power in favour of herself absolutely. *Ewart* v. *Ewart*, 1 Eq. R. 536 ; 1 W. R. 466.

A covenant in a settlement to settle property to be acquired "under or by virtue of" the will of the wife's father :—Held, not to comprise property over which the father had by will exercised a power of appointment amongst his children, given to him by an earlier settlement. *Evans* v. *Jennings*, 1 N. R. 178.

Property Expressly Excepted.]—By a deed of ante-nuptial settlement, the intended husband covenanted with the intended wife that "he will have no claim or demand to that part of the lands of B. now in her possession, nor any stock thereon, nor to the crops thereof during her life, nor to the furniture of said house ; but she is to have claim and control over the stock and furniture during her natural life, and that she can dispose of the farm and lands of B., together with the furniture of the said house thereon, together with the crops growing on the said premises at the time of her death, and the house and furniture, either by deed or will, to such person or persons as she may think fit." The wife was seised of the lands of B. for a freehold estate, and after marriage she farmed these lands, and purchased farming stock out of the profits. She died in her husband's lifetime, having made a will, by which she devised and bequeathed to P. "the said lands and all the stock that may be thereon, and all the household furniture in the dwelling-house on the said lands" :—Held, upon the true construction of the settlement, that the wife had power to dispose by will of the stock on the lands of B. at the time of her death. *Purcell* v. *Sheehy*, 16 L. R. Ir. 439.

Personalty—Not Included.]—The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth and all other her share by survivorship or otherwise, and all her right, contingent, reversionary, or otherwise, possibility, &c., therein. She afterwards became entitled to a further share by the death of a brother intestate :—Held, that it was not included in the settlement. *Edwards* v. *Broughton*, 32 Beav. 667 ; 2 N. R. 476 ; 11 W. R. 1038.

Settlement by a husband of all his personal estate to which he was then or might thereafter become entitled, in trust for himself for life, with remainder absolutely to his wife :—Held, not to comprise his interest in a fund bequeathed to him for life, with remainder to his children. *St. Aubyn* v. *Humphrey*, 22 Beav. 175.

A covenant by a husband to settle all future-acquired property on himself, his wife and children, does not include his life interest in property bequeathed to him, with a direction to settle it on himself and his family. *White* v. *Briggs*, 22 Beav. 176.

D., by his settlement, agreed that if he then was, or should during the intended coverture become entitled to any property of the value of 100*l.* or upwards from any estate or interest whatsoever, he would settle the same. He was at the time in receipt of half-pay, which he subsequently commuted for 2,175*l.* :—Held, that the commutation money was not bound by the settlement. *Churchill* v. *Denny*, 44 L. J., Ch. 578 ; L. R. 20 Eq. 534 ; 23 W. R. 825.

A covenant in a marriage settlement to settle after-acquired property of the wife does not bind investments made by her with the savings of her separate income. *Lewis* v. *Madocks* (post, col. 879), explained. *Bendy, In re, Wallis* v. *Bendy* (ante, col. 849), differed from. *Finlay* v. *Darling*, 66 L. J., Ch. 348 ; [1897] 1 Ch. 719 ; 76 L. T. 461 ; 45 W. R. 445.

Realty—Included.]—By a settlement, of 1794, A. conveyed certain specified lands, together with all other the lands which he was then or thereafter might be entitled to, in reversion, remainder, or otherwise howsoever, to the trustees, and

covenanted to do any act if required, concerning the specified lands, or any other lands which he should thereafter be entitled unto, for the further carrying out the settlement. In 1819 a judgment was recovered against A.; and, in 1839, he became entitled, as heir-at-law of his brother, to other lands not specified in the settlement. In 1859 A. died:—Held, that the trusts of the deed of 1794 attach to the latter lands on their acquisition by A., without any further act by him, and that his eldest son, claiming under that deed, was entitled to hold them discharged of the judgment. *Stack* v. *Bryse*, 12 Ir. Ch. R. 246.

P., on his marriage with T., executed a bond to be void, if, in the event of T. surviving P., his executors, &c., should, within three months after his decease, pay to trustees 1,000*l.* in trust for T., and if in the event of P. surviving T., and there being any children of the marriage living at the decease of P., his executors, &c., should, within three months after his decease, pay to trustees 1,000*l.* in trust for such children; "and, further, if P. should during his natural life become seised of any messuages, &c., in possession, and should settle the same upon T. and the issue of the said intended marriage, to such uses as should be thought requisite, the better to make a provision for T., in case she should happen to survive P." After the death of T., P. having married again, and then become seised of real estates, and having at his death left issue by both marriages, such real estates were held subject to the obligation, and settled on the issue of the first marriage. *Prebble* v. *Boghurst*, 1 Swanst. 309; 1 Wils. Ch. 161.

A settlement made in 1819 recited an agreement that "one moiety of all such property as A., the settlor, should, during the intended coverture, be or become seised or possessed of, or entitled unto should be settled;" and contained a covenant by A. "that in case any or other real estate, should during the intended coverture accrue unto or vest in him, upon the death of any person whomsoever he would settle one moiety thereof. His father and elder brother were then living. The elder brother died intestate in 1825, and the father died in 1828. Thereupon A. became his heir-at-law, and certain lands and tenements, of which he had a vested remainder in tail expectant on the death of his father, and defeasible under the father's power of appointment (not exercised), fell into possession. A disentailing deed was afterwards executed by A.:—Held (reading the covenant with the assistance of the recital), that the estate, which became vested in fee in the settlor, was an estate which accrued to him for the first time, and became an indefeasible estate in possession upon the death of his father, and therefore was included in the expression "of any person whomsoever," and was subject to the covenant. *Maclurcan* v. *Lane*, 5 Jur. (N.S.) 56; 7 W. R. 135.

On the marriage of an English lady with a foreigner, her bank annuities were settled in trust for her, her husband, and their children; and her real estates were directed to be sold and the produce held on similar trusts. And it was agreed between all the parties, and the husband covenanted, that in case any real or personal estate should vest in the wife, or in him in her right, he, as far as he lawfully could, would, either alone or in concurrence with his wife, settle it upon the same trusts. Real estates descended on the wife. The husband and some of the children were aliens:—Held, that the lands descended were bound by the covenant. *Master* v. *De Croismar*, 11 Beav. 184; 17 L. J., Ch. 466; 12 Jur. 762.

Realty—Not Included.]—By a settlement, real estate was conveyed to such uses as M. (the intended wife) should by will appoint, and in default to certain other uses, and it was provided that all property which during the coverture should come to or vest in the husband in right of M., or in M. by descent, devise, limitation, gift, or otherwise, should be settled to the same uses. M., by will, made shortly after, devised all her property, "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." M. purchased real estate, and it was conveyed to the uses of the settlement:—Held, that the exception in the will referred only to the property then subject to the settlement, and that the real estate subsequently purchased by M. passed under her will. *Hughes* v. *Jones*, 2 N. R. 417; 32 L. J., Ch. 487; 9 L. T. 143; 11 W. R. 898.

Realty and Personalty—Included.]—Where a lady had, by an ante-nuptial settlement, assigned and conveyed to trustees whatever she might "conquest or acquire" during the marriage:—Held, that the words "conquest" and "acquire," so used, were sufficient to pass to the trustees property of every kind which during the marriage had come to her by succession. *Diggens* v. *Gordon*, L. R. 1 H. L. (Sc.) 136.

——Not Included.]—A settlement contained a covenant by husband and wife jointly and separately, to settle property which they or either of them in her right should become entitled to during the coverture, except the wife's life interests, and property settled to her separate use. The wife's brother gave all his real and personal estate to the wife and her husband, their heirs, executors, &c., as joint tenants:—Held, that the property was within neither the letter nor the spirit of the covenant. *Elye* v. *Addison*, 3 N. R. 66; 1 H. & M. 781; 33 L. J., Ch. 132; 9 Jur. (N.S.) 1320; 12 W. R. 97.

Property of Bankrupt—Included.]—On the marriage of J. with E. neither party being possessed of any property, articles were entered into providing for settlement of all property which E. was then or thereafter might become entitled to, upon trust, as she should appoint; and in default to her for her separate use for life, and then for the husband for life, and then for children; and that the settlement should contain a covenant by J. that all property which he or the wife should thereafter become entitled to should be settled upon the like trusts. J. was largely indebted at the time of the marriage, and a few months afterwards took the benefit of the Insolvent Debtors Act, and after that became entitled, as heir-at-law and next of kin, to real and personal estate from a deceased brother:—Held, that the property was subject to the articles, and was not liable to pay the creditors. *Hardey* v. *Green*, 11 Beav. 182; 18 L. J., Ch. 480; 13 Jur. 777.

A., on his marriage covenanted that all his property, real and personal, as well that in

possession as that afteracquired, should be charged with the sum of 3,000*l.* for his wife and issue. After marriage he became a trader, and was declared a bankrupt :—Held, that the covenant created a valid charge on all the freehold estates of A. purchased subsequently to his marriage, as against the assignees of the bankrupt. *Lyster* v. *Burroughs*, 1 Dr. & Wal. 149. And see *Gubbins* v. *Gubbins*, *id.* 160, n.

——**Not Included.**]—A trader by a settlement made before marriage, settled property for the benefit of his wife and children, and covenanted to settle all other real or personal estate to which he should become entitled during the coverture upon trusts thereby declared. No trusts of the after-acquired property were declared in the settlement. After the marriage, when still solvent, he purchased some shares ; the shares were registered in his name, and he held the certificates. Subsequently he filed a petition for liquidation :—Held, that the shares must be handed to the trustees in the liquidation. *Bolland, Ex parte, Clint, In re*, 43 L. J., Bk. 16 ; L. R. 17 Eq. 115 ; 29 L. T. 543 ; 22 W. R. 152.

Husband's Covenant in General Terms—Bond.]—Execution decreed of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time, during the coverture, be possessed of. *Lewis* v. *Madocks*, 8 Ves. 150 ; 17 Ves. 48 ; 7 R. R. 10.

——**Property Acquired "by Devise, Purchase, or Otherwise"—Shares—Policy of Insurance.**]—A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate, real or personal, of or to which he should, at any time thereafter during marriage, become possessed or entitled by devise, bequest, purchase, or otherwise. He afterwards purchased some shares and effected some policies of insurance on his life :—Held, that the covenant on the settlement was in fact divisible, and that the shares and policies were "property," and property of or to which the settlor had "during the marriage become possessed or entitled by purchase" within the specific words of the covenant. Whether the covenant would have been capable of enforcement if it were in fact indivisible, or if, though divisible, the shares and policies had not come within one of the particular classes specified in it, quære. *Turcan, In re*, 58 L. J., Ch. 101 ; 40 Ch. D. 5 ; 59 L. T. 712 ; 37 W. R. 70—C. A.

Leasehold Interest subsequently Acquired.]—By marriage articles made in 1886 between W. Y. B., L. K. B. his intended wife, and the plaintiff and three other trustees, it was agreed that so soon as might be after the marriage, a settlement should be made of the property therein mentioned, and W. Y. B. agreed to settle any property which he might acquire during the intended coverture. The marriage took place, and a settlement was executed accordingly. Subsequently the plaintiff demised certain property to W. Y. B. for twenty-one years, W. Y. B. covenanting to keep the property in repair, and not to assign or underlet without leave of the lessor. W. Y. B. thereafter became bankrupt, and the premises were surrendered to the plaintiff by the trustee in bankruptcy. In an action by the plaintiff against L. K. B. claiming possession of the premises :—Held (following *Lewis* v. *Madocks* (supra)), that the covenant in the settlement primâ facie included the premises ; that, as the difficulty as to underletting could be got over in the manner pointed out in *Turcan, In re* (supra), the trustees would be able to apply the income arising therefrom for the benefit of the cestuis que trust, and that consequently the premises must be held bound by the trusts of the settlement. *Churston (Lord)* v. *Buller*, 77 L. T. 45.

Annuities—Fitting in with Trust of Settlement.]—By an ante-nuptial settlement made in 1870 the intended husband and wife respectively covenanted with the trustees that all the estate, property, and effects, real or personal, of or to which the wife, or the husband in her right, should at any time during the coverture become seised, possessed, or entitled, should be assured and settled, as regarded personal estate, upon trust, as to such part thereof as should not consist of money or authorised investments, or of interests determinable on the death of the wife, upon trust to convert, and to invest the proceeds, and such part of the estate as should consist of money, upon such investments as therein mentioned, and during the joint lives of husband and wife pay "the interest, dividends, and annual proceeds thereof" to them in equal shares, the share of the wife to be for her separate use without power of anticipation. By a deed of the same date the wife's father covenanted with the trustees to pay to them an annuity of 500*l.* to be applied by them upon trusts corresponding with those of the income of the personal property mentioned in the covenant. In 1874 the wife's father bought up the husband's interest in this annuity, and assigned it to trustees for the wife's separate use with no restraint on anticipation :—Held, that the covenant to settle included life annuities given to the wife, that the share assigned by the wife's father in the annuity of 500*l.* was bound by the covenant, and that, during the joint lives of the husband and wife, three-fourths of the annuity belonged to the wife for her separate use with a restraint on anticipation, and the remaining fourth to the trustee of the husband, who had become bankrupt, and that persons to whom the wife had mortgaged the interest assigned in 1874 took nothing. *Scholfield* v. *Spooner*, 53 L. J., Ch. 777 ; 26 Ch. D. 94 ; 51 L. T. 138 ; 32 W. R. 910—C. A.

Covenant to Settle—"Equal Child's Share"—Advancement to other Children.]—A., by settlement on the marriage of his son B., covenanted to settle an equal child's share for B., rateably and in proportion to the several children of him the said A., of all the property, real and personal, he should die possessed of. A., in his lifetime, made advances to some of his children. By his will, A. directed a valuation to be made of his estate, that all his debts, funeral and testamentary expenses should be paid, and that the clear amount of the residue of his real and personal estate should be ascertained, and the testator gave such an amount as would be equivalent to one-seventh of the real and personal estate when so ascertained, to the trustees of the settlement, in satisfaction of the covenant. After several other bequests, he directed that, subject as aforesaid, his trustees should be possessed of all his residuary real and personal

estate, in trust for such of his children, save B., as should survive him, in equal shares. A. died, leaving B. and six other children him surviving:—Held, that the one equal seventh share, to which B. was entitled, meant one-seventh of the property of which the testator died actually seised and possessed, and without taking into account the advancements which he had made to others of his children. *Stephens* v. *Stephens*, 19 L. R. Ir. 190.

vii. *Amount.*

Construction.]—When a covenant to settle after-acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source. When such property has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement. *Hood* v. *Franklin*, L. R. 16 Eq. 496; 21 W. R. 724.

In a settlement it was agreed to settle the property which the intended wife should at any time during the coverture become entitled to. The wife was then entitled in reversion, on the death of her mother, to 212*l.*, and she became entitled by her mother's will to another sum of more than 500*l.*:—Held, that the words "at any time" meant "from one and the same source," and that the sum of 212*l.* was not bound by the covenant. *Hooper, In re*, 5 N. R. 462; 11 Jur. (N.S.) 478; 12 L. T. 137; 13 W. R. 710.

Distinct Interests under same Will.]—A settlement contained a covenant to settle after-acquired property of the value of 500*l.* and upwards. The wife's mother subsequently bequeathed to her some specific chattels, and to the trustees the residue of her estate upon the trusts of the settlement, being trusts for the separate use of the wife for life:—Held, that that residuary bequest could not be taken into account when computing the value of the specific chattels. *Forster* v. *Davies*, 4 De G. F. & J. 133; 31 L. J., Ch. 276; 8 Jur. (N.S.) 65; 10 W. R. 180.

By a settlement it was agreed that all property which, during the joint lives of the husband and wife, should devolve upon the wife or the husband in her right, and which should, at the time when the same should respectively so devolve, exceed the value of 500*l.*, should be settled. By a subsequent will a legacy of 200*l.* was left to the wife, and a share, exceeding 500*l.* of the residuary estate of the testator was also given to her for her separate use:—Held, that the legacy of 200*l.* need not be settled. *Middleton, In re*, 16 W. R. 1107.

By a settlement it was provided that all further or other portions or personal estate of the intended wife should be settled, but not unless every such legacy or interest should at each time amount to 500*l.* The wife became entitled under the will of her mother to 1,000*l.*, and also to 350*l.* on the death of one of her sisters as one of her next of kin. The property of which the sum of 350*l.* was a part was also derived from the will of the mother, by which it was bequeathed to the sister for life with remainder to her (the sister's) next of kin:—Held, that the sum of 350*l.* was not subject to the covenant. *Buller* v. *Hornby*, 25 L. T. 901; 20 W. R. 198.

Time of Computing.]—A settlement contained a covenant that if, during the coverture, the wife should become entitled to any property of the value of 500*l.* or upwards, it should be settled. After the marriage a sum of 5,499*l.* 19*s.* 1*d.* was bequeathed upon such trusts as the wife should appoint. She executed eleven successive deeds, several of them on the same day, by each of which she appointed 499*l.* 19*s.* 11*d.* for her own separate use:—Held, that the money was not bound by the covenant in the settlement. *Bower* v. *Smith*, 40 L. J., Ch. 194; L. R. 11 Eq. 279; 24 L. T. 118; 19 W. R. 399.

By a settlement it was agreed that if the wife then was, or if during the coverture she or her husband in her right, should become entitled to any property of the value of 500*l.*, or upwards, the same should as soon as circumstances would admit, be settled. Under a will, which came into operation prior to the settlement, an annuity was given to be applied wholly or in part for the benefit of a widow, the unapplied balance to be divided among a class of persons, of whom the wife was one. The period for division happened after the determination of the coverture, and the share of each person participating then amounted to over 500*l.*, but neither at the date of the settlement, nor at any time during the coverture, did such share amount to 500*l.*:—Held, that the share was not subject to the settlement. *Welstead, In re, Welstead* v. *Leeds*, 47 L. T. 331.

A settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any property of the value of 400*l.* for any estate or interest whatsoever, it should be settled upon certain trusts. The wife was then entitled, on the death of her mother, to a share in stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above 400*l.*, but the value of the wife's reversionary interest in them at the date of the settlement was much less than 400*l.* On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage.

Secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it.

Thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately. *Mackenzie, In re*, 36 L. J., Ch. 320; L. R. 2 Ch. 345; 16 L. T. 138; 15 W. R. 662.

Proportional Settlement.]—Covenant in marriage articles, by the husband, "inasmuch as he was to be absolutely entitled to all the wife's personal estate," to settle "in respect of any sum that might come to her afterwards, after the rate of 100*l.* per annum, on her for life, for every 1,000*l.*, and upon certain contingencies that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a decree for 400*l.* of the wife's money, but did not receive it:—Held, she was entitled to a settlement according to that proportion, and, the contingencies having happened, to the moiety likewise of all sums received, including

the 400*l.*; since the husband might have received it. *Prime* v. *Stebbing*, 2 Ves. 409.

A sum of 865*l.* stock, partly belonging to the husband and partly to the wife, was settled (subject to the interests given to the husband, wife, and children) as to the husband's part on the husband's executors, and as to the wife's to her next of kin. The settlement contained a covenant, that the after-acquired property of the wife should be settled on like trusts:—Held, that the husband and wife's representatives were, under the ultimate limitation, entitled to the wife's after-acquired property in proportion to their interests in the 865*l.* *Stevens* v. *Van Voorst*, 17 Beav. 305.

viii. *Enforcing.*

Power of Appointment—Exercise in Breach of Covenant — Damages.]—By a marriage settlement, dated in 1867, a husband and wife covenanted to settle all property to which the wife, or the husband in her right, should at any time during the coverture become entitled; and that if any power of appointment over any property should become vested in the wife during the coverture, the same should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture the wife became donee of a general testamentary power of appointment over a sum of stock, under the will of her father, who died in 1871. She died in 1892, having by her will exercised the power in favour of persons other than the trustees:—Held, that specific performance of the covenant by the wife to exercise the power in favour of the trustees must be refused; but that, there having been a breach by the wife of her covenant, the trustees were entitled to recover damages against her executors to the extent of the assets come to their hands, the measure of such damages being the value of the property which would have come to the trustee if the covenant had been performed. *Parkin, In re, Hill* v. *Schwarz*, 62 L. J., Ch. 55; [1892] 3 Ch. 510; 67 L. T. 77; 41 W. R. 120.

Volunteer Claiming Benefit—Defective Execution of Power.]—The maxim that equity looks upon that as done which ought to be done, applies only (in cases depending on contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers. By a marriage settlement executed in 1853, certain personal estate was assigned to trustees upon trust in case the husband should die in the lifetime of the wife, and there should be no children of the marriage, to stand possessed thereof for the wife, her executors, administrators, and assigns. The settlement contained a covenant by the husband and wife that any real estate to which the wife should become entitled, whether in possession, reversion, remainder, or expectancy, or over which she should have an absolute power, should be assured to the trustees to be held by them upon the same trusts as the above-mentioned personal estate, or as near thereto as the nature of the property would admit of, and until so assured should be subject to the trusts and enjoyed accordingly. By a deed executed in 1873, certain lands called the Stonehouse property were conveyed to trustees for the wife during the joint lives with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and in default of appointment to the husband in fee. By a codicil to her will made in her husband's lifetime the wife devised the Stonehouse property to two persons. The husband died in May, 1882, and the wife in the month of June following. She never republished her will or codicils. There were no children of the marriage, and the Stonehouse property was never assured to the trustees on the trusts of the marriage settlement. In an action to administer the real and personal estate of the wife:—Held, that the covenant to assure after-acquired property could not be enforced or treated as operative in favour of the heir-at-law, that the declaration of trust annexed to it could not be regarded in his favour as a defective execution of a power which the court would cure, and that the codicil being a good execution of the power of appointment contained in the deed of 1873, the two devisees therein-mentioned were entitled to the Stonehouse property. *Anstis, In re, Chetwynd* v. *Morgan*, 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483—C. A.

—— **Post-nuptial Settlement.**]—By a post-nuptial and voluntary settlement, a husband and his wife assigned to trustees all their present or future acquired property, in trust for the wife for life, with remainder to the husband for life, with remainder over. A bequest was afterwards made to the wife. The court refused to compel the husband to perform the trusts of this voluntary settlement. *Ellis* v. *Nimmo* (post, col. 902) observed on. *Holloway* v. *Headington*, 8 Sim. 324; 6 L. J., Ch. 199.

By a post-nuptial settlement made in 1847, it was agreed and declared by and between the husband, wife and trustees, and the husband covenanted, that all property of or to which the wife or her husband in her right was then or should during the coverture become possessed or entitled should be assured upon trust for the wife for life to her separate use without power of anticipation, and after her death upon trusts in favour of the husband and issue of the marriage. During the coverture property of the wife was reduced into possession by the husband and settled upon the trusts of the settlement. In 1883 the wife became entitled as one of the next-of-kin of a deceased testator to a share of undisposed of property:—Held, first, that the operation of s. 5 of the Married Women's Property Act, 1882, conferring on women married before the 1st of January, 1883, the right to hold and dispose of as their separate property all real and personal property accruing after that date was not displaced by s. 19 of the act, which saves "any settlement or agreement for a settlement made or to be made, whether before or after, respecting the property of any married woman;" but that s. 19 referred only to settlements made by and binding upon married women, and therefore that the settlement, so far as it purported to be made by the wife, being void, the wife was entitled to the undisposed of personalty as her separate property; secondly, that the wife could be put to her election notwithstanding that the compensating fund was subject to restraint on anticipation. *Queade's Trusts, In re*, 54 L. J., Ch. 786; 53 L. T. 74; 33 W. R. 816.

Settlement on Marriage of Female Infant—Restraint on Anticipation.]—The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of

such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Therefore, where a marriage-settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property:—Held, that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. *Vardon's Trust, In re*, 55 L. J., Ch. 259; 31 Ch. D. 275; 53 L. T. 895; 34 W. R. 185—C. A.

c. Consent of Wife.

By articles made in contemplation of the marriage between E. S. and M. P., who was then an infant, after reciting "that it had been agreed that all the freehold, copyhold, leasehold, and other personal estate and property, or share or accruing shares therein of or to which the said M. P. was or might become seised or possessed, &c.," "should be conveyed, assigned, and settled," E. S. covenanted that "in case the said M. P. would voluntary consent thereto, but not otherwise," he and she would settle the same. Mrs. S. having become entitled to certain personal estate, stated in writing her wish that the money should not be put in settlement. The fund having been paid into court under the Trustee Relief Act, and E. S. having presented a petition for payment of it to him:—Held, that the personal estate in question must be settled, although the wife refused her consent, and that the consent of the wife was only applicable to real estate, which could not be settled without the consent of the wife to be taken in the ordinary way; but that as to the personal estate the wife's consent was not required, and the husband's covenant was absolute. *Daniel's Trusts, In re*, 18 Beav. 309.

Where for valuable consideration the wife by ante-nuptial settlement assigned to her husband an interest at the time reversionary the court, when the interest was reduced into possession, ordered payment to the husband without the wife's consent. *Chalmers* v. *Macleod*, 1 Jur. (N.S.) 724.

d. Other Matters.

Effect of an agreement to settle present and future property. *Coke* v. *Bishop*, 3 Swanst. 401.

Validity of covenant to settle all future-acquired property. *Hardey* v. *Green*, 12 Beav. 182; 18 L. J., Ch. 480; 13 Jur. 777.

Money Paid to Trustees under Mistake—Declaration of Trust.]—A husband and wife, under an erroneous idea that they were performing a covenant to settle the after-acquired property of the wife, directed a sum of money, to which she had become entitled, to be paid to the trustees of their marriage settlement upon the trusts thereof. They executed a release, which recited these facts. After the decease of the husband, and the subsequent marriage of the wife:—Held, that the money was appropriated to the trusts of the settlement; that the direction to pay the trustees was, in effect, a declaration of trust: and that the transaction must be supported against the second husband, who claimed the money by virtue of his marital right. *Spicer* v. *Dawson*, 26 L. J., Ch. 704; 3 Jur. (N.S.) 1161; 5 W. R. 431.

4. Performance and Satisfaction of Covenants.

a. General Principles.

Distinction between satisfaction and performance. *Goldsmid* v. *Goldsmid*, 1 Swanst. 219; 18 R. R. 60.

Where a husband, by a settlement before marriage, was obliged to do a particular act for his wife's benefit, and he does a thing equally satisfactory, the court will presume a satisfaction by implication. *Weyland* v. *Weyland*, 2 Atk. 632.

The presumption of a satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. *Id.* 634.

b. Actual Discharge of Liability, What Amounts to.

Covenant to Appoint—Share in Default—Substantial Satisfaction.]—A testatrix bequeathed 5,000*l.* upon trusts for her nephew for life, and then for his wife for life. She then gave to her nephew a power of appointment by will over the 5,000*l.* amongst his children; and in default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at twenty-one or marriage. The nephew had five children, one of whom, a son, after attaining twenty-one, died unmarried and intestate. Afterwards a daughter, who had also attained twenty-one, married, and on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the 5,000*l.* The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of and in the 5,000*l.* The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the 1,000*l.*, but also one-fifth of the remaining 4,000*l.*, as being a part of the fund which was not completely and entirely disposed of by the covenant of the appointor:—Held, that the covenant, though not actually performed, had been substantially satisfied; and that they were entitled to no more than 1,000*l.* *Thacker* v. *Key*, L. R. 8 Eq. 408.

Transfer of Stock afterwards Reduced.]—By a marriage settlement executed in 1797, reciting that S., the intended husband, was entitled to real estate on the decease of his father, and to certain sums in the English funds, as residuary legatee of his grandmother, S. covenanted with the trustees that he would, as soon as he could after the execution of the settlement, transfer to them the money, and invest in such funds as should be thought most advisable, in the names of the trustees, such further sums, the interest of which should amount to 600*l.* a year, free from all deductions, in trust for S. for life, and after his death upon trust to pay the interest to A., his intended wife, as a jointure, with a power to S. to revoke the trust of the fund so to be invested, on conveying to the trustees real estate of the value of 600*l.* a year, to be held on the same trusts. S. died in 1798, leaving one son, who died in 1812. In 1799 and 1801, his executors transferred to the trustees of the settlement

4*l.* per cent. stock, then producing 600*l.* a year, but which was, by successive acts of parliament, ultimately reduced to 3 per cent. stock, and became insufficient to pay the 600*l.* a year :—Held, that A. was not entitled to have the deficiency made good out of the assets of S., the covenant having been performed by the transfer of stock, which, in 1801, produced 600*l.* a year. *Napier* v. *Staples*, 10 Ir. Ch. R. 344.

Bond—Devise to Pay Debts.]—By a settlement, the wife's father covenanted to pay 3,000*l.* to trustees for the husband for life, then to the wife for life, and afterwards for the younger children; but it was provided, that upon the husband's settling a certain real estate, he should become absolutely entitled to the 3,000*l.* In 1814 the husband assigned that sum to trustees for his wife during their joint lives. In 1820 the estate was settled, and in 1823 the 3,000*l.* was paid to the trustees, who paid it over to the husband, taking his bond for the amount. The husband, by his will, directed his debts, including, as he declared, this bond, to be paid out of his real estate :—Held, that, upon satisfaction of the wife's claim, the debt upon the bond ceased. *Senhouse* v. *Hall*, 14 Beav. 241.

—— **Settlement not According to Condition.**]—Before marriage, a husband executes a bond to trustees, the condition of which binds him to settle the property of the wife on her and her issue, in such manner as the trustees, in their discretion, should think proper. After the marriage a settlement is made, by which part of the property is to be applied in payment of his debts, and for his furtherance in life; another part is settled on the wife for life, remainder to the issue of the marriage, and, in case there should not be any such issue, to the husband absolutely; and a third part of the property is given to the wife for life, and, after her decease, in case there should be no issue of the marriage, as she should appoint :—Held, that this settlement was not according to the condition of the bond, and did not bind the rights of the wife. *Webb* v. *Kelly*, 3 L. J. (o.s.) Ch. 172.

Agreement to Settle Personalty—Purchase of Realty—Proper Covenant.]—Articles before marriage for settling real estates of the husband, and also all and singular his personal estate of what nature or kind soever; a proper execution would be by a covenant, that real estate that should be purchased with the personal, should, with respect to the objects of the settlement, be considered personal: the settlement, therefore, made after marriage containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devise according to the articles. A gift by him in his life, in consideration of service, was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the court appeared to question its validity. *Ranlall* v. *Willis*, 5 Ves. 262.

Payment to Husband instead of Trustees.]—A father, on the marriage of his daughter, agreed to pay, by way of portion, a sum of money to trustees, to be held in trust for the husband, daughter, and children of the marriage in succession: the trustees named in the settlement having refused to act, the father paid the money to the husband :—Held, that the payment was wrongful, and, the money having been lost, the father was held liable at the suit of a child of the marriage to pay it a second time. *Evans* v. *John*, 4 Beav. 35.

Payment to Tenant in Tail.]—Money by marriage articles to be laid out in land, to uses of husband and wife for life, then to the children as they should appoint; in default of appointment, equally; but if one, to that one in tail; reversion to husband in fee. There is one daughter: the trustee pays it to her and her husband, she not being sui juris, not separately examined; the payment not sufficient to make it considered as money, and sister of the half-blood may claim the reversion in fee from the father; but the husband of the other sister, who was tenant in tail, will be tenant by curtesy. *Cuningham* v. *Moody*, 1 Ves. Sen. 174.

Covenant by Traders—Account opened between Firm and Trustees.]—One of several partners, previous to his marriage, agreed with his intended wife's trustees, that he would assign to them a portion of his capital in the business, to secure to them certain periodical payments of 500*l.* on the trusts of his marriage settlement. In pursuance of this arrangement, the partnership open an account in their books with the trustees, in which they place to the credit of the trustees the sum of 3,000*l.*, and debit their partner with the same sum, giving the trustees notice that they have transferred this sum from their partner's private account. Default having been made in the payment of 500*l.*, and the firm having become bankrupt:—Held, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage. *Hill*, *Ex parte*, 1 Deac. 125.

Effect of Bankruptcy.]—Bankruptcy cannot have the effect of voluntary transfer of stock under a covenant. *Alcock*, *Ex parte*, 1 V. & B. 179.

In Case of Covenants to Bequeath.]—*See* ante, col. 814.

c. Covenants to Purchase or Settle Land.

1. *In General.*

Purchase of Copyholds.]—Purchase of copyholds not generally considered as a performance of a covenant to purchase and settle lands. *Att.-Gen.* v. *Whorwood*, 1 Ves. Sen. 541.

—— **Of London Houses and Borough English Lands.**]—The purchase of houses in London, and of lands of the tenure of borough English :—Held, not to be a due execution of a covenant in marriage articles to purchase or settle "lands of inheritance." As to the mode of computing the value of premises in the master's office. *Pinnel* v. *Hallet*, 2 Ves. 276; Ambl. 106.

The purchase of houses in London will not answer a covenant to purchase lands of inheritance. *Lewis* v. *Hill*, 1 Ves. Sen. 274.

—— **Of House and Gardens.**]—The husband, by articles before marriage, covenants to add 500*l.* to his wife's portion of 500*l.*, and that it should be laid out in land, and settled on the wife and the issue of the marriage. The hus-

band, without the trustees' consent, lays out the money in a fine house and gardens. Allowed a sufficient performance of the covenant. *Tunbridge* v. *Teather*, 1 Vern. 345.

—— **Of Rent charge out of Customs.**]—One, on marriage, gives bond to settle an estate of inheritance of clear 100*l.* a year to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to his own right heirs; he afterwards settled a rent-charge, which he was entitled to, payable out of the customs at Hull:—Held, a performance of the agreement. *Middleton* v. *Pryor*, Ambl. 391.

Improvements—Costs of Conveyance.]—A marriage settlement contained a covenant by the husband to pay 3,000*l.* to the trustees upon the same trusts as a sum of 17,000*l.* settled by the deed; and also a power to the trustees, with the consent of the husband and wife, to invest any part of the trust funds in real estate. The trustees accordingly invested the sum of 17,000*l.* in land, and the husband paid the expense of the conveyance, and laid out a large sum on farm buildings and permanent improvements on the newly-purchased property. In a suit by the trustees against the executors to enforce the performance of the covenant to pay 3,000*l.*:—Held, that neither the money laid out on the land, nor the expenses of the conveyance, could be allowed in satisfaction of the covenant, or on any other ground. *Horlock* v. *Smith*, 17 Beav. 572; 23 L. J., Ch. 962; 2 W. R. 117.

Estates Purchased with Money obtained from Trustees.]—Money settled to separate use of wife, and in event of no children to her absolutely surviving husband, with power to trustees, with her consent, to invest it in land:—Held, that no lien existed on estates purchased by husband having obtained the money from trustee, the circumstances not raising the presumption as if he had been under an engagement to purchase, that his purchases were in pursuance of engagement; and upon evidence, the fact of the application of trust fund, or the inability of husband by other means, not being made out. *Lench* v. *Lench*, 10 Ves. 511.

—— **Money Borrowed.**]—Effect of a contract on marriage by bond to devise, convey, or assure, all such goods, personal estate, and effects, that the husband should at any time, during the joint lives of him and his wife, be possessed of, to the use of them and the survivor, attaching on capital, not income, unless paid up as capital; admitting, therefore, expenditure and debts, in a fair application of income not liable to a minute account. On that principle, an estate purchased by the husband with money, partly his own, partly borrowed on his personal security, and some paid off by him, was, after his death, held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. *Lewis* v. *Madocks*, 17 Ves. 48; 7 R. R. 10.

Mortgaged Land—Legacy—Assets by Descent in Fee—Personalty.]—A. agreed with B. to give him 2,000*l.* portion, to be laid out by A. A. purchased lands with 1,060*l.*, and mortgaged them, and then settled pursuant to the articles, excepting only in one limitation. A. devised these lands to his wife for life, and gave legacies to B. and his children, and died without issue, leaving B.'s children his heirs-at-law, who, together with B., brought their bill against the widow and executor of A. to have an account of the profits, and for performance of the articles. Per cur., the land settled according to the articles is a good performance, so far as the value is over and above the mortgage. It was urged that the legacy to the children was a bounty, and not a satisfaction of the demand of the heir, because, at the time of the legacy, it was not known whether he would be heir, or take anything by the settlement; also, it was a legacy given to him in company with others, and the dispute is not between the executor and a creditor, but between the executor and B., and his son and daughter; and there are assets enough to answer anything. Yet his lordship directed that the master should inquire what assets by descent in fee, and other personal estate, came into his hands, and that to be as part of the satisfaction of his demand. *Lechmere* v. *Blagrave*, Gilb. Eq. R. 64.

Bequest to Heir.]—Covenant in marriage settlement, that sum of money should be laid out in land, and settled so as to descend on children, is not satisfied by the covenantor bequeathing certain sums to the heir. *Slaney* v. *Slaney*, 5 Bro. P. C. 113.

Value, how Computed.]—One living in Oxfordshire covenants to purchase lands of 80*l.* a year, to be settled, &c. The parties entitled desiring the money, were decreed to have twenty-four years' purchase, the price lands bore in that county, and 80*l.* a year for the time past, but not the interest of the purchase money. *Badger* v. *Badger*, Moseley, 117. *And see* 2 Vern. 551, 428.

ii. *Lands Purchased but not Settled.*

Lands Suffered to Descend.]—Covenant in marriage articles, to purchase and settle lands; lands, purchased and suffered to descend, taken in satisfaction of it. *Lewis* v. *Hill*, 1 Ves. Sen. 274; *Davys* v. *Howard*, 6 Bro. P. C. 370; *Hucks* v. *Hucks*, 2 Ves. Sen. 568; *Wilson* v. *Piggott*, 2 Ves. 356; 2 R. R. 246; *Wilcocks* v. *Wilcocks*, 2 Vern. 558.

A father's permitting lands to descend in fee, if just the same value with lands covenanted to be settled in tail, this is a satisfaction. *Lechmere* v. *Carlisle* (*Earl*), 3 P. Wms. 225.

A matter of less value cannot be taken in satisfaction of what is of greater value. *Id.* 226.

Land, though of much greater value, let to a daughter, no satisfaction of a portion. *Ib.*

Thirty thousand pounds is covenanted to be laid out in land: the money need not be laid out altogether in one purchase, but if laid out at several times it is sufficient; and if the covenantor dies, having, after the covenant, purchased some lands which are left to descend, this will be a satisfaction pro tanto. *Id.* 228.

By marriage articles, the husband was to purchase and settle lands of 800*l.* value on himself and wife for life, remainder to the heirs male of the marriage, remainders over. The eldest son brought a bill against his father's executors for the benefit of this agreement; defendants insisted that the father purchased a copyhold estate, which descended to plaintiff, and likewise be-

queathed to him 100*l.* to be raised out of land, and that these ought to be in satisfaction of the marriage agreement, especially as the husband and wife were tenants in tail, and might bar the issue. Decreed, the plaintiff must have satisfaction of the agreement, with interest at 4 per cent. from the father's death, the copyhold descending to be taken in satisfaction pro tanto but not the 100*l.* legacy. *Wilks* v. *Wilks*, 5 Vin. Abr. 293 pl. 39.

Lands Considered as Purchased in Pursuance of Covenant.]—Where a tenant for life sells part of the settled estate under the authority of an act of parliament, which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir-at-law, who was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the act, and will not permit the remainderman to recover the value of the lands sold against the personal estate of the tenant for life. *Tubbs* v. *Broadwood*, 2 Russ. & M. 487.

By marriage articles, the eldest son was made tenant in tail; proviso, that the father might sell the lands by the consent of the trustees, and purchase other lands, and settle them to the like uses; he purchased other lands, but did not settle them to the like uses, yet held good. *Reeves* v. *Reeves*, 9 Mod. 128.

On marriage, the husband covenants to pay to trustees the sum of 2,000*l.* at least, to be by them laid out in land in the county of D., and settled to the uses of the marriage; the husband never pays the money to the trustees, but soon after the marriage purchases land in the county of D., and takes the conveyance to himself in fee, and then dies intestate, without making any settlement. These lands will be considered as purchased by the husband in pursuance of his covenant, and be liable to the trust of the settlement. *Sowden* v. *Sowden*, 1 Bro. C. C. 582; 1 Cox, 165. *And see* 10 Ves. 5.

Husband receiving proceeds of a sale of wife's estate, and promising, by a note or receipt, to lay it out pursuant to trusts relative to other property, this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband were held to be bound. *Att.-Gen.* v. *Whorwood*, 1 Ves. Sen. 534.

If a person covenants to settle land, or an annuity out of land, and has no land at that time, but afterwards purchases land, that land shall be liable to the covenant, and that against a voluntary devisee. *Tooke* v. *Hastings*, 2 Vern. 97.

—— **Purchase in Name of Another.**]—A. by marriage articles covenanted, that all lands he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K. and took a conveyance in fee in the name of his youngest son, without a declaration of trust:—Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake* v. *Blake*, 7 Bro. P. C. 241.

—— **Covenant to Convey and Settle.**]—S. covenanted to convey and settle houses, lands, &c., or a rentcharge thereout, to certain uses. S. purchased lands, and died without making any settlement:—Decreed, the after-purchased lands shall be to those uses, for a covenant to convey and settle is stronger than to settle only. *Deacon* v. *Smith*, 3 Atk. 323.

Lease Renewed but not Assigned.]—A., on the marriage of B., his son, settles a lease on B. for life, to the wife for life, and then to the issue of the marriage; and B. covenants from time to time to renew the lease and assign it on the same trusts. B. renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage articles, and is not assets for the payment of debts. *Plowman* v. *Plowman*, 2 Vern. 289.

Where no Presumption of Purchase in Execution of Trust.]—Trustee for the purchase of land died without personal assets, but, having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry* v. *Phelips*, 17 Ves. 173—C. A.

Mortgage—Bankruptcy.]—By an ante-nuptial settlement the intended husband covenanted to purchase a convenient residence for himself and his intended wife, the purchase to be made with her approbation; and if it could not conveniently be made within twelve months after the marriage, he covenanted to invest 1,000*l.* at least, in the purchase of freeholds or leaseholds, or in the funds, in the names of the trustees, till a residence could be found. Five years after the marriage the husband purchased a freehold messuage for 1,600*l.*, but never conveyed it to the trustees, nor treated it as subject to the settlement. Several years afterwards he raised 1,800*l.* by way of mortgage upon this messuage and other property devised to him by his father; and while some of the money thus raised remained unmixed with his general estate, became bankrupt:—Held, that the remaining portion ought to be apportioned between the devised and purchased property comprised in the mortgage, and the proportion attributable to the latter paid to the trustees of the settlement; and that they had a charge upon the equity of redemption of the purchased estate for the amount (if any) by which the proportion fell short of 1,000*l.* *Poole, Ex parte*, 1 De G. 581; 17 L. J., Bk. 12; 11 Jur. 1005.

iii. *By Devise of Lands.*

Devise in Fee.]—Agreement to settle is satisfied by suffering estate to descend, or by devising it to party entitled. *Seys* v. *Price*, 9 Mod. 220.

—— **Of Copyholds.**]—A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of 2,000*l.* and interest. It was recited in the condition, that, in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property to the uses thereinafter mentioned; and if such surrender should not be so made within eighteen months after the marriage, the husband and wife, or the survivor, should receive, after the death of the obligor, 1,000*l.* The condition was to the effect of the

recital, and that if the estate should be so settled in substance, to the use of the husband and wife for life, remainder to the survivor, remainder to their issue; and if the 1,000*l.* should be paid, or if the obligor should make such surrender in his lifetime, the obligation to be void. The obligor died without making the surrender, and by his will he devised the copyhold estate to his daughter, the wife of the obligee:—Held, that the bond was not forfeited by reason of the breach of the condition; that it was merely an agreement to settle the land, and as such satisfied by the devise, although absolute to the wife; and that it was an agreement of which equity would enforce the specific performance; the penalty being only meant to secure the settlement recited in the condition. Time for the performance of the condition is not of the essence of the contract. The obligor held to have no power to elect either to pay the money or settle the land. *Roper* v. *Bartholomew*, 12 Price, 796.

—— **Of Residue for Life only.**]—Devise of residue of real and personal for life, not a satisfaction for a sum to be laid out in lands in fee by articles. *Alleyn* v. *Alleyn*, 2 Ves. Sen. 37.

—— **In Place of Annuity.**]—A., previous to marriage, covenants to secure to wife an annuity of 1,000*l.* a year, issuing out of lands, for her jointure, and in bar of dower. The marriage is had, and A. by will devises to wife certain parts of real and personal estate of considerable value:—Held, no satisfaction of covenant. *Broughton* v. *Errington*, 7 Bro. P. C. 461.

One gives a bond on his marriage, either within four months to settle lands of 100*l.* per annum on his wife, or that his heirs, &c., shall pay her 2,000*l.* within four months after his death; husband, after this, devises to his wife lands of 80*l.* per annum; this shall not be taken in part of the 100*l.* per annum, but only as a benevolence. *Eastwood* v. *Vinke*, 2 P. Wms. 614.

—— **In Addition—No Satisfaction.**]—Covenant in marriage articles, that lands settled were of a certain value, which they were not; husband by will "confirms the articles, and also gives his wife all his lands in A. B. for life":—Held, not to be a question of satisfaction or part performance, but of construction, and that the wife was entitled to both interests under the intent thus collected. *Prime* v. *Stebbing*, 2 Ves. Sen. 409.

d. By Gift in Will.

Gift of Equal Sum.]—Gift of an equal sum by will is a clear performance of a covenant in the settlement. The provision in the settlement is not a debt, in the ordinary sense of the word, so as to come under direction in will to pay debts. *Wathen* v. *Smith*, 4 Madd. 325; 20 R. R. 302.

Covenant in settlement to leave by will, satisfied by legacy to amount; though followed by general direction for payment of debts. *Ib.*

—— **One Gift only Intended.**]—E. K., by marriage articles, agreed to settle 50*l.* a year upon his wife in the event of her becoming a widow, payable out of the lands of C. E. K. subsequently made his will, in which was the following passage:—"I bequeath to my wife during her life the sum of 50*l.* yearly (50*l.* yearly being settled on her by me in our intermarriage), payable out of the lands of C.":—Held, that the widow took only one annuity of 50*l.* *Power, In re*, Fl. & K. 282.

A. agrees to settle 100*l.* per annum on intended wife; falling sick, devises 100*l.* per annum to her; recovering, marries her, and the settlement is carried into execution; she can take but 100*l.*, and parol evidence admitted to prove the intent. *Masval* v. *Masval*, 1 Ves. Sen. 323.

—— **Of Share.**]—A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

—— **Of Larger Amount.**]—Covenant, that husband, if wife survive him, should secure to her one-half value of her fortune, is satisfied by husband's leaving her legacy to larger amount. *Corus* v. *Farmer*, 2 Eq. Abr. 34.

Lands settled in jointure are covenanted to be of the yearly value of 1,000*l.*; the husband by his will gives his wife 1,000*l.*, and other legacies. The jointure lands prove deficient 300*l.* per annum:—Held, that the legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency. *Montague* v. *Maxwell*, 4 Bro. P. C. 598.

—— **Of Residue.**]—Gift of a residue by will, is a satisfaction for money secured to be paid by marriage articles. *Pearson* v. *Morgan*, 2 Bro. C. C. 388.

On the marriage, the husband covenanted, that if the wife should survive him, and there should be no issue, his executors should, within nine months after his death, pay to the wife 800*l.* for her own use. There was no issue of the marriage. The husband by his will bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.* This bequest will not amount to a performance or a satisfaction of the covenant contained in the marriage settlement; the gift of a residue is never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial. *Devese* v. *Pontet*, 1 Cox, 188; 1 R. R. 15.

—— **Of Different Sum.**]—A testator on his marriage covenanted that his representatives should, within three months after his decease, pay 2,000*l.* to trustees to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year, payable quarterly, and other benefits:—Held, that the provision for the wife, under the settlement, was not satisfied by the provision made for her by the will. *Cole* v. *Willard*, 25 Beav. 568; 4 Jur. (N.S.) 988; 6 W. R. 712.

—— **To Different Trustees.**]—A testator being, by virtue of his marriage settlement, under an obligation to pay the trustees 5,000*l.* for his wife for life, by his will bequeathed 10,000*l.* to other trustees for his wife for life; and he also directed the payment of all his just debts:—Held, that the bequest was not a satisfaction of the 5,000*l.*, and that the widow was entitled to both provisions. *Pinchin* v. *Simms*, 30 Beav. 119.

—— **To Cestui que trust—Covenant with Trustees.**]—Where a testator was indebted to the trustees of his marriage settlement, which contained a power of appointment which had not been exercised, in consequence whereof certain of his legatees became interested in the fund:—Held, that the legacies were not satisfied, pro tanto, out of the debt due to the trustees. *Smith* v. *Smith*, 3 Giff. 263; 31 L. J., Ch. 91; 7 Jur. (N.S.) 1140; 5 L. T. 302.

But a legacy to the cestui que trust of a settlement, by which the testator had covenanted with trustees to settle certain funds:—Held, not a satisfaction of the covenant. *Ib.*

Bequest held, under the circumstances, not to be intended in satisfaction of a liability to pay, contracted by covenant in a marriage settlement. *Milligan* v. *Hardwicke* (*Earl*), 1 Jur. (N.S.) 793.

—— **Of Life Interest only.**]—A., on his marriage, covenants to purchase and settle 20*l.* a year on his wife for her life, and, if he died before it was done, to leave her 300*l.* out of his personal estate, for her better livelihood and maintenance. He died without making any settlement, and by will gives his wife the interest of 330*l.* for her life, with a power to dispose of 30*l.* at her death. Decreed, first, that she was entitled to the 300*l.* by the articles, and that the executors were not at liberty to settle 20*l.* a year on her for life; secondly, that the legacy was not a satisfaction of the articles, but she should have the 300*l.* by the articles, and the legacy too. *Perry* v. *Perry*, 2 Vern. 503.

Covenant to Bequeath—Appointment by Will of equal Sum.]—A., having a power under his marriage settlement to appoint a fund amongst his children, which was limited to them in default of appointment, became a party to his son's marriage settlement, by which he covenated with the trustees to bequeath to his son or daughter-in-law 2,500*l.* upon the trusts of the settlement. By his will A. appointed to his son 2,500*l.* (part of the trust funds) in full discharge of his covenant:—Held, that the bequest was not a performance of his covenant, and that the parties claiming under the son's settlement were entitled to both. *Graham* v. *Wickham*, 31 Beav. 447; 2 N. R. 410; 1 De G. J. & S. 474; 9 Jur. (N.S.) 702; 8 L. T. (N.S.) 679; 11 W. R. 1009.

Bond—Bequest of larger Sum.]—Bond upon marriage to secure 300*l.*, the wife's fortune, to the wife within one month after husband's decease; by will the husband gave her 500*l.* payable within six months after his decease, together with other legacies; the bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes* v. *Mico*, 1 Bro. C. C. 129. See *Adams* v. *Lavender*, 1 M'Cle. & Y. 41. *See also* Romilly's Notes of Cases, 41.

—— **Gift for Life only.**]—Wife entitled, under bond by the husband upon the marriage, to the sum payable three months after death for her for life, then for the children, if none for her absolutely. By will he gave all real and personal estate he then had, or might die possessed of, upon trust, to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children:—Held, the widow entitled to both. *Forsight* v. *Grant*, 1 Ves. 298; 3 Bro. C. C. 242.

—— **To Husband—Devise of greater Value to Husband and Wife and their Heirs.**]—One, on the marriage of his daughter, gives a bond to the husband for the daughter's portion, and afterwards, by will, devises land of much greater value to the husband and the wife, and their heirs. The devise no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow* v. *Burchett*, 2 Vern. 298.

—— **Gift of greater Value, but not Absolute.**]—Bond conditioned that executors pay 5,000*l.* to a natural son at twenty-one if he should attain that age; by will afterwards the father gave 15,000*l.* to trustees to pay 200*l.* per annum, for the maintenance of the son till twenty-five, and then to pay him the principal; and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried before twenty-five, the whole over; the devise is not a satisfaction of the bond. *Peacock* v. *Falkener*, 1 Bro. C. C. 295.

—— **Not Satisfied by Annuity.**]—An annuity of 40*l.* per annum devised to wife is no satisfaction of bond for 1,000*l.* settled on her at marriage; but held she was entitled to both. *Jobson* v. *Pelly*, 9 Mod. 437.

Grounds for inferring Double Gift.]—A testator, by his marriage settlement, covenanted to secure his wife a life annuity of 100*l.* a year if she survived him. By his will, he gave her a life annuity of 100*l.* a year:—Held, that this was in addition, and not in satisfaction, on three grounds; first, because he directed his debts to be paid; secondly, because he expressed it to be given as an addition to her own property; and, thirdly, because he gave it in full satisfaction of her dower, freebench, and thirds upon his property. *Glover* v. *Hartcup*, 34 Beav. 74.

Power to Redeem Annuity—Gift of greater Value.]—A. B. on his marriage conveyed real estates to a trustee for 200 years, on trust to raise an annuity of 100*l.* a year for his wife for her life; and it was provided that, if he should invest in the name of the trustee of the term sufficient stock to secure the annuity, and declare proper trusts thereof, the term and charge should cease. At the date of his will other charges existed on this property, and by his will he gave his wife all his real estate, if his son should die without issue; and he gave her all his personal estate, which consisted, among other things, of stock more than enough to pay 100*l.* a year. The investment of stock was never made by the testator. On a bill, filed on behalf of the infant son of the testator, it was held that the widow was entitled to the benefits given by the will, in addition to the 100*l.* a year secured by the settlement. *Reeve* v. *Reeve*, 14 Jur. 264.

Intention not Expressed.]—Covenant in marriage articles by the husband, to pay his wife, if she should survive, 200*l* as jointure, and 50*l.* to provide herself with a house, yearly for life; afterwards by will, he gave her for life an estate and house, above the yearly value of 100*l.* a year, with the household goods, &c., and an annuity of 100*l.*, commencing and payable at different

times from those in the articles:—Held, not a performance, nor intended as a satisfaction, no such intent being expressed. *Richardson* v. *Elphinstone*, 2 Ves. 462.

Mortgage—Rent-charge on Equity of Redemption—Gift of larger Annuity.]—By a marriage settlement, a rent-charge of 200*l.* a year was secured to the wife for life, payable quarterly, with powers of distress, &c. To enable the husband to mortgage, the wife relieved her rent-charge to the mortgagee. The equity of redemption was reserved to the husband, who covenanted to convey other land on the trusts of the settlement. The husband by his will gave his real and personal estate to his brother, on condition that he would allow his wife 300*l.* a year for life:—Held, that the 200*l.* a year remained a valid charge on the equity of redemption; and, secondly, that it was not satisfied by the 300*l.* a year. *Wood* v. *Wood*, 7 Beav. 183.

e. By Share under Statute of Distributions.

Equal or greater Amount.]—Covenant to leave a sum of money which is not done, but personal estate is permitted to descend, so that an equal or greater sum would go according to the covenant: that is a performance. *Richardson* v. *Elphinstone*, 2 Ves. 463.

Covenant to leave his wife 620*l.*; party dies intestate, and wife's share comes to above 620*l.*; this is a satisfaction. *Blandy* v. *Widmore*, 1 P. Wms. 324.

G. having by marriage articles covenanted that, if he died in the lifetime of his wife, his executors should within three months after his decease pay to her 3,000*l.*, and having by his will given all his property to his executors in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right"; on his death, during the life of his wife, the executors having died or renounced, his property is divisible according to the Statute of Distributions; and the widow's distributive share, exceeding 3,000*l.*, is a performance of the covenant in the marriage articles. *Goldsmid* v. *Goldsmid*, 1 Swanst. 211; 1 Wils. Ch. 140; 18 R. R. 60.

Claim to Distributive Share in Addition.]—Covenant in settlement by husband, in event of his death leaving his wife surviving and children, within six months after death, to pay, &c., one full and clear moiety of all such real and personal estate as he shall be seised, &c., of at his death:—Held, on principle of part performance, the widow was not entitled, in addition to the moiety under the covenant, to a third of the residue of personal estate, by intestacy of husband. *Garthshore* v. *Chalie*, 10 Ves. 1; 7 R. R. 311.

Husband covenants to give his wife by deed or will 1,000*l.* at his death if she survives him, but dies intestate; she is not entitled to her distributive share in addition to her claim under the covenant. *Lee* v. *D'Aranda*, 1 Ves. Sen. 1; 3 Atk. 419.

L., previously to his marriage with D., covenanted that he would, by will or by some good assurance, grant to D. or her mother or her executor, &c., in trust for D., 1,000*l.*, to be paid to her after his decease for their separate use; and in case he should not, by deed or will, assure the same, then his executors, &c., should pay the 1,000*l.* L. died without such deed or will:—Held, that D. was not entitled to the 1,000*l.* and her distributive share of L.'s personal estate also, it being meant by L. not as a debt, but a security only for his wife's provision. *Lee* v. *Cox*, 3 Atk. 419; 1 Ves. Sen. 1.

No Satisfaction of Bond.]—A bond for marriage portion to secure a life interest to the wife, is not satisfied by a distributive share of the husband's estate to a larger amount. *Wright* v. *Fearris*, 3 Swanst. 681.

—— **Of Life Interest.**]—When a husband covenanted on his marriage that, for the purpose of making a further provision for his intended wife, in case she should survive him, a trustee should stand possessed of all his personal property at the time of his death, in trust for the use and benefit of the intended wife and the issue of the marriage, with power to her to distribute the same as she might think proper among such issue, and the husband died before her intestate, and there was no issue:—Held, that the wife, besides taking a life interest in such personalty, was, in the absence of express words to the contrary, entitled to her share of the corpus under the statute of distributions. *Young* v. *Young*, Ir. R. 5 Eq. 615.

Real estate was settled, on marriage, upon trust to sell, with the consent of the husband and wife, or the survivor of them, and hold the proceeds on the trusts of an indenture of even date. The trusts of the deed of even date were for the benefit of the husband and wife during their lives, and after their death for the issue of the marriage. This deed also contained a covenant by the husband that he or his representatives would, during his lifetime, or within twelve months after his death, pay to the trustees 1,200*l.* to be held upon the trusts of the settlement. There was no issue of the marriage; the husband died intestate without having paid the 1,200*l.*, and the widow's net distributive share considerably exceeded that sum:—Held, that the husband's covenant to pay the 1,200*l.* was not satisfied by his intestacy. *James* v. *Castle*, 33 L. T. 665.

Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband to pay within three months after his death 6,000*l.* to the trustees in trust if the wife should survive him, and there being no issue (which was the event) to pay 1,500*l.* to the wife, her executors, &c., and to pay the interest of the remaining 4,500*l.* to her for life, she is entitled to dower, and her share under the statute of distributions is not a satisfaction or performance of the covenant. *Couch* v. *Stratton*, 4 Ves. 391; 4 R. R. 230.

—— **Of Annuity.**]—Where a husband covenanted by his marriage settlement to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, executors, or administrators, and the husband afterwards died intestate:—Held, on the authority of *Couch* v. *Stratton* (4 Ves. 391), that the widow's share of the husband's personal estate, under the statute of distributions, was not to be taken by her as a performance of his covenant either wholly or pro tanto. *Salisbury* v. *Salisbury*, 6 Hare 526; 17 L. J., Ch. 480; 12 Jur. 671.

Wife's Right not barred by Jointure.]—A covenant by the husband in marriage articles to provide a jointure of 200*l.* sterling per annum, such jointure to be levied on the lands of D. and B., though the jointure be paid, will not bar the wife's right to her distributive share of the personal estate. *Creagh* v. *Creagh*, 8 Ir. Eq. R. 68.

—— **By Share under Statute and Custom of London.**]—Proviso in a settlement, that the wife should not be barred of anything the husband should give or leave by deed or will; he dies intestate, and a freeman of London: her shares by the statute and custom are not a satisfaction of the covenant. *Kirkman* v. *Kirkman*, 2 Bro. C. C. 95.

—— **By Non-payment of Portion to Husband.**]—By a settlement in contemplation of marriage, made at the Mauritius, where the laws of France were in force, drawn up in the French language, and executed according to the French form, it was agreed that there should be no community of goods between the husband and wife; and it was stated to be the intention of the parties to marry according to the laws and customs of England, the benefit of which they reserved to themselves the right to claim. The husband then acknowledged the receipt of 4,000*l.* belonging to the wife, which he covenanted to invest for her benefit, and for her separate use during the marriage, either in land or in the French funds, or other securities which the wife should approve. The 4,000*l.* was never paid to the husband, nor did he invest such a sum during the marriage. His domicil was in England:—Held, that upon his death intestate, the wife was entitled to receive 4,000*l.* out of his estate, and also a distributive share of his personal estate remaining after payment of that sum. *Lang* v. *Lang*, 8 Sim. 451; 6 L. J., Ch. 324; 1 Jur. 472.

Provision for Satisfaction of Distributive Share by Settlement.] — *See* EXECUTOR AND ADMINISTRATOR.

f. By other Provisions or Property of Covenantor.

Appointment under Prior Settlement.]—The father, by his will, reciting a power contained in his own marriage settlement of appointing 10,000*l.* among his children, which sum, in default of appointment, went to them equally, appointed 2,500*l.* to the son on his marriage in full discharge of covenant. About a year after the father's death this 2,500*l.* was paid to the trustees of the son's marriage settlement by the son's direction, and several years afterwards he took from them an assignment of the benefit of the covenant:—Held, that in the absence of evidence to show that the son directed the payment of the 2,500*l.* to the trustees, with the intention of discharging the father's estate from its liability under the covenant, it was not so discharged. *Graham* v. *Wickham*, 2 N. R. 410; 1 De G. J. & Sm. 474; 31 Beav. 447; 9 Jur. (N.S.) 702; 8 L. T. 679; 11 W. R. 1009.

Rent-charge out of Customs.] — One, on marriage, gives bond to settle an estate of inheritance of clear 100*l.* a year to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to his own right heirs; he afterwards settled a rent-charge, which he was entitled to, payable out of the customs at Hull:—Held, a performance of the agreement. *Middleton* v. *Pryor*, Ambl. 391.

Covenant for Annuity until Beneficed for Life — Induction to Living, with Bond to Resign.]—A bond for the performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice, which he might hold during his life, of the yearly value of 600*l.*:—Held, to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it; but liberty was given to take the opinion of a court of law. *Rainer*, *Ex parte*, 1 J. & W. 280.

Charge for Issue — Subsequent Settlements on only Child.]—J., in 1810, by his marriage settlement, covenanted with the trustees of that settlement, that all the property of which he should die seised or possessed should be charged with 1,300*l.* for the issue of the marriage. There was but one child, E., issue of that marriage. On the marriage of E., in 1847, J. conveyed certain freehold property to trustees, for the benefit of E., and the children of her marriage, and covenanted to make up the amount of the produce of that property to 300*l.* per annum. J., by will, dated in 1852, devised real estate to the separate use of E., for life, with remainder for her children, and declared that devise to be in satisfaction of the covenant in the deed of 1847. In 1852, J., by deed, assigned railway shares upon trust for E., for life, for her separate use, in case she should survive him, with remainder for her children. By codicil, made in 1853, J. bequeathed certain chattels personal to E. for her separate use, and bequeathed to trustees 1,850*l.* bank stock, upon trust for the husband of E. for life, remainder to E. for life, remainder for her children. The will and codicil disposed of the entire of the testator's estate:—Held, that the 1,300*l.* secured by the covenant in the deed of 1810 was satisfied by the subsequent benefits conferred by J. *Garner* v. *Holmes*, 8 Ir. Ch. R. 469.

Settlement by Executor in Consideration of Natural Love.] — A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a large amount, in consideration of the natural love and affection he bore them:—Held, that this was not a satisfaction of the debt. *Drewe* v. *Bidgood*, 2 Sim. & S. 424; 4 L. J. (O.S.) Ch. 33.

Wife's Estate—Reversion of After-acquired Lands.]—S. had an estate in B. by his first wife, by whom also he had a daughter, M. By the marriage articles it was agreed that S. should leave his daughter, M., 2,500*l.*, if the trustees demanded it within one year after his death. A., the father of S., was then living. S. married again, and had several daughters. By deed in his lifetime, he gave the estate in B. to M. and her heirs; and by deed also he charged his reversionary lands in D. with 5,000*l.* to each of his daughters, and died. M. demanded the 2,500*l.*, with interest. Harcourt, Ld. K., decreed that M. should have the 2,500*l.*, with interest from the death of S.; that the estate in B. could

not be an equivalent, because it moved from the mother of M., and was the condition of the marriage agreement; and that the reversion of the lands in D. could not be so, because they were not then in being, and the father of S. was then living, and to make it an equivalent it ought to be in being and in view at the time of giving the equivalent. *Anon.*, 5 Vin. Abr. 292, pl. 38.

Widow's Pension from Mutual Society.]—Members of a society covenanted mutually, that their widows should receive annuities from the society. Payment from the society is not a satisfaction for a covenant in the settlement by the husband, to pay her an annuity in lieu of all claim on his personal estate. *Rhodes* v. *Rhodes*, 1 Ves. 96.

Covenant to Insure—Policy Effected with Friendly Society.]—By a marriage settlement the husband covenanted with the trustees that he would forthwith effect a policy of assurance upon his life with some respectable assurance company, for the sum of 1,000*l.*, and assign the same to the trustees. A policy of assurance effected with a friendly society, if it be not assignable, or if it be less beneficial than a policy effected with an ordinary insurance company, is not within the meaning of the covenant, and a reference was directed on the subject. *Courtenay* v. *Courtenay*, 3 Jo. & Lat. 519; 9 Ir. Eq. R. 329.

A friendly society is not an assurance company within the meaning of such a covenant; and that, if the covenantor rely upon an assurance with a recently established friendly society (supposing such to be an assurance company within the covenant) as a performance of his covenant, he ought to show that the society is possessed of capital, and is solvent. *Ib.*

g. Satisfaction by Legacy of Portions, and of Covenants by Parents to Settle Property on Children, and Satisfaction by Portion of Legacy.

See PORTION.

II. EXECUTED SETTLEMENTS.

A. VALIDITY, CONSIDERATION, AND EXECUTION.

1. CONSIDERATION. VALIDITY OF.

a. Articles or Promise before Marriage (Post-nuptial Settlements).

Transfer before Marriage upon Parol Trusts.]—Where, prior to a marriage, the parties transfer a fund to trustees upon trusts agreed on by parol only, and the instrument declaring the same trusts is executed after the marriage, it is perfectly valid as an instrument for valuable consideration. *Cooper* v. *Wormald*, 27 Beav. 266.

A. and B. were trustees of a will, and they and the widow were the executors. The widow, previous to her second marriage, transferred a sum standing in her sole name to A. and B upon certain trusts agreed on between her and her second husband. After the marriage the trustees of A. and B. declared the trusts accordingly. The fund was part of the testator's assets, but the second husband had no notice of that fact:—Held, that A. and B. held it on the trusts of the settlement, and not on those of the will. *Ib.*

Recital of Ante-nuptial Agreement Disproved.]—A post-nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children:—Held, both husband and wife desiring it, that this deed was a nullity; that as against the husband it was voluntary; and that it was not such a settlement as the court would enforce against the wife. The property was therefore treated as if it had never been settled. *Hogarth* v. *Phillips*, 4 Drew. 360; 28 L. J., Ch. 195; 4 Jur. (N.S.) 1093; 7 W. R. 69.

Unproved Parol Promise before Marriage.]—Settlement after marriage held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage failing, and court of opinion that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage. *Spurgeon* v. *Collier*, 1 Eden, 54.

Where Articles for Settlor's own benefit.]—See *Birkett* v. *Purdon*, [1895] App. Cas. 371—H. L. (Sc.).

Ante-nuptial Agreement not referred to in Post nuptial Settlement.]—An ante-nuptial agreement by an infant is not sufficient to take a post-nuptial settlement, in which no reference is made to the ante-nuptial agreement, out of the operation of the 27 Eliz. c. 4, and such post-nuptial settlement is, therefore, void against a subsequent purchaser for value. *Trowell* v. *Shenton*, 47 L. J., Ch. 738; 8 Ch. D. 318; 38 L. T. 369; 26 W. R. 837—C. A.

b. Marriage.

i. *In General.*

Principles.]—Marriage is alone a sufficient consideration for an agreement. *Marsh*, *Ex parte*, 1 Atk. 158.

Marriage is a valuable consideration. *Churchman* v. *Harvey*, Ambl. 340.

The court of equity will not judge according to strict rules of law on a gift of lands, causâ matrimonii prælocuti. *Langley* v. *Brown*, 2 Atk. 202.

Where marriage is one of the considerations, the amount of pecuniary consideration is immaterial. *Prebble* v. *Boghurst*, 1 Swanst. 319; 1 Wils. Ch. 161.

Intention—Inconsistent Articles construed in favour of Issue.]—Where the parents of the intended husband and wife by marriage articles unskilfully drawn covenanted to settle estates respectively in terms expressed to be dependent, but the whole instrument taken together, and also the covenant for title, tended to show the intent on of the parties that the covenants were not dependent:—Held, in favour of the issue of the marriage, to be independent, and decreed to be conveyed accordingly. *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 192; 6 L. J., Ch. 135; 1 Jur. 69. Affirming 8 Sim. 7.

Bequest—Subsequent Settlement good against Claim on Testator's Estate.]—A., in 1829, bequeathed all his residuary personal estate in trust for his daughter, B., on attaining twenty-four, or on previous marriage, with consent, absolutely. Prior to her marriage in 1848, the whole fund was settled, part of it for the benefit of the husband for life, remainder for the wife for life, remainder for the children of the marriage: and the other part was settled for the benefit of the separate use of the wife for life, with remainder, in case she should survive her husband, for herself absolutely. In 1856, for the first time, a claim in respect of a breach of covenant in a lease which had been granted to the plaintiff's father, and by him assigned to A., was made against the plaintiff by the representative of the original lessor. Thereupon the plaintiff instituted a suit for the purpose of having the damages in respect of the breach made good by the husband of B., or out of the fund settled to the separate use of B.:—Held, that the consideration of marriage protected the whole fund from the plaintiff's claim. *Dilkes* v. *Broadmead*, 2 Giff. 113; 29 L. J., Ch. 310; 6 Jur. (N.S.) 289; 8 W. R. 318.

Post-nuptial Settlement — Re-marriage.]—A settlement after a marriage in Scotland not supported against creditors in bankruptcy, as upon valuable consideration, by a recelebration of the marriage in England; but it was sustained as the consideration of an agreement, to settle by the parent of the other party. *Hall, Ex parte*, 1 V. & B. 112; 1 Rose, 30.

Furniture.]—The consideration of marriage will support a settlement, even of movable effects, and neither the joint possession of furniture, nor the want of an inventory, nor the fact that the settlor was indebted at the time, and that his wife knew it, will affect the settlement. *Campion* v. *Cotton*, 17 Ves. 271.

Fraudulent Settlement on Eve of Bankruptcy.]—The consideration of marriage will not support a settlement made on the eve of bankruptcy, where there is clear evidence of an intention to withdraw the property from the claims of creditors and to make the celebration of a marriage part of a scheme to defeat and avoid their rights. *Colombine* v. *Penhall*, 1 W. R. 272.

Fraudulent Settlement on Innocent Party.]—C., a trader, on the occasion of his marriage with P., executed a settlement, which recited that he was indebted to P. in 20,000*l.*, and in which he covenanted that he would pay this sum to the trustees of the settlement to hold upon the trusts thereof, and the settlement contained a declaration that as soon as C. should become owner in fee of certain property the trustees should lend this sum to him upon mortgage of this property. About two years after, C. having become owner in fee of the property, executed a mortgage of it to the trustees, but no money ever actually passed. Three years after the mortgage he became bankrupt. The recital that the 20,000*l.* was owing to P. was untrue, and the evidence showed that the settlement was a scheme by C. to defraud his creditors, but that P. was ignorant of the false recital and had been no party to the fraud:—Held, that the false recital did not vitiate the settlement, that there was no necessity for actual payment of the money, and that, the covenant having been made for the good consideration of marriage, and the mortgage having been executed in pursuance of the covenant, the settlement and mortgage were valid against C.'s creditors. *Kevan* v. *Crawford*, 45 L. J., Ch. 729; 6 Ch. D. 29; 37 L. T. 322; 26 W. R. 49—C. A.

Held, also, that it would be premature to decide any question as to the future life interest of C. contingent on his wife's death in his lifetime. *Ib.*

Wife's Knowledge of Fraud.]—A person, pending an action against him for the recovery of a debt, married a woman with whom he had cohabited for several years, and in consideration of the marriage executed a settlement of all his property. The court, upon the suit of the creditor, finding that the wife had knowledge of the facts, declared the settlement fraudulent and void. *Bulmer* v. *Hunter*, 38 L. J., Ch. 543; L. R. 8 Eq. 46; 20 L. T. 942.

Settlement made under a Mistake as to Position of Parties.]—A lady having married with consent of guardians named by her deceased putative father, and the court of chancery, suffered a recovery, and declared the uses to the joint appointment of herself and her husband, with remainder in strict settlement; it being discovered that her supposed marriage was void, because at the time her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement:—Held, that the recovery and first settlement were valid, although made under a mistake of the situation in which the parties stood. *Boughton* v. *Sindilands*, 3 Taunt. 342.

ii. *Marriage within Prohibited Degrees of Affinity.*

Marriage with Deceased Wife's Sister.]—A deed, executed in consideration of a future cohabitation between two persons who are incapable of contracting a legal marriage, is invalid. *Ford* v. *De Pontès*, 30 Beav. 572.

In July, 1853, A., a widow, married N., the widower of her deceased sister. By a deed in October purporting to be a post-nuptial settlement, and to be made between N. and A. his wife, of the one part, and a trustee of the other part, they, N. and A. (described as his wife), assigned to the trustee real and personal estate belonging to A., in trust for N. absolutely. A. and N. lived together until 1859, when A. left N.'s house, and from that time ceased to reside with him. Shortly after A. assigned the property to her brother C. for value. N. having threatened to sell the property, C. and A. filed a bill for the purpose of having the deed of October, 1853, set aside. A. deposed that it was not until 1859 that she became fully aware of the invalidity of her marriage. The court declared that the deed ought to be set aside, and ordered the same to be delivered up to be cancelled, on the ground that the benefit of the relation of husband and wife, to obtain which the deed had been executed by A., had failed. *Ib.*

Where a widower married a sister of his

deceased wife:—Held, that the relation thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister the onus of showing, that at the time of entering into the transaction she was fully, fairly, and truly informed of its character, and of her legal status. *Coulson* v. *Allison*, 2 Giff. 279; 6 Jur. (N.S.) 1140. Affirmed, 2 De G. F. & J. 521; 3 L. T. 763.

Such a marriage, and consequent cohabitation, held not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely. *Ib.*

J. P., previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnisation of the marriage, and after the solemnisation thereof, and after the decease of J. P., to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife and such children as he should have by his intended marriage; but if there should be no such child or children, then for J. P., his executors, administrators, and assigns:—Held, that as no valid marriage could take place between J. P. and his deceased wife's sister, the trust in favour of himself until the solemnisation of such marriage continued, and the subsequent trusts never having arisen, the property remained in J. P., and formed part of his general estate. *Pawson* v. *Brown*, 49 L. J., Ch. 193; 13 Ch. D. 202; 41 L. T. 339; 28 W. R. 652.

A trader lived with his deceased wife's sister as her husband. In 1858 she received a legacy of 3,000*l.*, which she handed over to him upon an agreement that the money should be advanced to and used by him in his business, but that as to 2,000*l.* he should be a trustee for her, and a settlement should be executed to carry out that agreement. The money was accordingly used by him in his business, but no settlement was ever executed. The trader having gone into liquidation in 1876:—Held, that inasmuch as by its primary destination under the agreement the fund was to be and was used in the business, no trust could be imposed upon it to the disadvantage of the creditors, and the wife could not prove in the liquidation for any part of it. *Corbidge, Ex parte, Beale, In re*, 46 L. J., Bk. 17; 4 Ch. D. 246; 35 L. T. (N.S.) 768; 25 W. R. 324.

H. transferred shares into the names of trustees, and by a deed, which, on the face of it, was voluntary, declared trusts of the shares for the immediate and absolute benefit of the sister of his deceased wife, with whom he shortly afterwards went through the form of marriage. Upon a bill filed ten years after the death of H. by his legal personal representative against the lady, a husband whom she subsequently married, and the surviving trustee, praying for a retransfer of the shares:—Held, that the transfer having been complete, a court of equity would not have interfered on behalf of the settlor, who was a particeps criminis, and that his personal representative stood in no better position. *Ayerst* v. *Jenkins*, 42 L. J., Ch. 690; L. R. 16 Eq. 27; 29 L. T. 126; 21 W. R. 878.

—— **Where Valid by Lex Loci.**]—A domiciled Englishman, a widower with six children, went through the ceremony of marriage with his deceased wife's niece in Neufchâtel, in Switzerland, where such a marriage is valid. The parties were under the impression that the marriage, being good in Switzerland, would also be good here. On this occasion a settlement of reversionary personal estate belonging to the husband was executed by him and the lady, the consideration for which was expressed to be the intended marriage, the natural love and affection which the settlor bore for his children by his late wife, and divers other good considerations, and under which the trustees were to hold the property in trust for the settlor, his executors, administrators, or assigns, until the intended marriage, should be solemnised, and afterwards upon trusts for the settlor and his intended wife for their lives, or as to the latter her widowhood, with remainder in trust for such of the settlor's children, whether by his former marriage or by the intended marriage, as being sons should attain twenty-one, or being daughters should attain that age or marry:—Held, that the word "solemnised," as used in the settlement, meant "validly and effectually solemnised," and that inasmuch as there never had been a valid and effectual solemnisation according to English law of the intended marriage, and the settlor was dead, without having changed his domicil, the whole beneficial interest in the property comprised in the settlement was vested in him at the time of his death, and that neither the second wife nor any child of the settlor or of the second wife acquired any interest in such property. *Chapman* v. *Bradley*, 4 De G. J. & S. 71; 3 N. R. 10; 33 L. J., Ch. 139; 10 Jur. (N.S.) 5; 9 L. T. 495; 12 W. R. 140. Varying 33 Beav. 61.

B., by his first wife C., who died in 1847, had one son and one daughter. In 1851, he, being then a domiciled English subject, intermarried in Denmark with E., the sister of his deceased wife (such marriage being valid according to the lex loci contractûs), by whom he had one son and two daughters. By his will, dated in 1855, he gave all his real and personal estate among the children of his two marriages in certain proportions. Both B. and E. died in 1855, and the son of their marriage in 1857. Upon the question as to whether the share of the latter in B.'s estate went, as to the realty, to B.'s son by his first marriage, and as to the personalty, among all B.'s children equally, or whether such share, both of realty and personalty, passed to the crown by reason of the invalidity of B.'s second marriage, and consequent illegitimacy of the issue:—Held, that the second marriage was invalid, and the issue consequently illegitimate, and the real and personal estate vested in the crown. *Brook* v. *Brook*, 3 Sm. & Giff. 481; 27 L. J., Ch. 401; 4 Jur. (N.S.) 317; 6 W. R. 110, 451.

In 1854 A. went through the marriage ceremony, in Prussia, with C., his deceased wife's sister. After the marriage, and in consideration thereof, C. settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently, by her will, C. confirmed the trusts of the settlement. On the death of C. both the will and settlement were admitted to probate:—Held, that the settlement was valid. *Seale* v. *Lowndes*, 17 L. T. 555.

c. Other Considerations.

Mutual Concurrence of Husband and Wife.]—Semble, the mutual concurrence of a husband

and wife in the levying of a fine of land in which they were jointly interested, and in the declaration of the uses for the benefit of their issue, constitutes a valuable consideration to support the deed declaring such uses. *Parker* v. *Carter*, 4 Hare, 409.

Marriage and Portion—Non-payment—Acquiescence.]—A., in consideration of marriage, and of 500*l.* portion, which he is to have with his wife, by settlement empowers his wife to dispose of 200*l.* by her will; they live together fifteen years, the wife gives the 200*l.* away by her will. The husband at this distance of time, not admitted to say he had not 500*l.* with his wife, but shall pay the money. *North* v. *Ansell*, 2 P. Wms. 618.

Natural Love and Affection.]—Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd* v. *Spillet*, 2 Atk. 149.

Charge to Secure Money Borrowed.] — A charge created by C. S. upon his estates to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S., to indemnify C. S. and his estate from payment of the money borrowed, but also for the settlement of the S. estates upon his family. A. H., being a trustee for the younger children of S. H. S., advanced a sum of 5,185*l.* 3*s.* 4*d.* upon the security of certain estates in Berkshire, which C. S., on the 20th January, 1832, demised to A. H. for 300 years to secure the repayment. The money was borrowed for S. H. S., who was tenant in tail of the S. estates in remainder expectant on the death of his mother, the tenant for life; and on the 21st January, 1832, S. H. S. demised the S. estates to C. S. for 2,000 years, to indemnify him and the Berkshire estates from the 5,185*l.* 3*s.* 4*d.* and interest secured to A. H.; and by deeds dated the 23rd and 24th January, 1832, in further compliance with an agreement recited in this deed, he settled the S. estates upon various uses for the benefit of his family. On the death of the tenant for life, S. H. S., being greatly indebted to G. S. F., executed a disentailing deed, and conveyed the S. estates to G. S. F., giving him a power of sale over the estates as a security for the money due; this was subsequently confirmed by another deed; and in a suit instituted by G. S. F. insisting that the settlement of the 23rd and 24th January, 1832, was voluntary and void against the subsequent alienation for value made to G. S. F., who had notice of the settlement:—Held, that the agreement made by S. H. S. with C. S., to indemnify him against the 5,185*l.* 3*s.* 4*d.*, and to settle the S. estates, was such as this court would specifically perform, and that it was a consideration sufficient to support the settlement; that the recital in the deed of 24th January, 1832, of the agreement between S. H. S. and C. S. was sufficient evidence of the contract, and that it was doubtful if evidence to disprove it could have been entertained; that S. H. S. and C. S. were, by executing the deed, estopped from alleging that the recital was false; that the plaintiff, G. S. F., was in the same position as S. H. S.; that the deeds of the 23rd and 24th January, 1832, were valid, and not voluntary and void against a subsequent purchaser for value. *Ford* v. *Stuart*, 15 Beav. 493; 21 L. J., Ch. 514.

Advance.]—The owner of a freehold estate, which was worth, beyond a mortgage to which it was subject, about 1,300*l.*, was persuaded by a relative of his wife to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, he agreed to advance him 150*l.* on his promissory note to meet the interest on the mortgage, which was then in arrear. The settlement was accordingly prepared and executed, but no mention was made in it of the advance of 150*l.*:—Held, on a bill by a subsequent mortgagee to establish priority over the settlement, that the advance of 150*l.* was a sufficient valuable consideration to support the settlement under 27 Eliz. c. 4. *Baysposle* v. *Collins*, 40 L. J., Ch. 289; L. R. 6 Ch. 228; 25 L. T. 282; 19 W. R. 363.

Testator's Wish.]—Real estate was devised to a single woman with a declaration of a wish that if she should marry she would before marriage settle it to her separate use for life and to such uses as she should by will appoint. She married without a settlement, and afterwards, by an acknowledged deed expressed to be made for giving effect to the testator's wish, the husband and wife conveyed the land to trustees during the life of the wife upon trust for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned. Subsequently the husband and wife mortgaged the property without notice of the settlement:—Held, that the settlement was for valuable consideration, and not void as against the mortgagee under 27 Eliz. c. 4. *Teasdale* v. *Braithwaite*, 46 L. J., Ch. 725; 5 Ch. D. 630; 36 L. T. 601; 25 W. R. 546—C. A.

Liability on Leasehold.]—A widower, on his second marriage, made a settlement, in which he assigned a leasehold property to trustees, one of whom was his son by a former marriage, upon trust for himself for life, and after his death for his said son. He afterwards contracted to sell the leasehold property to the plaintiff:—Held, that the settlement of the leasehold property on the son was not a voluntary conveyance under 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration. *Price* v. *Jenkins*, 46 L. J., Ch. 805; 5 Ch. D. 619; 37 L. T. 51—C. A. But compare *Ridler, In re, Ridler* v. *Ridler*, 52 L. J., Ch. 343; 22 Ch. D. 74; 48 L. T. 396; 31 W. R. 93; 47 J. P. 479—C. A.

Valid Consideration subsequently becoming Invalid.]—J., who was tenant in tail in remainder of the lands of A., in 1840 joined his father T., who was tenant for life in possession, in barring the entail; and in a resettlement, which included limitations to J. and his issue, T. by the deed of resettlement conveyed the lands of B., to which he was absolutely entitled, to the same uses. All the lands were charged by the resettlement with a jointure for T.'s wife and portions for his younger children, and a present rentcharge for J. It was afterwards discovered that J., who was supposed to have attained his majority at the date of the resettlement, was in

fact an infant at the time, but there was no imputation of fraud upon the transaction. J., upon this discovery and within a reasonable time, repudiated the resettlement, and T. purported, in 1852, to execute a new settlement, admittedly for valuable consideration, including amongst others the lands of B.:—Held, that as the resettlement of 1840 was voidable only by J., and not void as against him until his election to repudiate it, there was a sufficient consideration for that deed in its inception to render the settlement of B. a conveyance for value on the part of T.; and that, as this consideration for value originally existed, the stat. 10 Car. 1, sess. 2. c. 3, was inapplicable, and the deed was not avoided by the subsequent settlement of 1852, notwithstanding the failure of the consideration by J.'s repudiation of the deed of 1840. *Paget* v. *Paget*, 9 L. R., Ir. 128.

Reasonable Family Settlement.]—On the treaty of marriage between A. and B., the father and mother of B., in consideration of the settlement to be made by A., join in conveying a small estate (out of which the mother was dowable) to A. in fee (but no fine was levied); and they also joined in settling another estate of which the father was seised in fee on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the stat. 13 Eliz., more especially as she had joined in conveying the small estate in fee to the husband. *Jones* v. *Boulter*, 1 Cox, 288.

Family Arrangement — Postnuptial Settlement to avoid application to Commit for Contempt in Marrying Ward of Court.]—A stop order on a fund in court, in an action to administer the trusts of an original settlement, obtained by an assignee of a cestui que trust's interest in the fund under a derivative settlement, does not give the assignee priority over an earlier assignee who has given notice, though subsequently to the stop order being obtained, to the trustee of the derivative settlement. A postnuptial settlement by a husband and wife, who had intermarried without the leave of the court when the wife was a ward, entered into under pressure from the wife's friends and to avoid an application to commit the husband for contempt, contained a joint and several covenant by the wife (who was beneficially interested under her father's will) and the husband to settle, upon trusts for the benefit of the wife and husband and children of the marriage, any property (other than that already settled) to which the wife or the husband in her right then was or thereafter might become entitled, and the husband also settled a policy of assurance on his life, and covenanted to keep the premiums thereon duly paid:—Held, that the settlement was not a voluntary one, and was one which the court would enforce. *Stephens* v. *Green*, 64 L. J., Ch. 546; [1895] 2 Ch. 148; 12 R. 252; 72 L. T. 574; 43 W. R. 465—C. A.

Wife "Purchaser in good faith and for valuable consideration"—Proviso for Cesser of Husband's Interest on Bankruptcy.]—In order to constitute a "purchaser in good faith" within s. 47 of the Bankruptcy Act, 1883, it is sufficient if there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith. A wife, who was married in 1883, and was then possessed of separate property, after the marriage allowed that property to pass into her husband's hands, but not as a gift, nor as a loan for the purposes of his trade. The husband, having applied part of her property to his own use, settled the residue of it, together with other property of his own, upon trusts under which he took a life interest, with a proviso for the cesser thereof in the event of his bankruptcy. The wife had no notice of any fraud or fraudulent intention on his part. In an action by the husband's trustee in bankruptcy to set aside the settlement:—Held, (1) that it was not void under s. 47 of the Bankruptcy Act, 1883; (2) that to the extent of the wife's property received by the husband, the proviso for the cesser of his life interest was good; and (3) following *Tidswell*, *Ex parte* (35 W. R. 669), that s. 3 of the Married Women's Property Act, 1882, did not apply. *Macintosh* v. *Pogose*, 64 L. J., Ch. 274; [1895] 1 Ch. 505; 13 R. 254; 72 L. T. 251; 43 W. R. 247; 2 Manson, 27.

And see Fraudulent Conveyances, sub-tit. FRAUD AND MISREPRESENTATION.

d. Voluntary Settlements.

Covenant by Grantee to build House.]—A contract for sale for value, which had been entered into by a vendor upwards of ninety years of age, was upon his death resisted by his devisee, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, his great-nephew. The deed was expressed to be in consideration of natural love and affection, and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that if the grantor failed to furnish such plans, then the grantee "would build such a house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance:—Held, that the deed was purely voluntary, there being an absence of any consideration by way of payment or benefit moving from the grantee to the grantor, and specific performance decreed accordingly. *Rosher* v. *Williams*, 44 L. J., Ch. 419; L. R. 20 Eq. 210; 32 L. T. 387; 23 W. R. 561.

In deciding whether a deed is voluntary or not, the court will anxiously lay hold of any circumstances showing a consideration moving from the grantee to the grantor. *Ib.*

Nominal price of Lands sold to Trustees.]—By a private act of parliament, passed in 1719, lands were annexed to the earldom of S. so that no earl could alienate them beyond the term of his own life, with an exception in favour of protestant earls. Another private act, passed in 1803, enabled the trustees to sell certain outlying portions of the estates, and to invest the purchase money, under the order and direction of the court of chancery, in the purchase of other estates, to be settled to the same uses, and to be

under the same restriction from alienation as the estates authorised to be sold. In 1824 Charles, Earl of S., being desirous of annexing inalienably to the title other large fee simple and entailed estates of the value of 89,000*l.* or thereabouts, contracted with the trustees for the sale of them for 1,000*l.* part of the money arising from the sales authorised by the act of 1803, and a petition was presented to the court for its sanction to the purchase, stating that the purchase money was much less than the hereditaments were fairly worth, and that it was a very advantageous purchase whereon to invest 1,000*l.*; and by the order made on the petition, the value and the propriety of the purchase were referred to the master, who reported in favour of the purchase. The report was confirmed by the court, and a conveyance was executed for the purpose of carrying out the contract, which, Earl Charles being then dead, was adopted by his successor, Earl John. By this conveyance, other estates belonging to Earl John, of the value of 40,000*l.*, and not comprised in the contract, were settled to the uses of the act:—Held, that the transaction was a fraud upon the act of parliament, its real nature being, not a bonâ fide sale and purchase for valuable consideration, but a voluntary settlement; and a succeeding earl having disentailed and devised the estates so settled, his devisees were entitled thereto on restoring 1,000*l.* to the trust fund. *Howard* v. *Shrewsbury* (*Earl*), 36 L. J., Ch. 908; L. R. 2 Ch. 760; 17 L. T. 358; 15 W. R. 1213.

Held, also, that the devisees had rightly sought their remedy in equity instead of proceeding by ejectment at law. *Ib.*

Postnuptial Settlement in pursuance of Articles for Settlor's own Benefit.]—By antenuptial contract of marriage the husband bound himself, his heirs, executors and representatives whomsoever, to pay to the wife an annuity of 1,000*l.*, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life." He secured the annuity on heritable property, and declared it to be his wife's separate estate free of the jus mariti:—Held, that the application of the annuity was for the husband's own benefit, and that the wife was not entitled to the payment of it as against his creditors. *Birkett* v. *Purdom*, [1895] A. C. 371; 11 R. 184—H. L. (Sc.)

Assignment by Lunatic under Misapprehension.]—A person being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to his brother absolutely. He was tried, not found guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during her Majesty's pleasure:—Held, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of the brother took no interest under it. *Manning* v. *Gill*, 41 L. J. Ch. 736; L. R. 13 Eq. 485; 26 L. T. 14; 20 W. R. 357; 12 Cox, C. C. 274.

In Favour of Children of Future Marriage.]—Trusts in a mariage settlement in favour of the children of a future marriage and of collaterals are purely voluntary. *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; 21 L. T. 449; 18 W. R. 83.

Second Marriage no Consideration for Settlement on Children of First.]—A second marriage, in contemplation of which a father executes a deed providing for children by a former marriage, is not a valuable consideration. *Greer, In re*, Ir. R. 11 Eq. 502.

Wife's chose in action, assigned by husband to unprovided child by former wife, natural love and affection recited as consideration, not good. *Becket* v. *Becket*, Dick. 340. But see *Clayton* v. *Wilton* (*Earl*), cited 3 Madd. 302; 18 R. R. 234.

Information Given to Persons Entitled.]—Where property is in the hands of trustees for the parties entitled to it, and there is no adverse claim after the death of the parties in possession, a communication to one of the cestuis que trustent in remainder of his interest in the property is not a consideration upon which a conveyance of a portion of the property can be sustained as the sale of a secret, for in such a case the disclosure is a nullity. *Reynell* v. *Sprye*, 8 Hare, 222; 21 L. J., Ch. 633.

Consideration Wrongly Stated in Deed.]—A different consideration from what is expressed in deed not to be averred; and though consideration of blood be a good consideration, yet that not to be regarded, if money or the grant of an annuity be expressed in the deed. Also a good objection, that the grant is to two and only one is of kin. *Clarkson* v. *Hanway*, 2 P. Wms. 204.

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner* v. *Byne*, 1 Sim. 160; 5 L. J. (O.S.) Ch. 125.

—— **In Testatum, but not in Recital.**]—A conveyance of a reversionary interest from an uncle to a nephew, under circumstances of gross inadequacy of price and alleged fraud, attempted to be set aside after forty years; but held to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although not expressed in the recital. Quære, as to the effect of length of time in such a case operating by way of evidence. *Whalley* v. *Whalley*, 1 Mer. 436; 3 Bligh, 1.

Relationship of Child to Parent.]—A postnuptial agreement, in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract founded on a meritorious consideration. *Ellis* v. *Nimmo*, Ll. & G. t. Sugd. 333. Observed upon in *Holloway* v. *Headington*, ante, col. 874.

Payment of Portion after Marriage.]—Settlement after marriage of a portion paid is on good consideration, and equal to one made before marriage. *Ramsden* v. *Hylton*, 2 Ves. Sen. 305.

Marriage as ex post facto Consideration.]—The court, having come to the conclusion, as a matter of fact, that the marriage of W. had taken place upon the faith of a previous voluntary settlement made by his father:—Held, first, that the marriage supplied an ex post facto

consideration for the settlement. *Guardian Assurance Co.* v. *Avonmore* (*Viscount*), Ir. R. 6 Eq. 391.

Held, secondly, that in such a case there is no presumption as to whether or not a marriage had taken place on the faith of the voluntary deed, but that it is the duty of the court, in the absence of direct proof, to form a reasonable judgment, by way of inference from the circumstances shown to have existed, whether or not the parties did know of the deed and act on it. *Ib.*

Wife's Freeholds—Wife and Husband concurring to Settle.]—A wife, being entitled to a reversionary freehold estate, joined with her husband in a postnuptial settlement, whereby they conveyed it to trustees upon trust for the wife for life for her separate use, with remainder to such uses as she should appoint by will notwithstanding her coverture, and in default to the issue of the marriage. Subsequently the husband and wife mortgaged the property to the plaintiff:—Held, that there was good consideration for the settlement between the husband and wife. *Hewison* v. *Negus*, 1 Eq. R. 230; 17 Jur. 445, 567; 1 W. R. 262.

By a postnuptial settlement freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment to the use of her children, with a power during her life for the wife to lease at rack rent, and with a power of sale and exchange in the trustees with her consent:—Held, that the settlement was for valuable consideration, and therefore not void under 27 Eliz. c. 4, and that the same must be upheld against a subsequent mortgagee. *Foster and Lister, In re*, 46 L. J., Ch. 480; 6 Ch. D. 87; 36 L. T. 582; 25 W. R. 553.

Mutual Agreement to Settle.]—Where A. agrees to make a provision for a volunteer, in consideration of B.'s doing the like, the contract is not voluntary. *Bentley* v. *Mackay*, 31 Beav. 143.

Surrender of Arrears Due.]—Where arrears due on a voluntary deed are surrendered in consideration of a new deed, such new deed is not voluntary. *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 49.

A deed of annuity by husband to wife by way of separate maintenance, in which two trustees covenant that wife shall support the children of the marriage, is not a voluntary deed. *Id.* 56.

Error in Settlement remedied by Covenant to Hold in Trust.]—Feme seised of a copyhold on marriage of her daughter to J., surrenders it to the use of J. and his intended wife, and the heirs of their bodies; remainder to J. in fee. The marriage takes effect, the husband signs a writing, whereby he owns that the limitation of remainder in fee to him was a mistake, and that it was intended to be to his wife; and accordingly covenants to stand seised of the remainder in fee, in trust for the wife in fee: this is not a mere voluntary covenant, and equity will compel the performance of it. *Randall* v. *Randall*, 2 P. Wms. 464.

Intention of Intestate expressed in Unexecuted Will.]—An eldest son and heir-at-law of an intestate made a voluntary settlement of the real estate which had descended upon him, for the purpose of providing, in accordance with the intentions, as alleged, of his father, as expressed in an unexecuted will, for the maintenance, education, and support of such one or more of the children of the intestate (except the settlor) as for the time being should be under the age of twenty-five, in such manner as he, his heirs and assigns, should think fit. One of the daughters of the intestate, after she had attained twenty-five, alleged that the trusts had been concealed from her, and claimed to be paid her portion of the rents: and the court, on a bill by her, held that she was entitled to a decree, as asked, and that the settlor must pay all the costs of the suit. *Langdon* v. *Blake*, 11 Jur. (N.S.) 762; 12 L. T. 202.

Settlement by Single Woman—Subsequent Marriage and Assignment.]—E. B., a single woman, transferred certain stock, her property, into the joint names of herself and two trustees; and on the day of the transfer, she and the trustees, without reference to any marriage on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust to pay the dividends to E. B., for her life, for her sole and separate use, independent of any husband whom she might marry; and, after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint, and, in default of such appointment, in trust for E. B., her executors, administrators, and assigns. E. B. afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by her husband:—Held, that whether or not under the deed of settlement the wife had power as against her husband to make this assignment, the joining the husband in the deed of assignment was confirmatory of the deed of settlement, and consequently that the assignment by the wife was valid. *Maber* v. *Hobbs*, 2 Y. & C. 317; 6 L. J., Ex. Eq. 12.

Construction.]—The construction of, and the right and incidents under a voluntary deed, if bonâ fide and valid, are the same as if executed for value. *Dickenson* v. *Burrell*, 35 Beav. 257; L. R. 1 Eq. 337; 12 Jur. (N.S.) 199; 13 L. T. 660; 14 W. R. 412.

Voluntary Bond without Condition.]—A voluntary bond without condition, is good in equity, if no fraud used in obtaining it. *Wright* v. *Moore*, 1 Ch. Rep. 157.

As Against Creditors or Purchasers.]—*See* Fraudulent Conveyances, sub-tit. FRAUD AND MISREPRESENTATION.

2. To Whom Consideration will Extend.

a. Principles.

To remotest Beneficiaries.]—In marriage settlements, &c., on good or valuable consideration, as between the immediate "parties," such considerations will run through all the limitations for the benefit of the remotest persons, even of those in respect of whom the deeds would otherwise have been voluntary. *Ithell* v. *Beane*, 1 Ves. Sen. 215; Dick. 213.

In marriage articles, and settlements on good and valuable consideration, such consideration will run through all the limitations in favour of the remotest remainderman. *Stephens* v. *Truman*, 1 Ves. Sen. 73.

Husband.]—If, in consideration of marriage, an estate be limited in fee to A., by his father, or other persons interested in making provision for the marriage, A. is a purchaser for valuable consideration in respect of the marriage. *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 147.

In an ordinary marriage settlement, where the lands settled are the property of the husband, the latter cannot be considered a purchaser, for valuable consideration, of the life estate in those lands limited to him by the settlement. *Brown, In re*, 13 Ir. Ch. R. 283.

Therefore, where A., by a settlement, executed in contemplation of his marriage, settled lands, of which he was owner in fee, to himself for life, remainder to provide a jointure for his widow, remainder to the children of the marriage:—Held, that a judgment which was, previously to the execution of the settlement, a charge on the lands, was still a subsisting charge upon the husband's life estate, notwithstanding that the judgment had not been registered pursuant to 7 & 8 Vict. c. 90, within the time (viz., five years) required by 13 & 14 Vict. c. 29, s. 3, for keeping it in force against purchasers under the settlement. *Ib.*

Husband and Wife.]—Consideration of marriage runs through the whole settlement, and especially supports every provision with regard to the husband and wife; she is interested in the provision for husband, enabling him to provide for her and children, and it is not affected by subsequent events, as death of wife without children. *Nairn* v. *Prowse*, 6 Beav. 752.

Husband as Purchaser of Wife's Mortgage.]—Husband, by making settlement on wife after marriage, considered as purchaser of mortgage of wife, though he did not reduce it into possession. *Sykes* v. *Meynal*, Dick. 368.

Children.]—Husband and wife are purchasers by the marriage for their children. *Parkes* v. *White*, 11 Ves. 228.

—— **Under both Parents.**]—Marriage agreements differ from all others, for as soon as the marriage is had the principal contract is executed, and the state and capacity of the parties are altered; the children are purchasers under both parents, and may compel a performance of the agreement from the relations of either; therefore, if the marriage contract could be rescinded, it would affect their interest. *Harvey* v. *Ashley*, 3 Atk. 610.

—— **Assignment of Father's Contingent Reversion.**]—By a marriage settlement, lands were conveyed to trustees to the separate use of A., the wife, for life, and in case B. should survive her, to him for life, and after the death of the survivor of A. and B., in trust to convey to the child or children of the marriage as A. and B. should by deed or will appoint, and, in default of appointment, to the children equally, and in default of issue, to the survivor of A. and and B. There was issue; and, by deed, reciting that A., in order to further the prospects in life of the children, had consented to assign her life estate for the benefit of the children, and that B., for the like purpose, agreed to assign his reversion, in case he should survive his wife. A., for the considerations aforesaid and ten shillings, conveyed her life interest to trustees to receive the rents during the life of A. and B., and apply them for the benefit and maintenance of the children in such manner as the trustees might deem sufficient. And it was agreed that the trustees should have full power and control over the property during the life of A. and B., free from the control or intermeddling or debts which at any time might have affected the estate of A. and B., and B. covenanted that if he should survive his wife he would be called on by the trustees to assign his estate and interest to the trustees on the same trusts:—Held, that the children were not within the consideration, and could not enforce a specific performance of B.'s covenant to assign his interest. *Joyce* v. *Hutton*, 11 Ir. Ch. R. 123.

—— **Postnuptial Settlement on—Bond for Jointure only.**]—A bond before marriage to settle a jointure, and afterwards a settlement is made which settles the estate on the wife, and the issue of the marriage. This settlement is good as to the jointure, but fraudulent as to the children in respect of a purchaser. *Jason* v. *Jervis*, 1 Vern. 286.

Where parents did not make so beneficial a bargain for a daughter as they might have done, that is no reason to set aside the marriage agreement; for the law has entrusted them with the marriage of their children, and there are many proper considerations that may induce a parent to agree to a match, besides a strict equality of fortune. There never yet has been an objection to a father's disposing of his daughter in marriage on what terms he pleases; and though most portions arise under settlements, the daughter is as much a purchaser as if her portion came from a collateral relation. *Ib.*

—— **Settlement of Property Devised—Debts of Testator.**] — A testator devised freehold estates to his son in fee, and also bequeathed to him certain leasehold property, subject to the payment of certain legacies. The son married shortly after the testator's death, and, on that occasion, conveyed and assigned the freehold and leasehold property, devised under the will (together with other estates), to trustees, in trust, in the first place, to pay the legacies charged by the will, and subject thereto in trust for the settlor and his intended wife, and the issue of the marriage; and the father of the intended wife covenanted to settle a sum of money on the lady and her children. The remaining assets of the testator were insufficient for the payment of all his debts:—Held, that the wife and the issue of the marriage were entitled to the benefits given them by the settlement, in preference to the creditors of the testator. *Spackman* v. *Timbrell*, 8 Sim. 253; 6 L. J., Ch. 147.

—— **Settlement by Father and Son—Subsequent Mortgage.**]—A father, tenant for life, with remainders to his son, joined with the son in executing a postnuptial settlement, by which the father and the son assigned the lands to a trustee in trust for the father for life, subject to

an annuity for the son; and after the father's death in trust for the son, subject to a jointure (charged by the pre-existing deed), and charged with a sum for portions of the younger children of the father. The father and son afterwards joined in a mortgage which did not notice this settlement: it contained covenants for title, but not against incumbrances: — Held, that the settlement as regarded the provisions for the younger children was not voluntary or void as against the mortgagee, nor revocable by the father and son; and, even if it was revocable, was not revoked by the mortgage. *Bennett* v. *Bernard*, 10 Ir. Eq. R. 584.

—— **Son a Purchaser.**]—J., having by his marriage settlement a power of appointing portions for daughters to the amount of 16,000*l.* under a term for years created for that purpose, appointed among four of his daughters, upon their respective marriages, 13,000*l.* in part thereof, and took assignments from them of their interests in the said term; he afterwards, in the marriage settlement of his eldest son, joined such son in a covenant in the fullest and most extensive terms, that the settled estates were free from all incumbrances due by either of them, and by will appointed the residue of the 16,000*l.* to another daughter, and died. In a suit to compel the trustees to raise the 16,000*l.* out of the term of years, it was held that the evident intention of J. to keep the term on foot for his benefit would clearly entitle his executors, as against those claiming under his own marriage settlement, but that his covenant would bar him and all claiming under him as against those claiming under the settlement of the son; and consequently the son himself, who, notwithstanding his joining in the covenant, so far as his interest in that settlement, must be considered as a purchaser of it, and consequently a covenantee. *Gower* (*Countess*) v. *Gower* (*Earl*), 1 Cox, 53.

Father's Heir—Payment in præsenti of Contingent Portion.]—On marriage of a daughter there is an agreement that the father shall in præsenti pay, for her separate use, 500*l.* (to which she was not entitled unless she survived him), and that a real estate which came to her from her mother should be settled, after the uses of the marriage, to the father and his heirs; the right heir of the father entitled to a specific performance of these articles. *Stephens* v. *Trueman*, 1 Ves. Sen. 73.

Husband's Heir.]—Money agreed on marriage to be laid out in land, and settled to the use of husband and wife, and their issue, with remainder to the husband in fee. The husband dies, leaving a son, who dies without issue; the heir of the husband brings a bill against the wife, who is administratrix of her husband and son, to have the money laid out and settled according to the articles. Bill dismissed. This cause was reheard in 1687, and decreed for the heir. *Kettleby* v. *Atwood*, 1 Vern. 298.

Unreasonable Settlement without Fraud.]—If a person on marriage make an extravagant or unreasonable settlement, yet if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent marriage settlement. *Hobson* v. *Staneer*, 9 Mod. 80.

b. Children—Of what Marriage.

Of former Marriage.]—A second marriage, in contemplation of which a father executes a deed providing for children by a former marriage, is not a valuable consideration. *Greer, In re*, Ir. R. 11 Eq. 502.

The performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband, will be enforced at the suit of those children, and is an exception to the general rule that the performance of a covenant cannot be enforced by volunteers. *Gale* v. *Gale*, 46 L. J., Ch. 809; 6 Ch. D. 144; 36 L. T. 690; 25 W. R. 772.

The general rule of law is that the courts will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them, others who would not otherwise be within the consideration, then not the matrimonial consideration, but the consideration of the mutual contract, extend to and comprehend them. *Mackie* v. *Herbertson*, 9 App. Cas. 303—H. L. (Sc.)

Where in an antenuptial contract of marriage, the intention of the owner of the property, a widow with children, was to make the children of the prior marriage and those procreated of the second marriage a single class, the members of which class were to take equally among them, subject to a power of apportionment, it is inconsistent with this intention to hold that some of the children take vested interests as they come into existence, and that others take nothing except subject to a testamentary power; and in such a case the vested interest of the children of the earlier marriage is not contingent on there being children of the second marriage, for the effect and operation of the deed must be determined at the time it was executed. A widow possessed of certain heritable and movable property, who had children alive by her first husband, by deed, before her second marriage, to which her husband was a party, conveyed her property to trustees for behoof of herself "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly and seclusive of the jus mariti of" her husband, "and not affectable by his or her debts or deeds or by the diligence of their creditors, and for behoof of the children procreated or to be procreated of" her body, "in such proportions, and on such terms and conditions as she might appoint by a writing under her hand, which failing, equally among them share and share alike," &c., "in fee." The trustees entered into possession, and applied the income for the behoof of the wife. She died without issue by the second marriage, leaving testamentary deeds by which she cut down one of the children's interest to a sum much less than he would have taken under an equal division of her estate. He raised this action for declarator of his right to an equal share of her estate; and the sole question now for decision was whether the marriage contract was revocable:—Held, that the provision of the marriage contract in favour of the children of the prior marriage was irrevocable *Ib.*

A widow before her marriage with A., her

second husband, conveys her estate to trustees in order to make settlements upon the issue of her first marriage. Afterwards A. and his wife mortgage the settled estates to persons who had notice of the settlement. Here it was declared that the settlement is no voluntary agreement, but a binding one, and no instance where such a limitation had been held fraudulent and void against subsequent purchasers or creditors: for if it should, no widow on her subsequent marriage could make any certain provision for the issue of a former. *Newstead* v. *Searles*, 1 Atk. 265; *Cotton* v. *King*, 2 P. Wms. 358, 674.

Husband, on second marriage, contracts to pay money in trust for the wife for life, and afterwards for the issue of that marriage, and a son by a former wife. His creditors cannot come upon this, against the son, as being a voluntary disposition as to him. *Ithell* v. *Beane*, 1 Ves. Sen. 216; Dick. 132.

Of future Marriage.]—Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals are purely voluntary. *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; 21 L. T. 449; 18 W. R. 83.

Limitation in favour of issue of second marriage was held good. *Clayton* v. *Wilton* (*Earl*), cited 3 Madd. 302; 18 R. R. 234.

A marriage settlement contained a limitation of the husband's estate to his daughters, as tenants in common in fee simple:—Held, that such limitation, so far as it extended to the daughters of a future marriage, did not come within the doctrine of *Clayton* v. *Wilton* (*Earl*) (cited 3 Madd. 302), because its avoidance, as to such daughters, could not prejudice its validity, so far as it affected the daughters of the marriage; and that, as regards the former class, it could not, in the absence of special reasons, be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife:—Held, therefore, that, as to those daughters, it was voluntary, and would therefore be void as against a purchaser for valuable consideration. *Cullin, In re*, 14 Ir. Ch. R. 506.

By a postnuptial settlement a settlor in 1837 granted lands to trustees, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a resettlement in 1848, to which the same trustees were parties, after reciting that it had been proposed that the settlor should give up his life estate in the premises, and forego the power given to him of appointing by will, the settlor granted the rents and profits during his life to the trustees for the benefit of his four children. He also covenanted with the trustees that he would not make any will whereby the trusts thereby declared should be impeached or defeated, and released the trustees from all the trusts of the former settlement. Shortly afterwards he married again, and had seven children by the second marriage. He died in 1866, having devised and bequeathed all his real and personal estate upon trust for his wife for life, and after her death upon trust to sell, and divide the proceeds among the children of the second marriage:—Held, that the ultimate limitation in the deed of 1837 did not cut down the meaning of the word "children" of the settlor to children of the first marriage; and that the children of both marriages were entitled to the benefit of the deed of 1837. *Isaac* v. *Hughes*, L. R. 9 Eq. 191.

Illegitimate Child.]—In a marriage settlement, a gift, by the woman, out of her own estate, to her illegitimate child, is not void, in the absence of fraud, as against a subsequent mortgage, under 27 Eliz. c. 4. *Clarke* v. *Wright*, 6 H. & N. 849; 30 L. J., Ex. 113; 7 Jur. (N.S.) 1032; 4 L. T. 21; 9 W. R. 571—Ex. Ch.

c. Collaterals.

Principles.]—Limitations in marriage settlement to collateral relations are voluntary. *Reeves* v. *Reeves*, 9 Mod. 132.

Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals are purely voluntary. *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

Limitations to collaterals in a marriage settlement, made by tenant in tail, are voluntary against subsequent purchaser for a valuable consideration, in the same manner as if the settlor had had the fee. *Cormick* v. *Trapaud*, 6 Dow, 86.

The consideration of marriage will not operate to support limitations to collaterals in a marriage settlement, which, therefore, as against subsequent purchasers for value, are voluntary and void. *Stackpoole* v. *Stackpoole*, 2 Con. & L. 489; 4 Dr. & War. 320; 6 Ir. Eq. R. 18.

Second Son on Marriage of First.]—A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, and in consideration of the wife's portion, makes not the second son a purchaser. *Webster* v. *Bishop*, Pre. Ch. 224.

Niece adopted as Daughter.]—A lady being indebted to the plaintiff at the time of marriage, settled all her real and personal property (with the exception of jewels and furniture exceeding in value the amount of her debt), upon failure of issue of the marriage, in favour of certain collateral relatives, including a niece whom she had adopted as her daughter. The lady survived her husband, and died without issue, leaving no assets:—Held, that the settlement, so far as it was made in favour of collaterals, was voluntary, and must be set aside to the extent of the plaintiff's debt. *Smith* v. *Cherrill*, 36 L. J., Ch. 738; L. R. 4 Eq. 390; 16 L. T. 517; 15 W. R. 919.

Wife's Brothers and Sisters.]—By a marriage settlement, an estate, the property of the wife, was limited, in default of children of the wife, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The husband agreed to sell the estate; and he and his wife joined in conveying it to the purchaser, by deed and fine. The wife died without issue:—Held, that the limitation in favour of her brothers and sisters was voluntary, and, therefore, void as against the purchaser. *Cotterell* v. *Homer*, 13 Sim. 506; 7 Jur. 544.

Nephew.]—A., the father, and B., the son, on the marriage of B., articled to settle land on B. and his wife for their lives, remainder to their issue, remainders to the nephew in fee; if A. had

the sole interest, the limitation to the nephew is voluntary. Secus, if the father and son had each some interest. *Osgood* v. *Strode*, 10 Mod. 533; 2 P. Wms. 245.

Where any party Purchases for Collaterals.]—The cases in which collaterals are not within the consideration of a marriage settlement, proceeded upon the ground that the wife cannot be considered to stipulate on the part of the relations of the husband; but limitations in favour of collaterals are supported, if there be any party to the settlement who purchases on their behalf. *Heap* v. *Tonge*, 9 Hare, 104; 20 L. J., Ch. 661.

Covenant to limit Remainder to Brother.]—J. S., in consideration of marriage, covenants to settle lands of 380*l.* per annum upon himself and wife, and the issue male of the marriage, with remainder to his brother in tail: equity will compel a specific performance of this covenant in favour of the brother, although he was no party to the articles, without putting him to an action of covenant in the trustee's name. *Vernon* v. *Vernon*, 1 Bro. P. C. 267.

Articles on marriage whereby money is agreed to be laid out in land, and settled, in default of the issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary. *Lechmere* v. *Carlisle*, 3 P. Wms. 223.

Niece — Completed Assignment.]—Residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death:—Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter and the trustees of another settlement, which she made upon a second marriage, inconsistent with the former settlement. *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., Ch. 577; 16 Jur. 625.

Whether the first settlement was voluntary as regarded the trust for the niece, quære. *Ib.*

Brother interposed between Two Classes of Issue.] — A. on his marriage put the lands of Blackacre in settlement upon himself for life, remainder to the sons of the intended marriage in tail male, remainder to B., his brother, in tail male, and, in default of such issue, to the use of all daughters of the intended marriage. There was no issue of the marriage, and by a subsequent deed, executed upon a second marriage, A. purported to charge the lands with an annuity of 50*l.* by way of jointure for his second wife, D. A. having died, B. barred the entail, and D. claimed his annuity:—Held, that under the first settlement, A. had no power to jointure an after-taken wife, and that the limitation to B. in the first settlement was valid as against subsequent purchasers for value, inasmuch as it was interposed between the two limitations to different classes of the issue of the marriage, and, consequently, that D. was not entitled to the jointure. *Sheridan, In re*, 1 Ir. Ch. R. 54.

Brothers and Sisters Entitled.]—Trustees of a marriage settlement were, in case each of the children of the intended marriage, being a son, should die under twenty-one without leaving issue, or, being a daughter, should die under that age without being or having been married, directed to convey and assign the freehold and leasehold estates, and to pay the rents unto the six brothers and sisters of the settlor equally. There was no issue of the marriage:—Held, that the six brothers and sisters were entitled to the estates. *Osborn* v. *Bellman*, 6 Jur. (N.S.) 1325; 3 L. T. 265; 9 W. R. 11.

Title depending on Validity of Limitation to Brothers.]—The lord chancellor on appeal was of opinion (agreeing with the vice-chancellor), that limitations in a marriage settlement to the brothers of the settlor and their issue, were voluntary; but thought, under the circumstances, that a purchaser could be compelled to take the title, depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement; the agreement for purchase being suspicious and it being doubtful whether the creditors could file such a bill. *Johnson* v. *Legard*, Turn. & R. 281; 3 Madd. 283; 24 R. R. 56. *And see* 6 M. & S. 60; 18 R. R. 301.

Copyholds—Father's covenant to Surrender discharged by Son's subsequent Covenant to Resettle.]—Covenant in marriage settlement, that settlor would surrender certain copyholds, which were intermixed with freeholds, to be settled upon issue of marriage, with limitations to collateral branches; his eldest son, upon marriage, covenants to suffer a recovery of freehold (which was done), and to settle the copyhold (to which he was admitted in fee). Upon a bill brought by a nephew of first settlor, on failure of issue of that marriage, for specific performance of the covenant, to surrender in favour of collaterals:—Held, that though consideration of marriage extended to collaterals, yet that son, by covenants on his marriage, and by his admission in fee, had taken copyholds discharged of specific limitations. *Hale* v. *Lamb*, 2 Eden, 292.

d. Next of Kin.

After Possibility of Issue Extinct.]—By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife, in the event of her dying before her husband without children, and in default of appointment there was a trust for the next of kin of the wife excluding the husband; but if the wife survived, then, in default of children, in trust for the wife absolutely. The father of the wife joined in the settlement, and covenanted to pay an annuity to his daughter. During the life of the husband and wife debts were contracted by the

wife. There were no children, and the impossibility of there being any was not questioned:—Held, upon the application of the wife, and with the approbation of the husband, that the next of kin being mere volunteers, and not within the marriage consideration, the corpus of the trust funds might be applied in payment of debts. *Paul* v. *Paul*, 50 L. J., Ch. 14; 15 Ch. D. 580; 43 L. T. 239; 29 W. R. 281.

By a marriage settlement the wife's property was settled, after life estates in the husband and wife and in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband:—Held, that the trust in favour of the next of kin could not be revoked, and that although there was no possibility of issue, the husband and wife together were not entitled to the corpus of the settled fund. *Paul* v. *Paul* (supra) overruled. *Paul* v. *Paul*, 51 L. J., Ch. 839; 20 Ch. D. 742; 47 L. T. 210; 30 W. R. 801—C. A.

Wife's Insurance Policy after Husband's Death.]—By a marriage settlement, some property, to the principal part of which the intended wife was entitled for life, was conveyed to trustees for her separate use; and it was agreed that the trustees should effect an insurance on her life, and pay the premium out of the trust money, and should invest the amount assured when received, and pay the dividends to the intended husband for life; and after his decease, pay as the wife should appoint, and, in default, to the persons entitled under the Statute of Distribution of Intestates' Estates. The wife survived her husband:—Held, that she had then a right to refuse to keep up the policy; and that this court would not consider her bound to perform the agreement for the benefit of mere volunteers. *Godsal* v. *Webb*, 2 Keen, 99; 7 L. J., Ch. 103.

Wife's Property—Covenant by Husband only.]—In a marriage settlement (the intended wife being an infant) the husband covenanted that one-half of the wife's personal and of the proceeds of her real property, when sold, should be settled upon trust for himself for life, then for her for her life, and then, in default of issue, upon trust for her next of kin. The property was duly vested in the trustees. The husband died, and there was no issue of the marriage:—Held, that the trust for the next of kin was not binding against the wife, and that she had absolute power to deal with the trust funds. *Gibbs* v. *Grady*, 41 L. J., Ch. 163; 20 W. R. 257.

e. Husband Purchaser of Wife's Portion.

Where no Agreement.]—When a man makes a settlement equivalent to his wife's portion, it shall be intended that he was to have the portion, though there is no particular agreement for that purpose. *Blois* v. *Hereford* (*Viscountess*), 2 Vern. 502.

Unraised Portion after Death of both Husband and Wife.]—Where the wife's portion is charged by will on certain lands, pursuant to a power in settlement, it shall go to the administrator of the husband, and not to the administrator of the wife, though the husband and wife are both dead, and the portion not raised. *Meredith* v. *Wynn*, Pre. Ch. 312; Gilb. Eq. Rep. 70.

What Property Included.]—Provision by marriage settlement not held a purchase of all the property of wife, unless that is expressed or clearly imported. *Druce* v. *Denison*, 6 Ves. 385.

Future Accession.]—Settlement by husband in consideration of portion of fortune which he would have or receive on his marriage, limited to the portion received upon the marriage, not extending to make him a purchaser of future accession, unless clearly the intention. *Carr* v. *Taylor*, 10 Ves. 574; 8 R. R. 40.

—— Non-performance by Husband.]—Settlement on consideration of wife's fortune confined to her fortune at the time, unless expressed to comprehend future accessions. No claims can be maintained by husband, or in his right, while the terms are not fulfilled on his part. *Mitford* v. *Mitford*, 9 Ves. 87. And on the latter point, *Corsbie* v. *Free*, Cr. & Ph. 64; 5 Jur. 790.

Wife's Right as Administratrix.]—Where there was an agreement on marriage to settle a jointure in consideration of 50*l.* portion, and the husband dies before the portion paid or jointure settled, and the wife takes administration to her husband:—Held, she shall not have the portion as administratrix and the jointure also. Sed quære. *Meredith* v. *Jones*, 1 Vern. 463.

—— Under Gift Over on Bankruptcy.]—A trader, on his marriage, received a fortune of 5,000*l.* with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided that if he should survive his wife, and the issue of the marriage should fail, and he should then be or have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l.* was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to fifteen sixty-sixths of the stock:—Held, that the limitations over in the event of the bankruptcy of the husband were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester* v. *Garland*, 5 Sim. 205.

Purchase of Wife's Dower.]—*See* HUSBAND AND WIFE (DOWER).

Purchase of Wife's Distributive Share.]—*See* EXECUTOR AND ADMINISTRATOR.

See also JOINTURE.

f. Strangers.

Covenant in Favour of—Voluntary.]—Covenant in marriage articles in favour of a stranger held merely voluntary, and not to be supported by the marriage consideration. *Sutton* v. *Chetwynd*, 3 Mer. 249.

Interest of, under Contract for Value.]—If two parties for a valuable consideration enter into a contract, of which one of the stipulations

is for the benefit of a third person, who is a stranger to the consideration, the court will not enforce the contract without securing his interest under it. *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451; 12 L. J., Ch. 492; 7 Jur. 1077. Affirmed 1 Ph. 98.

Annuity given to, upon Marriage.]—Where feme covert, having power to dispose of her separate estates, grants annuity to A. on her marriage, A. is not to be considered as a volunteer. *Power* v. *Bailey*, 1 Ball & B. 49.

Parties Confirming Settlement.]—Parties entitled to an estate confirming a jointress's settlement are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement. *Portsmouth* (*Earl*) v. *Suffolk* (*Lord*), 1 Ves. Sen. 31.

3. Non-Execution—Effect.

Executing Parties Bound.]—Where a deed of marriage settlement is drawn up as between the intended husband and wife and their respective fathers; and the father of the wife secures to the father of the husband a sum of money as the portion of the wife, according to a provision of the deed, but neither he nor his daughter executes the deed, and it is executed only by the intended husband and his father: it is binding upon, and as between the parties who execute, and creates efficient rights for the objects of the settlement. *M'Neill* v. *Cahill*, 2 Bligh, 228.

Tenant for Life with Power to Charge—Remainderman Bound by Covenant.]—Tenant for life with power to settle 500*l.* per annum out of such and such lands on a wife, enters into marriage articles, by which he covenants for himself and his heirs, &c., that he or his heirs would, in pursuance of this power, or otherwise, settle 500*l.* per annum. The marriage takes effect, and a settlement is drawn accordingly, by his direction, of such lands as were comprised within the power, but never executed. The question was, whether this should bind the remainder, or whether the wife should have satisfaction made her out of the personal estate, and decreed upon a second hearing that the lands should be settled. *Coventry* (*Lady*) v. *Coventry* (*Earl*), 10 Mod. 464; 2 P. Wms. 222; 1 Stra. 596; Gilb. Eq. R. 160; Comyn, 312.

Misunderstanding — Executing Party not Bound.]—Where funds came to the wife after marriage, the husband being in India, a contract of settlement of those and of other funds, by her father, was prepared and executed by the latter, and sent out for execution by the husband, who in the meantime had given instructions for a settlement in different terms:—Held, that the husband not being bound to execute the former, the father was not bound by it, although executed by him, and containing covenants for the benefit of an infant. *Woodcock* v. *Monckton*, 1 Coll. C. C. 273.

Execution by Husband only—Wife Bound by her Acts.]—Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c., the wife not an executing party. After the marriage, a real estate of the wife came into possession. The husband dies; the wife marries B. and dies; bill by a younger child against B., and the heir of his mother. It seems that the statute of frauds could not have been taken advantage of on account of the wife not having been an executory party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under the first husband's will, which recited the bond, from whence it was held she had bound herself at all events. *Archer* v. *Pope*, 2 Ves. Sen. 523.

A husband and wife had entered into an antenuptial agreement, which was signed by the husband only, for the settlement of the wife's property, part of which consisted of a reversionary chose in action which was not within Malins' Act. After the marriage the husband alone executed the settlement, which contained a covenant by the husband and wife to assign the wife's property to trustees upon trust for the wife for life, and after her death for such persons as she should by deed or will appoint. The wife, however, during coverture exercised the power of appointment given her in the settlement by mortgaging the reversionary chose in action for her own benefit:—Held, that she had by her conduct elected to confirm the settlement, and, although a married woman, was bound by it; and that, therefore, the mortgage was valid. *Seaton* v. *Seaton* (13 App. Cas. 61) is not inconsistent, and does not overrule *Barrow* v. *Barrow* (4 K. & J. 409) and *Wilder* v. *Pigott* (22 Ch. D. 263). *Greenhill* v. *North British and Mercantile Insurance Co.*, 62 L. J., Ch. 918; [1893] 3 Ch. 474; 3 R. 674; 69 L. T. 526; 42 W. R. 91.

4. Execution, Presumption of.

Existence of Drafts.] — The existence and execution of a settlement by indentures of lease and release, presumed from circumstances, principally the existence of the drafts; a statement in an abstract of the title, and the existence of the lease, for a year, of other estates, appearing to have been included in the same plan of settlement. *Ward* v. *Garneys*, 17 Ves. 134.

Evidence of Parties.]—A suit was instituted for the appointment of new trustees of a marriage settlement. The settlement was lost, but the husband and wife swore directly to the circumstances under which it was executed; to the execution of it by them; and to the contents of it. The solicitor who prepared the settlement was dead, but, in addition to the evidence of the husband and wife, there was the indirect testimony of several other parties to the same effect:—Held, that there was sufficient evidence for the court to assume that the settlement was actually executed and to the effect contended for. *Hall* v. *Dawson*, 7 L. T. 519.

Conflict of Evidence—Trustee's Action.]—In 1860, a husband, through the intervention of his wife, obtained possession of their marriage settlement from the trustee. The husband, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it. In 1864 the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement;

but the trustees and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise contents of it. No draft or other copy of the settlement was produced to the court, but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transaction, and in the proposed sale of part of the settled property:—Held, that, upon a full consideration of all the evidence in the case, the trustee was entitled to the relief which he sought. *Brandom* v. *Barlow*, 13 L. T. 6.

B. PROPERTY SETTLED.

1. Construction of Settlement—General Words.

Restricted by Recitals.]—A marriage settlement recited that, by virtue of certain specified instruments, certain specified hereditaments, "and all other the freehold hereditaments in the county of York thereinafter expressed to be appointed and released," were limited as the settlor should appoint, and, subject thereto, to him in fee. The settlement then recited that, upon the treaty for the marriage, it was agreed that the several hereditaments and estates in the county of York, thereinafter mentioned and intended to be thereby conveyed, should be assured to the uses thereinafter mentioned. The deed then contained an appointment and a conveyance by the settlor of the specified hereditaments mentioned in the recital, and of "all other the freehold hereditaments, if any, in the county of York, of or to which the grantor was seised or entitled for an estate of inheritance." The settlor, at the date of the conveyance, was seised of a fee simple estate in Yorkshire, called the L. estate, which was not comprised in the above-specified instruments, and was not recited nor mentioned in the conveyance:—Held, that the general words must be restricted by the recital, and that the L. estate did not pass. *Jenner* v. *Jenner*, 35 L. J. Ch. 329; L. R. 1 Eq. 361; 12 Jur. (N.S.) 138; 14 W. R. 305; L. R. 3 Eq. 91; 15 W. R. 51.

In a settlement, general words held not to include property omitted from the recitals. *Neam* v. *Moorson*, 36 L. J., Ch. 274.

"Or otherwise."]—H. N. being entitled under her father's will to a share of a fund, such share is settled on her marriage, the words of the settlement referring to all the parts or shares, possible or contingent, to which H. N. was then or might thereafter be entitled under the will "or otherwise." H. N. then became entitled to a share of her brother's residuary estate as one of his next of kin; and the question was, whether such share was included in her marriage settlement:—Held, that it was not. *Newbolt's Trust, In re*, 4 W. R. 735.

A marriage settlement recited that the intended wife was absolutely entitled, under a will of S., to one-sixth part of certain funds, and might become thereafter entitled to other shares under the trusts of the same will, and that it had been agreed that all her shares in the trust funds under such will should be settled. By the operative part of the deed she assigned to the trustees of the settlement all the one-sixth part or share, and all other the parts or shares, vested or contingent, to which she was then or might become entitled, by accruer, survivorship, "or otherwise" in such trust funds, and also all the shares and interest, whether vested or contingent, or in expectancy, and which she was then or might become entitled to, in any property whatsoever under the will of S.:—Held, that the words "or otherwise" must be construed as relating to a mode of acquisition ejusdem generis with accruer and survivorship, and did not include a share in the trust funds which the wife derived under the will, or as one of the next of kin of her father, who became entitled thereto. *Parkinson* v. *Dashwood*, 30 Beav. 49; 7 Jur. 854; 5 L. T. 44; 9 W. R. 493.

2. What Property Included.

Primâ facie every Interest of Settlor.]—Primâ facie, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. *Johnson* v. *Webster*, 4 De G. M. & G. 474; 24 L. J., Ch. 300; 1 Jur. (N.S.) 145; 3 Eq. R. 99; 3 W. R. 84.

A remote reversion in fee was held to pass under general words in an act by way of settlement in execution of articles, though the reversion was not particularly in contemplation at that time, the general words being sufficient to carry it; and the intention of the party being to include all the estate of the settlor. *Freeman* v. *Chandos* (*Duke*), Cowp. 360.

Appointment of Whole — Grant of Moiety only.]—Semble, that by an appointment duly made of a whole estate to the uses of a marriage settlement by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, the entirety of the estate passed. *Farmer* v. *Farmer*, 1 H. L. Cas. 724.

Testatum inconsistent with Recital.]—A marriage settlement recited an intention that 3,000*l.* should be settled in the testatum; it was agreed that 1,000*l.* should be paid to the husband, and the remaining 2,000*l.* was settled in the usual way:—Held, that the 2,000*l.* only could be treated as settled. *Hughes* v. *Young*, 1 N. R. 166; 32 L. J., Ch. 137; 9 Jur. (N.S.) 276.

A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry, and its sub-denominations; but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Kilahan, which it was proved were reputed a sub-denomination of Ballyhenry:—Held, that there was not sufficient evidence of mistake to justify the court in striking Kilahan out of the settlement. *Alexander* v. *Crosbie*, Ll. & G. t. Sugd. 145.

Amount—Time of Computation.]—Settlement of "all the two-third parts of all my property, &c., belonging, &c., lately devised unto me by M.":—Held, to pass only two-thirds of such property as then remained, and did not extend to such parts of property as had been spent previously to settlement. *Cotteen* v. *Missing*, 1 Madd. 176.

—— **Advanced Rent.**]—Lands were settled at marriage on trustees, that if wife survived she should receive the then profits. Husband made leases and advanced the rent:—Held, heir-at-law entitled to advanced rent. *Lawley* v. *Lawley*, 9 Mod. 32.

Balance Settled on Wife.] — When by a marriage settlement a part of the wife's personal estate was settled in the usual way, and as to the balance it was declared that it should not be subject to the trusts of the settlement, but should be held only for the wife, her executors, administrators, and assigns:—Held, as against the husband's creditors, that the fund was not settled. *Spirett* v. *Willows*, 3 De G. J. & S.; 34 L. J., Ch. 365; 11 Jur. (N.S.) 614; 11 L. T. 314; 13 W. R. 329.

—— **Not expressly Settled.**]—By a marriage settlement a sum of 30,000*l.* Irish currency was vested in trustees upon trust out of the interest and dividends of two equal third parts of it, together with the interest and dividends of the remaining third part, to make up the annual sum of 500*l.*, and pay such annual sum to the husband and wife during the life of A.:—Held, that the husband and wife were entitled during the life of A. to the income of the remaining third part, whether it did or did not exceed 500*l.* per annum. *Davis* v. *Morier*, 2 Coll. C. C. 303.

By a marriage settlement, after reciting that the husband was absolutely entitled, by virtue of an appointment made under the marriage settlement of his father and mother, to 10,000*l.*, a moiety of the trust funds comprised therein; and reciting also that he was contingently entitled, in the event of his sister dying under twenty-one and unmarried, to the other moiety of the trust funds; and reciting that upon the contract of marriage it was agreed that he should settle as well the moiety as also all other his part, share, and interest, as well vested as contingent, of and in the trust funds; it was witnessed that the husband assigned the 10,000*l.*, and all other the part, share, and interest, as well vested as contingent, in the trust property, upon certain trusts therein declared; and it was provided that if the moiety of the trust funds, to which he was contingently entitled as aforesaid, should by the death of his sister under the age of twenty-one, without having been married, or otherwise, devolve upon or vest in him, 2,000*l.*, part thereof, should belong to the plaintiff for his own benefit. The sister attained twenty-one, but died without having been married. The mother, in pursuance of a power in the settlement in that behalf contained, appointed the sister's share in trust for the plaintiff absolutely:—Held, that the share so appointed did not pass to the trustees of the plaintiff's marriage settlement. *Childers* v. *Eardley*, 6 Jur. (N.S.) 690; 8 W. R. 1698.

Mortgage Debt.]—By marriage settlement in 1842, T. being seised of the equity of redemption in fee of lands subject to a mortgage for 4,000*l.*, 2,000*l.* of which had been paid off, but kept alive for the benefit of the persons who paid off the same, and having also become entitled to the benefit of such last-mentioned charge, and contemplating the possibility of paying off the balance, conveyed the lands in question, and assigned the charge as to the 2,000*l.* already existing, "and also all sum or sums of money which he or any person in trust for him then was or should at any time thereafter be entitled to receive, whether principal or interest, as a mortgagee, or by purchase or assignment from the said then existing mortgagee, of all the lands in question." The trusts were substantially for T. for life, remainder to the children of former marriages absolutely. In 1846 T. paid off the remaining 2,000*l.*, and took a conveyance of the debt and mortgaged securities to a trustee for himself. In 1849 T. became insolvent:—Held, as between the assignees in insolvency and the trustees of the marriage settlement of 1842, that the 2,000*l.* thus paid in 1846 was bound by the settlement. *Cochrane* v. *St. Clair*, 1 Jur. (N.S.) 302.

Unapplied Income.]—By a marriage settlement, after reciting that the lady was entitled to real and personal property, and that it had been agreed that she should settle it, and also all other property to which she might become entitled during the coverture, upon the trusts thereinafter mentioned, all her then property was vested in trustees in trust, during her life, to pay and apply the income to such person or persons as she from time to time, by any writing or writings signed by her, should appoint; and, in default of such appointment, to her for her separate use; and, after her death, to pay 500*l.* a year to her husband for his life; and the settlement declared that, subject to those trusts, all the trust property, and all the annual produce of it which might remain unapplied at her death, should remain upon the trusts thereinafter mentioned, none of which were for the benefit of her husband. The trustees received the income of the settled property, and, with the lady's privity and acquiescence, paid it into a bank in their own names, and made remittances to her from time to time as she required money. She and her husband separated soon after their marriage, and she died in his lifetime; at her death 888*l.* were in her house, and a balance of 2,049*l.*, arisen from the income of the settled property received by the trustees, was standing to their credit in the books of the bank:—Held, that the husband was entitled to the 888*l.*, but that the 2,049*l.* were subject to the ultimate trusts of the settlement, as being annual produce remaining unapplied at the wife's death. *Johnstone* v. *Lumb*, 15 Sim. 308; 15 L. J., Ch. 386; 10 Jur. 699.

Secured Debts—Securities not Assigned—No Notice to Debtors.]—P. by a voluntary settlement assigned to trustees certain debts specified in the schedule thereto owing to him on the security of certain bills of sale in such schedule also specified, and all interest thereon respectively. And he directed the trustees to get in the debts, and empowered them to do whatever was necessary for that purpose. The settlement contained no express assignment of either the bills of sale or the chattels comprised in them. No notice of the assignment was ever given to the debtors. P. died, having received from the debtors the debts in question:—Held, that the settlement amounted to a complete assignment of the debts, within the principle of *Kekewich* v. *Manning* (1 De G. M. & G. 176); that the fact that notice of the assignment was not given to the debtors did not make the gift incomplete; and the settlor's estate was liable to account to the trustees of the settlement for the amount of

the debts that he had got in. *Patrick, In re, Bills* v. *Tatham*, 60 L. J., Ch. 111 ; [1891] 1 Ch. 82 ; 63 L. T. 752 ; 39 W. R. 113—C. A.

Secret of Recipe.]—The sole proprietor of a recipe for a medicine assigned it, on marriage of his daughter, to trustees for her and her husband for their lives, and then to their children. The mother destroyed the recipe, but verbally communicated contents to A., the eldest, for the benefit of B. and C., the younger children. Upon bill filed against A. by B. and C., A. was declared to hold the secret on trusts of the settlement, and was decreed to account for profits since the mother's death ; and as a sale was impracticable, an issue was directed to ascertain value of secret. *Green* v. *Folgham*, 1 Sim. & S. 398. *S. C.*, nom. *Green* v. *Church*, 1 L. J. (O.S.) Ch. 203.

Chattels Real as "Moneys."]—A deed purporting to settle a sum of money, "portion of moneys to which the settlor was entitled under the statute of distributions," passes chattels real coming to the settlor in the manner described. *Newitt* v. *Robinson*, 15 W. R. 77.

Furniture not "Fixtures."]—Household furniture does not pass under the description of "fixtures and fittings-up." *Simmons* v. *Simmons*, 6 Hare 352 ; 12 Jur. 8.

—— In Two Houses.]—By marriage articles, A. makes a provision for his wife by way of jointure, and in bar of dower, &c. ; proviso, that nothing therein contained should bar or hinder her from enjoying any legacy or bequest which the husband might give to her, nor should extend to all or any the household goods, or utensils of household stuff, rings, plate, jewels, or linen of the husband at the time of his death. A. lived in London, but had a large house furnished at Gosport, which he let out to Government as an hospital. On his death intestate, the widow claimed to be entitled, under the articles, to the furniture in both houses ; but held, that she was only entitled to the furniture of the house in London. *Pratt* v. *Jackson*, 1 Bro. P. C. 222 ; 2 P. Wms. 302.

By the testator's first marriage settlement a sum of 14,000*l.* was settled upon the testator for life, remainder to the first wife for life, remainder to the children of that marriage who should attain twenty-one. There were four children who lived to attain twenty-one. The first wife died, and the testator made his will, giving all his property to his children equally. The testator then married again, on which occasion 5,000*l.* was settled, after his decease, to the second wife for her life, remainder to the children of that marriage. There was but one child. After the birth of that child the testator executed a codicil giving certain annuities to his second wife, and in other respects confirming his will, except that he directed that previous to the equal division among his children the trustees were to take into consideration what each class of children would be entitled to under the marriage settlements of their respective mothers ; and whichever family should be individually least provided for, they should, in the first place, be severally entitled to receive out of the general estate so much as would make his or her share equal in amount to what each child of the other family would be entitled to under his or her mother's marriage settlement. The testator died, leaving his second wife surviving, and one child of the second marriage :—Held, that the subject of the settlement being nothing but money, the reversionary nature of the provision for the child of the second marriage was not to be regarded, although the provision for the children of the first marriage took effect in possession immediately on the testator's decease ; but, semble, that this might be otherwise in case the subject matter had been anything else than money. *Williamson* v. *Jeffreys*, 18 Jur. 1071.

Lease Renewed in Name of Settlor.]—A corporation, in consideration of a fine paid, granted a lease of a house for forty years from Michaelmas, 1856, at a yearly rent of 5*s.* 6*d.*, and subject to covenants for payment of rent, rates, and taxes, and to repair, maintain, and yield up the premises. The lease was assigned to L., who, in 1865, in consideration of natural love and affection, assigned the same, together with other property, to trustees for his wife for her separate use. Notwithstanding this settlement, L. remained in possession of the leasehold premises, and in 1870 he surrendered the lease to the corporation, and, in consideration of a fine paid, procured a new lease to be granted to him in his own name. He afterwards died :—Held, that in taking the new lease L. acted for the benefit of his wife and as agent for her and the trustees of the settlement, and that, although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease. *Lulham, In re, Brinton* v. *Lulham*, 53 L. T. 9 ; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928.

Houses Presumably Built out of Capital.]—By a marriage settlement the personal estates of the husband and wife were assigned to trustees, to permit the husband and wife to enjoy the use during their joint lives, and the whole to go to the survivor. The husband had farming stock, and the wife had money. Soon after the marriage the husband took a lease for lives of a piece of land, and built houses on it. The husband died first :—Held, that the presumption was that these houses were built out of capital, and not out of income, and that the representatives of the wife were entitled to a charge on them for the amount of personal estate which had been expended on them. *Williams* v. *Thomas*, 2 Dr. & Sm. 29 ; 31 L. J., Ch. 674 ; 8 Jur. (N.S.) 250 ; 7 L. T. 184 ; 10 W. R. 417.

3. Realty. *See* Settled Land.

4. Heirlooms and Personalty on Trusts of Real Estate.

a. Heirlooms, What are.

Pictures.]—From construction of will family pictures held to be heirlooms. *Savile* v. *Scarborough* (*Earl*), 1 Swanst. 537 ; 1 Wils. Ch. 239.

Jewels.]—Family jewels may be settled as heirlooms independently of real estate. *Shelley* v. *Shelley*, 37 L. J., Ch. 357 ; L. R. 6 Eq. 540 ; 16 W. R. 1036.

A husband who was entitled to family jewels and diamonds, bequeathed to his wife all "his" jewels for life, and afterwards as heirlooms :—

Held, that this bequest did not include pearl ornaments presented to her, or brilliant bracelets bought by the husband and given to the wife, and worn with the family jewels, so as to put the wife to her election. *Jervoise* v. *Jervoise*, 17 Beav. 566; 23 L. J., Ch. 703; 2 W. R. 91.

Books.]—Books not heirlooms, and if limited to go with entailed goods they become the property of the first tenant in tail. *Bridgewater* (*Duke*) v. *Egerton*, 2 Ves. Sen. 122.

Articles to have Heritable Character impressed.]—Where a gift was to "B. and her children, of my Quendon Hall estates, provided she takes the name of and arms of Cranmer, with my mansion house, furniture, books, plate, Archbishop Cranmer's portrait, India cabinet, striking watch, and my diamond earrings, as heirlooms with my estate." Semble, that heirlooms here meant something which, though not in its own nature heritable, is to have a heritable character impressed upon it. *Byng* v. *Byng*, 10 H. L. Cas. 171; 31 L. J., Ch. 470; 8 Jur. (N.S.) 1135; 7 L. T. 1; 10 W. R. 633.

Not Perishable or Consumable Articles.]—A testatrix directed that all plate, plated articles, furniture, implements of household, linen, china, goods, chattels, and effects, except books, which should be in and about a house in her occupation and possession, should be annexed to the house as heirlooms:—Held, that plate, jewellery, and a pianoforte passed under this gift, but that money found in the house, and articles perishable in a short time, such as live stock, carriages, wines, or wearing apparel, did not pass. *Hare* v. *Pryce*, 11 L. T. 101; 12 W. R. 1072.

"Utensils" in and about House—Not Farming Utensils.]—A testator directs that his household furniture, &c., and utensils in and about his mansion house at H., should go with the mansion house, and that for that purpose his trustees should make an inventory of the furniture, &c, and utensils which should be found in and about his mansion house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator, along with the mansion house. *Fitzgerald* v. *Field*, 1 Russ. 427; 4 L. J. (O.S.) Ch. 170; 25 R. R. 97.

b. Chattels Settled as Heirlooms without Reference to Uses of Freeholds.

Remainder after Estate Tail.]—Where of personal chattels there is a remainder, after an estate tail limited before, that remainder is void, and the person who was to have the estate tail will have the disposition of the whole. *Gower* v. *Grosvenor*, 5 Madd. 340.

Chattels Directed to go as Heirlooms.]—A direction annexed to a bequest of chattels, that they should go as heirlooms, and that the executors should make an inventory:—Held, not to make the bequest executory, or to empower the court to modify the bequest. *Rowland* v. *Morgan*, 2 Ph. 765; 18 L. J., Ch. 78; 13 Jur. 23. Affirming 6 Hare, 463.

Disposition till Person entitled Attains Twenty-one.]—S. devised all his books, pictures, and household goods, to such male person when he should attain twenty-one as should be then entitled to the trust, in possession of his real estate before devised, and till then he directed they should be kept at H., and be used in the meantime by such male person residing there, declaring it to be his will and desire that they should go in the nature of heirlooms with his estate, and be used therewith, as long as the law would permit. The pictures, books, and household goods ought to go as heirlooms as fully as the law will allow, for the devise is a disposition only of the use till some person, who is entitled to the inheritance, should come into possession by attaining twenty-one. *Trafford* v. *Trafford*, 3 Atk. 347.

Gift of Diamonds as Heirlooms—Letter.]—A casket containing diamonds was, in 1817, sent to the plaintiff's father, Sir J. H. S., and with them a letter, in which testator said the diamonds were to be considered as an heirloom in the family, and to be left to the eldest son and his heir, after the death of his mother, as long as the family should continue. At the death of Sir J. H. S. the diamonds remained in the possession of his widow, and on her death her acting executor raised the question whether, as she had alleged they were her property, they could be disposed of for the benefit of her creditors; but the court declared that the diamonds never formed part of her assets, but were the property of the plaintiff, Sir J. S., and that the executor must pay the plaintiff's costs. *Seale* v. *Haynes*, 9 Jur. (N.S.) 1338; 9 L. T. 570; 12 W. R. 239; 3 N. R. 189.

—— Will—New Diamonds afterwards added.] S. had a crotchet of diamonds belonging to his first wife, which by will he gave to his eldest son, to go to his heir in succession, as an heirloom. Afterwards he married a second wife, and then turned the crotchet into a necklace, adding new diamonds of 200*l.* value, which was more than the value of the crotchet. Upon the death of S., his heir-general claimed the crotchet of the widow. Ordered that the master do separate the diamonds, and deliver the diamonds which were in the crotchet to the heir-at-law, as an heirloom. *Calmady* v. *Calmady*, 11 Vin. Abr. 181, pl. 21.

Conditional Bequest—Condition becoming Impossible.]—Testator bequeathed a bust, after his wife's death, to "J., now Duke of B.," on condition that he caused it to be placed and remain in W. Abbey, and at the time of the delivery of it to him settle it so as to be held as an heirloom by the persons who under the limitations to which the Abbey should be subject, should then be entitled to the possession thereof, with a gift over in case J. should neglect to do so for twelve months after request by the trustees. J., Duke of B., had died in 1839. F. was Duke of B. at the time of testator's will and death, and was owner in fee of W. Abbey. F. died during the lifetime of the tenant for life, and consequently never received the bust. The present Duke of B. was willing to allow F.'s executors to place the bust in the Abbey:—Held, that the condition could not be performed by the duke's executors, and that the bequest fell into the residue of the testator's personalty. *Patching* v. *Barnett*, 51 L. J., Ch. 74; 45 L. T. 292—C. A. Reversing 28 W. R. 886.

c. Chattels Settled with a Title.

Limitation Void for Uncertainty.]—When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement or defeasance of an absolute interest are subject to all the rules which govern the validity of conditions subsequent. Such limitations, therefore, must be certain, not only in expression, but also in operation, and it is essential to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect. A testator, who was a peer, bequeathed chattels to trustees, upon trust to permit and suffer the same to go and be held and enjoyed with the title, so far as the rules of law and equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, and so that no person in existence at the time of the testator's decease, or born in due time afterwards, and afterwards coming to the title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease and afterwards attaining the title:—Held, that the latter clause of the limitations was void for uncertainty in operation, and that the first person born after the death of the testator who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of the testator's death, and who was capable of inheriting the title. *Exmouth (Viscount), In re, Exmouth (Viscount)* v. *Praed*, 52 L. J., Ch. 420; 23 Ch. D. 158; 48 L. T. 422; 31 W. R. 545.

—— **Remoteness.**]—V., by his will, bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c., upon trust to permit his wife to have the use of them during her life; and upon her death, to permit his son A. B. to have the use of the same goods, &c., for his life; and upon the decease of the survivor of his wife and son, should be possessed, &c., in trust for such person as should from time be Ld. V.; it being his will that the goods, &c., after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family as far as the rules of law and equity would permit:—Held, that the limitation over was void as being too remote, and that the estate vested absolutely in the eldest son of A. B., grandson of the testator, who was living at the date of his death. *Tollemache* v. *Coventry (Earl)* 8 Bligh (N.S.) 547; 2 Cl. & F. 611.

—— **For Life, giving absolute Interest.**]—A testator bequeathed personalty to trustees to pay the interest to Sir G. A., Bart., for life, and after his decease to his eldest son; but in case he should die, leaving no son, then in trust for the persons on whom the baronetcy should devolve, for life; and after the extinction of the baronetcy, to fall into the residue of his estate. At the death of the testator, Sir G. A. and his two brothers, J. and R., on whom the baronetcy successively devolved, were living. Sir G. A. afterwards died without having had any issue:—Held, that Sir J. became absolutely entitled to the property. *Mackworth* v. *Hinxman*, 2 Keen, 658; 5 L. J., Ch. 127.

—— **For Life with Remainder.**]—A testatrix, after bequeathing diamonds and china to L., Baron I., declared that she made "the bequest to Lord I. as head of the existing family," and so far as she lawfully could directed that the diamonds and china should be "deemed heirlooms in the family of I., and be held and enjoyed by the person for the time being bearing the title of Baron I." She then made a further bequest to "the said Baron I." L., Baron I., died in the lifetime of the testatrix, being succeeded in the title by E.:—Held, that, although the first bequest was not executory, L., if he had survived the testatrix, would only have taken a life interest in the diamonds and china, with remainder to the person who should succeed him, and that consequently E. was entitled to have the chattels delivered to him, but without prejudice to the question whether he was entitled for life or absolutely. *Montagu* v. *Inchiquin (Lord)*, 32 L. T. 427; 23 W. R. 592.

Held, also, that the second bequest was to L., and lapsed by his death in the lifetime of the testatrix. *Ib.*

d. Rights of Tenant in Tail.

General Rule.]—Where there is a limitation of realty in strict settlement, and a declaration of trust of chattels to follow the limitations of the real estate simpliciter, the interest in the chattels will vest absolutely in the first taker of an estate of inheritance. *Scarsdale (Lord)* v. *Curzon*, 1 J. & H. 40; 29 L. J., Ch. 249; 6 Jur. (N.S.) 209, 246.

An assignment or a bequest of personal estate, either immediately or by way of trust, executed in favour of one or more tenants for life, with remainder in tail, vests the interest absolutely in the first tenant in tail immediately upon his birth, and this whether the limitations are direct or by way of reference to the limitations of real estate, and the expression that the property is to be treated as heirlooms will carry it according to limitations of the realty. *Ib.*

An addition of the words "so far as the rules of law and equity will permit," or the circumstance of the legal interest being left in trustees, will not vary this. *Ib.*

Doubtful words, tending to restrict the interest of the chattels to those who come into possession of the realty, will not overrule the operation of the general canons of construction, nor suspend the interest until possession of the realty is acquired. But clear words imposing such a restriction, will overrule the ordinary construction of a bequest or settlement of heirlooms. *Ib.*

By a settlement, leaseholds were limited upon trust for the person or persons who, for the time being, should, by virtue thereof, be seised of or entitled to the freehold hereditaments thereby settled; with a proviso that they should not, for the purpose of transmission, vest absolutely in any child of a person thereby made tenant for life, who should not attain twenty-one. By the same settlement, plate and other chattels were limited upon trust for the person or persons who, for the time being, should by virtue thereof be seised of or entitled to the actual freehold of a mansion house thereby settled, so that the chattels might, so far as the rules of

law and the circumstances of the case would admit, accompany the mansion house as heirlooms for the benefit of the person or persons who, for the time being, should, under the limitations thereof, be seised of or entitled to the mansion house; with a proviso that the plate and other chattels should not, for the purpose of transmission, vest absolutely in any child of a person thereby made tenant for life, who should not attain twenty-one; but that such child should, nevertheless, during minority have the usufruct thereof. There were other clauses in the deed where the words "actual freehold" were used in the sense of freehold in possession. C. was a tenant in tail who attained twenty-one, and died in the lifetime of a prior tenant for life. The plaintiff succeeded C. as tenant in tail, attained twenty-one, and came into possession:—Held, that the leaseholds vested absolutely in C., and the plate and other chattels in the plaintiff. *Ib.*

Chattels directed to go as heirlooms with an estate, "as far as the rules of law and equity will permit," vest in the first tenant in tail, who comes in esse. *Vaughan* v. *Burslem*, 3 Bro. C. C. 101.

General rule is, that leasehold estate limited with freehold vests absolutely on birth of first tenant in tail, subject to intention declared or implied, that they shall go together as long as the rules of law and equity permit. *Southampton (Lord)* v. *Hertford (Lady)*, 2 V. & B. 63; 2 Rose, 63; 13 R. R. 18.

A testator devised freehold to A. for life, with remainder to the first son of A. in tail male, with remainders over; and he gave his residuary personal estate in trust to lay it out in the purchase of 3*l.* per cent. bank annuities, and to pay the dividends "unto such person or persons as for the time being should by that his will be entitled to the rents and profits of his freehold hereditaments thereinbefore devised," with the gifts over in case of the total failure of the estates tail limited by this will. On a petition by A. and his eldest son for a transfer to them of the fund which had been paid into court:—Held, that the general intention of the testator being, not to create a perpetuity, but to give the personalty so as to go with the freeholds, the first tenant in tail was absolutely entitled to it, and an order was made as prayed. *Johnson's Trusts, In re*, L. R. 2 Eq. 716; 12 Jur. (N.S.) 616.

Tenant in Tail Dying under Age.]—Devise of real estate to A. for life, remainder to trustees to preserve contingent remainders, remainders to A.'s first and other sons in tail male, remainder to B. for life, remainder to trustees to preserve contingent remainders, remainder to B.'s first and other sons in tail male, remainder over; and then a bequest of plate and furniture in the house to be held and enjoyed by the several persons who should respectively and successively be entitled to the use and possession of the house in the nature of heirlooms, to be annexed to and go along with the house for ever. A. had a son who died a few days after his birth. The plate vested absolutely in A.'s son as tenant in tail, and from him was transmitted to A., his father, and in A.'s hands was liable to an execution at the suit of his creditors. *Foley* v. *Burnell*, Romilly's Notes of Cases, 1; 1 Bro. C. C. 274; 4 Bro. P. C. 319.

Testator directed that all his plate, furniture, &c., at his mansion house should remain there as heirlooms, and devised the same to trustees, upon trust, to permit the same to go, together with the mansion house, to such persons as should, from time to time, be entitled to it for so long time as the rules of law and equity would permit; and devised his real estates to trustees to the use of several persons and their first and other sons, &c., successively in strict settlement. The absolute interest in the personal chattels vested in the first tenant in tail, and upon his death, under age, passed to his representative. *Carr* v. *Erroll (Lord)*, 14 Ves. 478; 8 R. R. 394.

—— **In Lifetime of Tenant for Life.**]—A testator by his will directed that his books and plate should be considered as heirlooms, and should pass with his real estate, in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed thereto; and he devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C. for life, and after the decease of R. C. for his first and other sons successively in tail male, and in default of such issue upon trust for Henry C., the eldest son of J. C., for life, and after his decease for his first and other sons successively in tail male, and in default of such issue upon trust for "the next eldest son of the said J. C. who shall survive the said Henry C." for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said Henry C." successively in tail male, and in default of such issue upon trust for his, the testator's, own right heirs. R. C. and Henry C. died without having married. J. C. died in testator's lifetime. George was the next eldest son of J. C., who survived Henry. F. J. C. was the eldest son of George, and the first tenant in tail under the settlement, and he died an infant in the lifetime of R. C. and of Henry C.:—Held, that, notwithstanding the death of F. J. C. before it could be known whether his father would survive Henry C., or whether there would be any issue male either of R. C. or Henry C., the heirlooms and residuary personalty vested absolutely in the legal personal representative of F. J. C. *Hogg* v. *Jones* (32 Beav. 45)) distinguished. *Cresswell, In re, Parkin* v. *Cresswell*, 52 L. J., Ch. 798; 24 Ch. D. 102; 49 L. T. 590.

A testator, after devising fee-simple estates to A. for life, with remainder to his first and other sons in tail, and like remainders to B. for life, and to his sons in tail, and to several others, bequeathed certain real and personal chattels to trustees, in trust to permit and suffer A. to receive the issues and profits thereof for his life, and after his decease "to permit and suffer each and every of the several other persons aforesaid, to whom an estate for life in real estates was hereinbefore limited, successively, and as each of them shall become seised of said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively, and from and after the decease of the last of the said last-mentioned tenants for life as shall become seised in manner aforesaid, or if none of them shall so become seised, then, from and after the decease of the said A., upon trust to grant, assign, and convey the chattels "to such person or persons as shall then become seised of the said

real and freehold estates under any of the limitations aforesaid" :—Held, that the chattels vested in a son of A., who was tenant in tail of the real estate, at the death of A., and did not vest in an elder son of A., a prior tenant in tail, who died in the lifetime of A., or remain in contingency until the death of the last of the successive tenants for life. *Potts* v. *Potts*, 9 Ir. Eq. R. 577 ; 3 Jo. & Lat. 353. Affirmed, 1 H. L. Cas. 671.

A testatrix seised in fee of a messuage and mill, subject to the life estate of C., directed the same to be conveyed to the use of C. for life, with remainder to his first and other sons in tail, and directed her trustees to stand possessed of 2,000*l.* stock, upon trust to apply the dividends from time to time in the repairs of the messuage and mill at the request in writing of C., and after the death of C. upon the application or request in writing of the person or persons entitled under the limitations thereinbefore directed, to the end and intent that the stock, and the interest and dividends thereof, might be, and be continued as long as the rules of law and equity would permit, as a fund for keeping the messuage and mill at all times in good and substantial repair for the benefit of the person or persons who might from time to time be so in possession thereof or entitled thereto. The property was settled in accordance with the directions of the will, and the first tenant in tail died in the lifetime of C., without having barred the entail :—Held, that the person who then came into possession as tenant in tail was entitled to the fund, and not the executors of the first tenant in tail. *Coe* v. *Sutton*, 25 L. J., Ch. 845 ; 2 Jur. (N.S.) 733.

A testator possessed of leaseholds for lives, insured each of the lives. By his will he directed the insurances to be kept up, and gave his real and personal estate for a tenant for life, with remainder to her children successively in tail. The eldest child died an infant. Subsequently one of the cestuis que vient died :—Held, that the policy moneys did not belong to the legal personal representative of the deceased tenant in tail. *Meller* v. *Stanley*, 12 W. R. 524.

Son of Second Tenant for Life born before Son of First Tenant for Life.]—Where a testator devises a leasehold for years to one for life (who has no children), with remainder to his first and other sons in tail male : remainder to another for life, and to his first and other sons in tail male, with several remainders over; if the second tenant for life has a son born before the first tenant for life has a son, the remainder in tail limited to that son will vest ; and all the subsequent remainders which were good, as possibilities, while the contingency of a nearer heir's coming in esse were in suspense, are ipso facto from that moment determined ; and though such tenant in tail should die an infant the next day after his birth, yet the ownership of the term must vest, and his administrator must take it subject only to be defeated by the birth of a son of the first tenant for life, which will still be prior to intestate infant in the order of limitation. *Pelham* (*Lady*) v. *Gregory*, 3 Bro. P. C. 204.

Freeholds under Shifting Clause — Trust of Leaseholds Executory.]—A testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement ; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into the possession of the Worcestershire estates :—Held, that the fifth son was entitled to the rents and profits of the Cardiganshire leaseholds, because they were given upon an executory trust ; and, assuming a shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection. *Miles* v. *Harford*, 12 Ch. D. 691.

Held, also, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Ib.*

Tenant in Tail attaining Twenty-one in Lifetime of Tenant for Life.]—A testator devised and bequeathed real and personal estates on trust to invest the rents and profits and annual proceeds while any person beneficially interested in the real and personal estate, by virtue of the trusts afterwards declared, should be under twenty-one, for the purpose of accumulation ; and subject thereto for the eldest son then living of the testator's daughter C. for life, remainder to his first and other sons in tail, with like remainders to the other living sons of C., with divers remainders over, and an ultimate remainder to the testator's right heirs and next of kin. The will then provided that such person or persons as should thereunder be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold and personal estates until he, she, or they respectively should attain the age of twenty-one ; and that the leasehold and personal estates should absolutely belong only to such person or persons as should first attain the age of twenty-one, and become entitled to an estate tail in possession in his real estate under the trusts therein aforesaid ; and in the meantime the same leasehold and personal estates should remain subject to the trusts thereinbefore declared :—Held, that the words "in possession" in the proviso in the will did not mean the actual receipt of the rents and profits of the real estate ; and that the proviso included only tenants in tail, by purchase, and was valid, and that the tenant in tail, entitled by purchase, who first attained the age of twenty-one, although in the lifetime of the tenant for life, was absolutely entitled (subject to his father's life interest) to the leasehold and personal estates. *Holloway* v. *Webber*, 37 L. J., Ch. 865 ; L. R. 6 Eq. 523 ; 19 L. T. 514 ; 17 W. R. 94.

Power to Sell and Invest in Real Estate.]—Leasehold estates bequeathed in trust to pay the

rents and profits to the persons, for the time being, entitled under the limitations of real estate, devised in strict settlement, with power to the trustees at any time, with the consent of the persons so entitled, or if minors at their own discretion, to sell and invest the produce in real estate to the same uses. The leasehold estates vest absolutely in the tenant in tail upon his birth, and the power is void. *Ware* v. *Polhill*, 11 Ves. 257; 8 R. R. 144. S. P., *Southampton* v. *Hertford*, 2 V. & B. 63; 2 Rose, 63.

Gift over of Freeholds revoked.]—Testator devised freehold estate to his brother and his wife for their lives, remainder to A., his nephew, and the heirs male of his body, and for default of such issue to B. in the same manner, remainder over; he gave so much of the same estate as was leasehold to his brother and his wife for so many years of the term as they or the survivor should live, and directed that after the decease of the survivor, the leasehold premises should from time to time be held and enjoyed, and belong to the several persons in succession, who should for the time being be entitled to the freehold as far as the rules of law would admit, and gave the same directions as to the furniture of the mansion-house. By codicil reciting that he had devised the freehold part, after failure of issue male of A., to B. in tail male, &c., he revoked those limitations, and after failure of issue male of A., devised to others, and repeated the disposition he had made of the leasehold and furniture. A. takes the leasehold absolutely. *Fordyce* v. *Ford*, 2 Ves. 536.

Disposition until Person entitled attains Twenty-one.]—S. devised all his books, pictures, and household goods to such male person when he should attain twenty-one, as should be then entitled to the trust, in possession of his real estate before devised, and till then he directed they should be kept at H., and be used in the meantime by such male person residing there, declaring it to be his will and desire that they should go in the nature of heirlooms, with his estate, and be used therewith, as long as the law would permit. The pictures, books, and household goods ought to go as heirlooms as fully as the law will allow, for the devise is a disposition only of the use till some person, who is entitled to the inheritance, should come into possession by attaining twenty-one. *Trafford* v. *Trafford*, 3 Atk. 347.

Absolute Interest on Disentailing.]—S., by will, gave 5,000*l.* to the eldest son of his late brother for life, with remainder upon trusts corresponding with the limitations made by A. of the C. estate in favour of his issue, but subject to an executory limitation over on the death under twenty-one, without issue then living, of any person who, under the said limitations of the C. estate, would be tenant in tail by purchase. A. had never made any settlement, but had registered according to the law of Scotland two deeds of entail of the C. estate, of which he was then tenant in tail in possession. A.'s eldest son, having executed a disentailing deed, and thereby become owner in fee of the C. estate, claimed the 5,000*l.* absolutely:—Held, that he had become absolutely entitled to the 5,000*l.* on the completion of the instrument of disentail. *Schank* v. *Scott*, 22 W. R. 513.

A testator devised an estate in strict settlement; he also gave a fund in trust to keep the estate in repair for a term of years, and to pay the surplus to the person for the time being entitled to the land. The testator prohibited any trees from being cut during the term, and deprived any person so doing from any benefit of the fund. At the end of the term the fund was to go to the person in possession of the estate, if a descendant of either of his sons; otherwise to the descendants of his brothers and sisters:—Held, that by barring the entail the persons became immediately entitled to the fund. *Colson's Trust, In re*, Kay, 133; 2 Eq. R. 257; 23 L. J., Ch. 155; 2 W. R. 111.

Life Interest only in Heirlooms.]—A father devised all his real estate, subject to certain settlements, to his eldest son, who was also residuary legatee, in tail male, with remainders over, and bequeathed plate, &c., "to go and remain as heirlooms, together with my estates":—Held, that the son took only a life interest in the chattels bequeathed as heirlooms. *Robinson* v. *Robinson*, 33 L. T. 663.

Furniture.]—Furniture, &c., at H. bequeathed for the use of those who should enjoy the estate, to be taken care of and delivered by executors, and to remain at H., as if in his own possession, vests in the first tenant for life. *Wyth* v. *Blackman*, 1 Ves. Sen. 197.

Devise that the household stuff at H. should remain there for the use of those who enjoy the estate by a settlement, to be taken care of and delivered by executor, &c.; it goes to the representative of the first taker, who was tenant for life, and is not to be sold as heirlooms with the house, although no estate in tail vested. *Id.* 202.

"Actual Possession"—Disruption of Limitations not foreseen by Settlor.]—Chattels were bequeathed, "in the nature of an heirloom, to the person who, for the time being, shall be in the actual possession and enjoyment of my freehold estates, under the limitations of this my will":—Held, that they did not vest absolutely in a tenant in tail whose estate was defeasible, and who never came into possession. Held, also, that they did vest absolutely in the person who, in the events which happened, would have been tenant in tail in possession, if his estate had not been defeated by the execution of a disentailing deed. To destroy the right of such person to the chattels, his exclusion from possession of the freeholds must arise from some act or disposition of the testator, and not from any foreign circumstance beyond the testator's control. *Hogg* v. *Jones*, 1 N. R. 222; 32 Beav. 45; 32 L. J., Ch. 361; 9 Jur. (N.S.) 507; 8 L. T. 816.

If chattels are given to such person as shall be in possession of settled estates under the limitations of the settlor's will, a disruption of the limitations before the time, by an act not contemplated by the settlor, and over which he had no control, will not accelerate or affect the gift. The chattels will still devolve upon the person who but for the disruption would have been entitled to the estates. *Ib.*

A testator bequeathed plate for the use of his wife during her life, and after her death he gave the same, in the nature of an heirloom, to the person who, for the time being, should be in the actual possession and enjoyment of his freehold estates under the limitations of his will. The real estates were limited to trustees, to receive

and accumulate the rents, and make payments thereout to his son during his life; and after his death, for the first and other sons of his son in tail male, remainder to the testator's daughter for life, remainder to her first and other sons in tail male, remainders over. The daughter and B., her eldest son, joined in suffering a recovery. Both died in the lifetime of the son. B. left a son, and devised his real estates to trustees. Upon the death of the testator's son without issue, B.'s son would, under the limitations of the will, have become entitled to the actual possession and enjoyment of the real estates:—Held, that notwithstanding the recovery suffered, he was entitled to the plate. *Ib.*

e. Directions against Vesting under Twenty-one.

Not extending to Tenants in Tail by Descent.]—G. devised freeholds for the use of his nephew for life, with remainder to the use of his first and other sons in tail male, with successive remainders over for life, and remainders to the first and other sons of the successive tenants for life in tail male; and he bequeathed his residuary personal estate upon such trusts as were thereby declared concerning the devised freehold hereditaments, "or as near thereto as the rules of law and equity would permit; provided, nevertheless, that such residuary personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years":—Held, that the proviso merely narrowed the class who would have taken under the previous words of gift, and did not extend such class to tenants in tail by descent; and, therefore, the personalty vested only in tenants in tail by purchase, and the gift was not void for remoteness. *Christie* v. *Gosling*, 35 L. J., Ch. 667; L. R. 1 H. L. 279; 15 L. T. 40.

Held, also, that the words "as near as the rules of law and equity will permit," would not by their own force have controlled the construction. *Ib.*

With no Gift Over.]—By a settlement in 1804, real estate was settled to the use of C., third Earl of Harrington, for life, with remainder to his first son, Lord Petersham, for life, remainder to the first and other sons successively of Lord Petersham, in tail male, with similar remainders in succession to the eight other sons of the third earl for life, and their respective first and other sons in tail male; remainder to the third earl in fee. By his will, made in 1824, the third earl gave chattels upon trust "for the person or persons who for the time being should, under the limitations in the settlement, be in the actual possession of the estates, to the intent that the same chattels might be deemed heirlooms, to go along and for ever be enjoyed with the estates, so far as the rules of law and equity will permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seised of or entitled to the estates for an estate of inheritance either in possession or reversion, or otherwise, unless such person should attain the age of twenty-one, or dying under that age should leave issue inheritable under the limitations in the settlement." The testator gave his residuary personal estate upon trusts for investment in lands to be settled to the same uses as those declared in the settlement of 1804. The first tenant in tail in possession died under twenty-one, within the period allowed by the law as to perpetuities:—Held, that the gift was not an executory bequest, and that the estate of the first tenant in tail was thereby terminated, but that there were no words which carried over the chattels in that event to any other tenant for life or tenant in tail, and that the chattels therefore passed by the residuary clause in the will. *Harrington* (*Countess*) v. *Harrington* (*Earl*), 40 L. J., Ch. 716; L. R. 5 H. L. 87. And see *S. C.*, 37 L. J., Ch. 593; L. R. 3 Ch. 564; 19 L. T. 38; 16 W. R. 742.

Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. *Ib.*

Covenant Executed by Decree of Court.]—Covenant in marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates, limited to the first and other sons in tail male, with several remainders; the court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one; or die under that age leaving issue male. *Newcastle* (*Duke*) v. *Lincoln* (*Countess*), 3 Ves. 387; 4 R. R. 31. But see the variations in this decree, *Id.* 398, n., and 12 Ves. 218, on appeal.

Proviso not Independent, but Qualifying previous Limitations.]—A testator, after giving several legacies, directed his trustees to invest dividends, and rents, and profits, and the annual proceeds of his real and personal estates, during the time that any person beneficially interested in those estates should be under twenty-one, in order to accumulate the personal estate. They were then to hold his real and personal estates for his first grandson, the eldest son of his daughter, then living, for his life, and after his death for the first and other sons of that grandson in tail, remainder over to the other sons of the daughter. After other remainders there was an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure of the trust estates respectively. Then followed this proviso: "I declare it to be my will and meaning that such person as shall under this my will be entitled to an estate tail in possession in my real estate shall not be absolutely entitled to my leasehold and personal estates until he shall attain the age of twenty-one, and that my leasehold and personal estates shall absolutely belong only to such person as shall first attain the age of twenty-one, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid." The eldest grandson was in possession of the life estate—his eldest son died under twenty-one without issue—but his second son attained that age during his father's lifetime:—Held, that this proviso was not a new and independent disposition, but a qualification of all the preceding limitations. *Martelli* v. *Holloway*, 42 L. J., Ch. 26; L. R. 5 H. L. 532.

Held, also, that the second son fulfilled all the conditions of the proviso, and was absolutely entitled to the personal estates. *Ib.*

f. Rights of Other Persons.

Quasi Estate Tail—Absolute Interest.]—Personal estate incapable of entail. *Stafford (Earl)* v. *Buckley*, 2 Ves. sen. 171.

Personal effects not to be given in perpetuity to heirs of body; and remainders void. *Id.* 181.

Limitation which would create an estate tail, as to freehold property, would give an absolute interest if applied to personal estate. *Sterne, Ex parte*, 6 Ves. 159.

It is the duty of the court to give effect to the intention of testators as far as the rules of law will permit; but if a testator uses words which, by their plain import, give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees, in a manner incompatible and inconsistent with the free enjoyment of the property plainly given to the first, will not authorise the court to alter the effect of the words by which that property is given. The first legatee of a quasi estate tail in personalty takes the absolute interest, notwithstanding a manifest and avowed intention to give a succession of limited interests. It has been established, that the words of a will must be construed with reference to the subject-matter, and that the same words even in the same sentence may have one effect in their application to real estate, and another under other circumstances proper for the consideration of the court in construing their effect in their application to personal estate. *Byng* v. *Strafford (Lord)*, 5 Beav. 558; 12 L. J., Ch. 169; 7 Jur. 98. Affirmed, sub nom. *Hoare* v. *Byng*, 10 Cl. & F. 508; 8 Jur. 563.

Tenant for Life.]—One settles a house on his daughter for life, with remainder over, and then by will devises the goods and furniture of the house to such persons as were to have the house after his death. By the settlement, the goods and furniture shall go according to the devise, and shall not be under the power of the first taker to dispose of, nor subject to her or her husband's debts. *Offley* v. *Offley*, Pre. Ch. 26.

—— **Execution for Debts.**]—Chattels devised as heirlooms to a certain house are removed by the tenant for life of that house to another, and are there taken in execution for a debt of the tenant for life. On a question whether these chattels were liable to be so taken, it was held they were. But this was so held under the particular words of testator's will. *Foley* v. *Burnell*, 4 Bro. P. C. 319; Romilly's notes of cases, 1—C. A.

Under Shifting Clause.]—A testatrix gave the H. estate to A. in fee, with a shifting clause to D. in fee if A. should become possessed of the K. estate; and gave certain household goods as heirlooms to A. and the persons possessed of the H. estate under the above limitations. After the death of D., A. became possessed of the K. estate:—Held, that the heirlooms belonged to the personal representative of D. *Campbell* v. *Ingilby*, 25 L. J., Ch. 761; 2 Jur. (N.S.) 410, 556; 4 W. R. 433.

Under substituted Limitations.]—Testator, by his will, directed that certain chattels in his mansion house should be annexed thereto, and be inherited and enjoyed by the several persons who should succeed to his real estates under the limitations of his will. By a codicil, he limited his estates to certain other persons, and declared that those limitations should take effect in precedence to the limitations in his will:—Held, that the persons entitled under the limitations in the codicil were entitled to the benefit of the direction respecting the chattels in the will. *Evans* v. *Evans*, 17 Sim. 108; 14 Jur. 383.

Limitations, how far Good.]—Limitation of personal chattels to go as heirlooms with real estate. Chattels shall follow that estate into a contingent remainder. *Gower* v. *Grosvenor*, 5 Madd. 337.

Where testator himself refers to "the rules of law," the limitations ought to go as far as those rules will permit. *Id.* 348.

All limitations of personal estate may be good until one vests, carrying the whole interest. *Brown* v. *Higgs*, 4 Ves. 717; 4 R. R. 323.

A bequest of leaseholds by reference to the uses declared respecting freeholds, make the leaseholds subject to other limitations and restrictions declared concerning the freeholds. *Heasman* v. *Pearse*, 40 L. J., Ch. 258; L. R. 11 Eq. 522.

Courts of equity will carry the limitation of a personal chattel, or trust of it, no further than the judges have done in the case of legal limitation of terms for years. *Beauclerk* v. *Dormer*, 2 Atk. 308.

Ultimate Limitation to Testator's Heir.]—If a testator directs his real estate to be settled on his son, his heir apparent, for life, with remainder to the first and other sons of his son in tail, with remainder to A. for life, with remainder to his first and other sons in tail, with remainders to other persons and their sons in like manner, and, ultimately, on his right heirs, and his personal estate to be settled on the same persons, in the same order and succession, and for the same estates and interests, so far as the nature of the property and the rules of law and equity will admit of, the court, if a suit is instituted immediately after the testator's death for the purpose of having a settlement made, will order the ultimate limitation of the personal and real estate to be made to the person who is the testator's heir. *Boydell* v. *Golightly*, 14 Sim. 328; 9 Jur. 2.

Testator gave his freehold and copyhold estates and his personal estate to certain persons (whom he appointed his executors), in trust, out of his personal estate, and by sale or mortgage of his freehold and copyhold estates, to raise money sufficient to pay his debts, funeral expenses, and legacies, and, out of the rents and interest of so much of his real and personal estate as should not be sold or disposed of for those purposes, to pay certain annuities and such sums as his trustees should think sufficient for the maintenance of his son John and his children (if he should have any), and to accumulate the residue of the rents and interests during the life of John, and after John's decease, to stand seised of his real estates in trust for John's first son, and the heirs of the body of such first son successively as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son, and, for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. and his sons, and to C. and D. and their sons, in like manner, with remainder to his own right heirs for ever; and he declared that his trustees and executors should stand possessed of his personal estate after John's death, in trust for such person and persons, in

the same order and succession, and for such and the same estates and interest, as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law and equity, the deaths of parties, and other contingencies would admit of. The testator died in 1780; his son John was his heir-at-law and customary heir. John, and A., B., C., D., died without issue:—Held, that the trusts subsequent to the trust for the first son of John were not void for remoteness, and that the ultimate trust of the personal estate, as well as of the freehold and copyhold estates, vested on the testator's death in his son John as his heir-at-law at his death. *Ib.*

Trusts whether Executory — Ultimate Trust for Next-of-Kin.]—A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children, as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed personal property was assigned to the trustees upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisoes, contingencies, declarations, and agreements, as were expressed concerning the payment by the trustees of the rents and profits of the real estate, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit":—Held, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate. This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next-of-kin: the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next-of-kin. *Ib.*

There was only one child of the marriage, who died an infant, in the lifetime of his father. On the death of the father:—Held, that such child took an absolute interest in the personalty, subject to open and let in other children, if any. *Doncaster* v. *Doncaster*, 3 K. & J. 96; 2 Jur. (N.S.) 1066.

Lien of Tenant for Life for Advances to Trustees.]—A tenant for life under a settlement comprising shares has a lien on the shares for repayment with interest of advances made at the request of the trustees for the purpose of paying calls on the shares, even though the trustees might, by exercising powers vested in them, have raised the necessary money otherwise. *Todd* v. *Moorhouse*, L. R. 19 Eq. 69; 32 L. T. 8; 23 W. R. 155.

Railway shares were settled on a married woman for life for her separate use, with remainders over. Calls were made, which the trustees had no means of paying, and at the request of the trustees, in order to prevent a sale or forfeiture of the shares, the tenant for life advanced to the trustees out of her separate estate the sums required for payment of the calls. The tenant for life having died:—Held, that the sums so advanced by her were in the nature of salvage moneys, and ought to be repaid out of the shares with interest at four per cent. from her death. *Ib.*

g. Protection of and Security for Heirlooms.

Practice.]—Practice as to tenant for life giving security for heirlooms. *Conduitt* v. *Soane*, 1 Coll. C. C. 285; 13 L. J., Ch. 390.

Custody in Interval.]—As to the custody of plate left as heirlooms, in the interval before any person became entitled to the possession. *Ellis* v. *Maxwell*, 12 Beav. 104.

Inspection.]—Inspection ordered on motion of articles claimed by the plaintiffs as heirlooms, in a chest at the bankers of the defendant, insisting by answer on a lien. *Macclesfield* (*Earl*) v. *Davis*, 3 V. & B. 16.

h. Sale.

Jurisdiction—Sale for Benefit of all Parties.]—The court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale will be for the benefit of all parties interested. *D'Eyncourt* v. *Gregory*, 45 L. J., Ch. 741; 3 Ch. D. 635; 25 W. R. 6.

But where in an administration suit a strong case was made for the sale of heirlooms settled by the will, liberty was given to take proceedings for obtaining a private act, and to apply in the suit as to the costs of such proceedings if they should prove unsuccessful. *Ib.*

—— **For Paying off Mortgages.**]—The court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder. *Fane* v. *Fane*, 46 L. J., Ch. 174; 2 Ch. D. 711.

Unprofitable Leaseholds.]—Leaseholds, specifically bequeathed to married women successively for life, for their separate use, with remainder to infants, proved damnosa hæreditas. The court decreed a sale notwithstanding the executors had so far assented to the bequest as to put the first tenant for life into possession. *Lonsdale* (*Earl*) *Berchtoldt* (*Countess*), 3 K. & J. 185; 3 Jur. (N.S.) 328.

And the second tenant for life, who had declined the property in specie:—Held, nevertheless, entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession. *Ib.*

5. Furniture and Other Personalty.

Settlement of Wife's Property on herself to enable her to Trade.]—A woman may, before marriage, with the consent of her intended hus-

band, convey all her stock-in-trade and furniture to trustees, to enable her to carry on her business separately; and if the husband does not intermeddle with them, and there is no fraud, such effects (though fluctuating) are not liable to his debts; but whether the trade is carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the stock-in-trade is liable to the debts of the husband; but even in such a case the furniture is not, though removed to the husband's house. It is no objection to such a settlement, that there is no inventory of the goods intended to be thus settled. *Jarman* v. *Woolloton*, 3 Term Rep. 618; 1 R. R. 780.

By a settlement before marriage, 32 cows, and the increase and produce arising therefrom, the property of the woman, were assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cow-keeper, to her own sole use. After the marriage, the wife, with the profits of her trade, purchased four more cows:—Held, that the settlement was good against the creditors of the husband, and that the cows purchased after the marriage were also protected by it. *Haslinton* v. *Gill*, 3 Dougl. 415; 3 Term Rep. 620, n.; 1 R. R. 783.

A feme sole who kept a horse and chaise to visit her customers before marriage, by deed conveyed to trustees, "all her household furniture, goods, and chattels" (specified in a schedule in which the horse and chaise were not included), and "all her stock-in-trade, materials, and other articles belonging to her, in and about her business." After marriage, she used the horse and chaise as before:—Held, that the horse and chaise passed to the trustees by the deed, and were not liable to be taken in execution for the debts of her husband. *Dean* v. *Brown*, 8 D. & R. 95; 5 B. & C. 336; 2 Car. & P. 62.

Of Furniture on Wife—Fresh Furniture subject to Settlement.]—A marriage settlement, reciting that it had been agreed that the intended husband should settle and assign all the household goods belonging to him, and to which he would become entitled on the solemnisation of the marriage, and set forth in an inventory, witnessed that the husband did assign all the household goods belonging to him, set forth in the inventory, to a trustee after the marriage, to assign the same to such person as the wife should by deed or will appoint, and in default of appointment to permit her to retain possession and enjoy the household goods, and to sell the same for her sole use and benefit, exclusive of the husband, and not subject to his debts; and after the death of the wife, for the husband; and after the death of the husband, in case the wife should survive him, for the wife; but in case she should die during his life, for him. The goods mentioned in the inventory were in a house in the possession of the husband; a part of them belonged to the father of the wife, which he had agreed to give her, a part to the wife, and the remainder to the husband. The marriage was solemnised; the parties enjoyed the use of the furniture for five years, when they removed, and the husband, at the desire of the wife, exchanged some articles, and sold some, and with the proceeds bought others. The trustee was informed of this, and approved, and ever since the husband and his wife continued to use and enjoy the furniture:—Held, that the husband joined in conveying the whole of the goods to the trustee for the sole and separate use of his wife: that the exchanging part of the goods, and the selling other parts, and buying fresh goods, were acts done by the husband, as the agent of the trustee, and that therefore the substituted goods must be considered as belonging to the trustee, and subject to the trusts of the deed. *Lane* v. *Grylls*, 6 L. T. 533.

6. Insurance Policies.

a. In General.—*See* ante, col. 839.

b. Duties and Liabilities of Trustees.

Lien for Premiums Advanced.]—A trustee, having a duty to keep up a policy, and the means of procuring funds for that purpose, can himself acquire no lien on the policy for premiums paid out of his own moneys, nor can he give any lien thereon to a third party who advances money for that purpose, and which is so applied. *Clack* v. *Holland*, 19 Beav. 262; 24 L. J., Ch. 13; 18 Jur. 1007; 2 W. R. 402.

If a trustee has no funds properly applicable for keeping up a trust policy, he may advance or borrow money to pay the premiums, and the amount will be a lien on the policies. *Ib.*

A policy was held on trust; the trustee assigned it to A. B. to secure some premiums. It being held that A. B., under the circumstances, had no lien on the policy, it was also held that he had obtained no priority over the cestui que trust, by first giving notice of the assignment to the assurance office. *Ib.*

Where it is the duty of a trustee or executor to obtain payment of a sum of money, he is exonerated, and never required to make good any loss if he has done all he could to obtain payment, but his efforts have not proved successful; nay, more, if he has taken no steps at all to obtain payment, but it appears that if he had done they would have been, or there is reasonable ground for believing they would have been, ineffectual, he is exonerated from all liability. *Ib.*

In the case of a chose in action, which is not assignable at law, the transferee, taking only an equitable interest, can obtain no greater benefit in it than the transferor himself possessed. *Ib.*

Trust funds were lent to A. B. (the tenant for life) with the assent of his wife and children, who were entitled in remainder. A. B. secured the repayment to the trustees by a life policy and a charge on his living. The trustees for seventeen years, with the assent and concurrence of A. B., paid over the surplus proceeds of the living to A. B.'s family, from whom he was living separate:—Held, that the debt was not thereby satisfied. *Ib.*

Covenant to Insure—Money Lent by Trustees on Security of Policy.]—A husband covenanted to insure his life for 1,200*l.* and assign the policy to trustees, and confessed a judgment to them to same amount, which was to be called in if policy not kept up. Another sum of 800*l.* in the same settlement was lent by the trustees to the husband on the security of a policy to that amount on husband's life. No other policy was assigned, and no steps taken to enforce the judgment and covenant:—Held, that the proceeds of the policy were not necessarily to be considered as obtained in pursuance of the husband's obligation, and that the trustees' liability in not compelling payment depended on the husband's ability. *Ball* v. *Ball*, 11 Ir. Eq. R. 370.

7. Deficiency in Settled Property.

—— **In Distributive Share Settled.**]—By a marriage settlement after reciting that the settlor was absolutely entitled to 7,000*l*., part of a distributive share in an estate which was being administered in chancery, and an agreement that 5,000*l*., part of the 7,000*l*., should be settled, it was witnessed that 5,000*l*. (part of the 7,000*l*. so belonging to the settlor as before mentioned) was settled upon certain trusts:—Held, that the parties claiming under the settlement were not entitled, the distributive share failing to realise the 5,000*l*., to have the difference made up out of the general estate of the settlor. *Evans* v. *Wyatt*, 31 Beav. 217; 8 Jur. (N.S.) 499; 7 L. T. 86; 10 W. R. 813.

Life Annuity—Arrears—Deficiency of Income—Charge on Corpus.]—By marriage settlement, dated the 29th January, 1821, two sums of 3,000*l*. and 1,000*l*. (Irish currency), were vested in trustees in trust to pay the income to the husband for life, and, after his death, in case the wife survived to pay to her out of the income an annuity of 200*l*. (Irish currency) for her life; and after the death of the husband, subject to the said annuity, in trust for the issue of the marriage. At the date of the settlement, the trust bonds were represented by two bonds for 3,000*l*. and 1,000*l*., bearing interest at 6*l*. per cent., given respectively by the husband and the wife's father. They were paid off shortly after the marriage, and the 4,000*l*. was invested in government stock, which produced annually 112*l*. 13*s*. 6*d*. only. The husband died in 1871, and the wife died in 1883, leaving one daughter issue of the marriage:—Held, that the executor of the wife was entitled to be paid out of the corpus of the trust fund a sum of money amounting to the difference between 112*l*. 13*s*. 6*d*. and 200*l*. (Irish currency) annually during the eleven and a-half years that the wife survived her husband. *Pepper's Trusts, In re*, 13 L. R. Ir. 108.

Business on Trust for Successive Tenants for Life—Loss during First, Profit during Second, Tenancy for Life.]—In an action to execute the trusts of a settlement, by which (inter alia) a business was assigned to trustees on trust for successive tenants for life and remaindermen, a receiver and manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned:—Held, that the loss must be made good out of the subsequent profits, and not out of capital. *Upton* v. *Brown*, 54 L. J., Ch. 614; 26 Ch. D. 588; 51 L. T. 591; 32 W. R. 679.

Insufficient Mortgage Security—Compound Interest.]—Money which was settled by a testator's will was invested by the trustees of the will on mortgage. The interest fell into arrear, and when the mortgaged property was sold it realised a sum less than the principal of the mortgage money:—Held, that the sum realised by the sale must be apportioned between the tenant for life of the settled money and the persons entitled to it in remainder, in the proportions which the principal of the mortgage money (which belonged to the persons entitled in remainder) and the arrears of interest (which belonged to the tenant for life) bore to one another, without any computation of compound interest. *Moore, In re, Moore* v. *Johnson*, 54 L. J., Ch. 432; 52 L. T. 510.

Fraudulent Appointment—Restitution.]—A sum of stock was settled in 1834 upon trust to keep up a policy of assurance on the life of D., and subject thereto upon trust for D. for life, and after his decease the fund and the moneys payable under the policy were to be held in trust for his three children, or such one or more of them, and in such shares and proportions, as D. should by deed or will appoint. In 1849 and 1850, D. and the three children released the trustees from the stock and from all liability to keep up the policy, D. entering into a covenant to keep it up, and the stock was transferred by the trustees. In 1852, D. appointed the policy to B., one of his daughters, to her separate use, without restraint on anticipation, upon a bargain with her that she should surrender the policy and pay the money to him. He promised her to effect and keep on foot a fresh policy, and to settle it upon the same trusts as the old one. The trustees, having no notice of the bargain, transferred the policy to B., who surrendered it to the office and paid the proceeds to D. D. effected the new policy, but failed to devote it effectually to the trusts. The money received on the surrender of the policy was 897*l*., but the sum which would have been payable under it if it had been kept on foot till D.'s death was more than 5000*l*.:—Held, by the court below, that the appointment was invalid, and that D.'s estate after his death was liable not merely for the 897*l*. which he had received, but for the sum which would have been received under the policy if it had been kept on foot, for that D. had virtually received the policy; and that the 5000*l*. must be raised out of his estate and be distributed as in default of appointment:—Held, on appeal, that (apart from the question of B.'s concurrence) this was the correct measure of liability, for that a person making a fraudulent appointment ought to be held liable to make good the whole loss occasioned by it to the trust estate, and that, moreover, D. was liable under his covenant to make good all loss arising from his not having kept the policy on foot; but that B. having been an active party to the transaction could not complain of it, and that the amount payable by D.'s estate must be diminished by the share which she, if not a party to the transaction, would have taken in default of appointment, and that D.'s promise to settle a fresh policy, which promise he failed to keep, was not a misrepresentation entitling her to say that she had been deceived into concurring in the transaction and was to be treated as if she had not concurred. *Deane, In re, Bridger* v. *Deane*, 42 Ch. D. 9; 61 L. T. 492; 37 W. R. 786—C. A. And see *Page* v. *Leapingwell*, 18 Ves. 463. *See also cases*, ante, col. 837.

8. Augmentation of Settled Property.

a. In General.

Husband not Purchaser of Accessions to Wife's Portion.]—Settlement by husband in consideration of portion of fortune which he would have, or receive on his marriage, limited to the portion received upon the marriage, not extending to make him a purchaser of future accessions, unless clearly the intention. *Carr* v. *Taylor*, 10 Ves. 574; 8 R. R. 40.

Additions to Settled Fund under Proviso.]—By a post-nuptial settlement, a wife settled sav-

ings of her separate estate upon trusts for herself and her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five, without issue, his share should go to the survivor. There was also a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, and that the sum to be so added should be subject to the like trusts as the original fund. The wife invested in the names of the trustees, but without communicating the fact to them, various sums arising partly from accumulations of the dividends and partly from funds derived from other sources, and after the death of the husband and of both of the sons without issue, the executor of the survivor of the sons instituted a suit to have the trusts of the settlement executed:—Held, that it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement. *Muggeridge* v. *Stanton*, 1 De G. F. & J. 107; 1 L. T. 44; 8 W. R. 69.

Held, also, that all the additions were subject to the trusts of it, and there not appearing sufficient probability of establishing in a cross-suit a case of mistake, the court refused to give an opportunity to institute such a suit. *Ib.*

—— As Advancement.]—Where A. B. invested some of the funds, subject to the trusts of his settlement, in the purchase of real estate, and added some money of his own:—Held, that it was an advancement to the parties entitled under the settlement. *Ouseley* v. *Anstruther*, 10 Beav. 461.

—— Appointment of Original Fund Only.]—Consols were vested in the trustees of a marriage settlement for the husband and wife successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends and paid them to him under a power of attorney from the trustees, to invest an additional sum of 2,000*l.* consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, and paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—Held, that there was no resulting trust of the 2,000*l.* for the husband, but that it became subject to the trusts of the settlement, as an augmentation of the trust fund. *Curteis, In re*, L. R. 14 Eq. 217; 26 L. T. 863.

A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum as an augmentation of the trust fund. Four years afterwards the husband and wife, under a power in the settlement, appointed the original fund, "or the trust fund and property representing the same," to two of their children:—Held, that the appointment passed only the original fund, and not the augmentation. *Ib.*

Accrued Shares—Appointment of whole.]—By a settlement, trustees were directed to be possessed of 1,760*l.* in trust for a daughter, and her sons at twenty-one, and daughters at twenty-one or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accruer between the three daughters and their children, in default of children, was declared, with a declaration, that the provisions applicable to the original shares should apply to such surviving or accrued shares: and it was provided, that if either of the three daughters should die without having or leaving any child who should attain a vested interest, she might dispose of any part of "her share," not exceeding one-third, by deed or will. On the death of one of the three daughters, her share accrued among the survivors. One of the survivors then died without a child, and appointed, by will, "one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l.*" The trustees paid so much of the share of the testatrix as had accrued into court, under the Trustee Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *Hutchinson's Settlement, In re*, 5 De G. & Sm. 681; 17 Jur. 59.

Appreciation of Securities—Specific Fund—Aliquot Parts—Apportionment.]—The doctrine of *Page* v. *Leapingwell* (18 Ves. 463) that, where various parts of a specific fund are disposed of in such a way as to exhaust the fund, they are to be treated as aliquot parts of the fund, and must all abate if there is a deficiency, applies also to cases where the securities on which the fund is invested have increased in value, and there is a surplus. A settlement of 10,000*l.* by which 5,000*l.* is given to A. and the residue to B.:—Held, on the true construction of the settlement, to be a division of the fund into moieties, so that the surplus funds arising from an increase in the value of investments must be shared equally between A. and B. *Phillips, In re, Eddowes* v. *Phillips*, 66 L. J., Ch. 714—C. A.

Windfalls—Capital or Income.]—A large part of the income of a settled estate was derived from the thinnings and cuttings of larch plantations, and, during a tenancy for life, high winds blew down a very large proportion of the larches, and it became necessary for the good cultivation of the estate to remove almost the whole of those which remained. It was estimated that it would take forty years for the plantations to yield the same income as before:—Held, that the tenant for life was not entitled to receive the proceeds of sale either of the trees not blown down but which had to be removed, or of the trees which were actually blown down, but that the whole of the proceeds of sale must be invested as capital. But held, that the tenant for life was entitled to receive out of the income arising from the invested fund and the plantations a fixed annual sum, equal to the average income which would have been derived from the plantations if no gales had occurred—such sum, if necessary, to be made up out of capital; the trustees to be at liberty to have recourse to the investments or the income of the plantations for the purpose of fresh planting. *Harrison, In re, Harrison* v. *Harrison*, 54 L. J., Ch. 617; 28 Ch. D. 220; 52 L. T. 204; 33 W. R. 240—C. A.

Minerals—Coals won by Innocent Trespassers—Compensation Moneys.]—Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for the defendant for life without impeachment of waste, with remainders over. During the life, and also after the death of B., part of these minerals were won by instroke by the owners of

adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—Held, that the moneys paid in respect of the minerals so won during the respective lives of B. and the defendant, belonged to the estate of B. and to the defendant repsectively. *Barrington, In re, Gamlen* v. *Lyon*, 56 L. J., Ch. 175; 33 Ch. D. 523; 55 L. T. 87; 35 W. R. 164.

—— **Coals required for Support of Railway—Compensation Moneys.**]—The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B., the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter-notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under s. 74 of the Lands Clauses Consolidation Act, 1845. *Ib.*

b. Bonuses on Insurance Policies.

Bound by Settlement.]—Bonuses on a policy held to be subject to the trusts of a marriage settlement. *Gilly* v. *Burley*, 22 Beav. 619; 2 Jur. (N.S.) 897; 4 W. R. 769.

Upon the construction of a settlement:—Held, that the policy effected in the names of trustees was itself settled; but that, under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. *Ib.*

Bonuses having been declared, the husband continued to pay the full premiums:—Held, on his death, that the bonuses were accretions to the trust, and did not belong to his executors. *Ib.*

By a marriage settlement the husband covenanted to effect a policy of insurance on his life, in the names of trustees, for the sum of 2,500*l.*, and to settle "the said sum of 2,500*l.*" upon certain trusts:—Held, that the trustees were entitled to the bonuses which accrued upon the policy. *Ib.*

—— **As against Assignees in Bankruptcy.**]—Where by his marriage settlement the husband covenanted to insure his life for 3,000*l.*, and "that the said 3,000*l.* under the policy should be settled, &c., and that the trustees should stand possessed of the policy and of the said sum of 3,000*l.* upon certain trusts for the benefit of the wife and children of the marriage:—Held, after the bankruptcy and death of the husband, that the bonuses payable on the policy belonged to the trustees and not to the assignees. *Parkes* v. *Bott*, 9 Sim. 388; 8 L. J., Ch. 14.

—— **As against Legatees.**]—The trustees of a marriage settlement were directed to keep up the premiums of a policy "to be taken out from some office in England or Ireland" on the life and in the name of W., the husband, out of the annual income of the property in the settlement. They were then directed to stand possessed of the policy, and a sum of 4,000*l.* thereby to be raised or secured upon certain trusts, after the decease of W., for the wife and the children of the marriage. W. covenanted to execute a regular assignment of the policy, "together with the said sum of 4,000*l.* sterling, to be insured upon the trusts and for the purposes aforesaid." W. did actually assign to the trustees an Irish policy for 4,000*l.*, Irish currency, which he had effected before the date of the settlement. Some time after, the trustees allowed the policy so assigned to drop, and effected an English policy on the life of W., but in their own names, for 3,666*l.* 13*s.* 4*d.*, which sum of English currency they were advised was equivalent to 4,000*l.* Irish currency. This policy they purported to hold on the trusts of the settlement in substitution for the Irish policy of 4,000*l.*, and they paid the premiums out of W.'s life income, as directed by the settlement. He afterwards died, having bequeathed the bonuses, which, with the 3,666*l.* 13*s.* 4*d.*, amounted to nearly 5,000*l.*, on certain trusts:—Held, that the bonuses belonged to the trustees of the settlement, and did not pass by the will of W. *Warren* v. *Wybault*, 12 Jur. (N.S.) 639; 15 L. T. 155.

Passing under Power to Bequeath.]—A policy of insurance for 3,000*l.* on A.'s life was assigned to trustees, and by a deed of even date trusts were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death 9,000*l.* was received under the policy:—Held, that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A. and C. in proportion to their legacies. *Courtney* v. *Ferrers*, 1 Sim. 137; 5 L. J. (O.S.) Ch. 107.

Express Trust for Settlor.]—A policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., and the money assured, on the trusts of the settlement. H. obtained possession of and misappropriated a portion of the trust funds:—Held, that the trustees were not entitled as against H.'s executrix to impound or retain the bonuses to make good the trust funds misappropriated by H., not as being settled property, because there was a prior resulting trust of them for H., not by way of set-off, because they were not payable till after H.'s death. *Hallett* v. *Hallett*, 49 L. J., Ch. 61; 13 Ch. D. 232; 41 L. T. 723; 28 W. R. 321.

Bonus applied for Child's Maintenance.]—A life policy of assurance was settled on the marriage of A. and B. on B., the wife, for life, with remainder to A., the husband, for life, with remainder to the children of the marriage at twenty-one, with remainder, in default of children, as B. should appoint. B. appointed her interest to A., and died, leaving one child. After B.'s death a bonus became payable on the policy. A petition was presented by the trustees and A., stating that A. was unable to support his child, and was going to emigrate, and praying that the sum receivable in respect of the bonus might be paid to the trustee, and applied for the maintenance of the child. The prayer of the petition was granted, on condition that A. gave up his

life interest under the settlement. *Hays, Ex parte*, 18 L. J., Ch. 441 ; 13 Jur. 762.

Settlement of Policy already effected—Recital of Amount.]—A marriage settlement recited that the settlor, the husband, had in pursuance of agreement effected insurances on his life for the sums of 2,000*l.* and 5,000*l.*, and had given a bonus to secure the sum of 7,000*l.*, and provided that the trustees should stand possessed of the said sums of 2,000*l.* and 5,000*l.*, so assured on the trusts of the settlement :—Held, that the bonuses did not pass. *Domville* v. *Lamb*, 9 Hare (App.) xxxii. ; 1 W. R. 246.

c. Bonuses on Stock and Shares.

New Shares created out of Profits.]—Five shares in a company were settled upon trust for J. for life, with remainder to her children. During the life of J., in pursuance of resolutions passed by general meetings of the company, the capital of the company was on several occasions increased by converting into shares a portion of the half-yearly profits of the company, and distributing such shares among the shareholders ratably according to the number of their shares. In this manner several new shares were allotted to the trustees of the settlement. After J.'s death, these new shares were claimed by her personal representative :—Held, that the new shares formed part of the capital of the settlement fund. *Barton, In re*, 37 L. J., Ch. 194 ; L. R. 5 Eq. 238 ; 17 L. T. 594 ; 16 W. R. 392. S. P., *Hodgens, Ex parte, and In re*, Ir. R. 11 Eq. 99.

Profits divided among Proprietors.] — By a marriage settlement, some shares in the London Assurance Company were settled on the husband and wife for their lives, and after their deaths on their children, and it was provided that, if any bonus should be given by way of increase of the capital of the trust funds, it should be added to the capital, but if it should be given by way of interest or dividend it should be paid to the person entitled to receive the dividends of the trust funds for the time being. At a meeting of the company the usual dividend of 1*l.* per share was voted, and it was resolved that a certain sum should be taken out of the profits of the company, and divided amongst the proprietors in proportion to their shares :—Held, that the addition made in pursuance of the resolution, was to be considered as part of the capital of the trust fund. *Ward* v. *Combe*, 7 Sim. 634.

Annuity—Surplus Dividends and Bonuses.]—A sum of 7,500*l.* bank stock was vested in trustees upon trust out of the proceeds thereof to pay an annuity of 561*l.* to I., for life, and invest the residue in bank stock or government security ; and upon trust that after the decease of I. the 7,500*l.* bank stock, and the savings of the dividends or proceeds thereof, be divided into five equal shares, a share to be transferred to each of five persons therein named. One-fifth of the 7,500*l.* bank stock was, upon the marriage of one of the persons entitled to the corpus of the trust fund in the lifetime of the annuitant, made the subject of settlement :—Held, upon the intention of the parties, to be gathered from the nature of the instrument and upon its construction, that one-fifth of accretions, by way of bonus, subsequently added to the original capital sum, and also one-fifth of the surplus dividends, were subject to the trusts of the settlement. *Plunkett* v. *Mansfield*, 2 Jo. & Lat. 344.

Tenant for Life entitled but not claiming Bonus.]—Stock stood in the names of trustees, upon trust, under a marriage settlement, to pay the dividends "of the stock, together with such bonuses as should from time to time be allowed thereon, when and as the same should become payable," to A. and his wife, and the survivor, for life :—Held, that A. was absolutely entitled to a bonus declared pending his life estate. *Mittam's Settlement, In re*, 4 Jur. (N.S.) 1077.

A. did not possess himself of the bonus, but allowed the same to be added to the capital, and received the dividends on the whole. On his death :—Held, that the wife, as survivor, was entitled to receive the bonus. *Ib.*

—— **To whole Bonus.**]—Where a party was entitled, as tenant for life, to the dividends of stock of the Royal Exchange Company, which had for many years previously declared half-yearly dividends on the stock, but in 1840 declared, in addition to the ordinary dividend, that a distribution of 5 per cent. out of the accumulated property should be paid :—Held, that the tenant for life was entitled to the whole, and not merely to the interest on the bonus when invested. *Price* v. *Anderson*, 15 Sim. 473. S. P., *Preston* v. *Melville*, 16 Sim. 163.

Passing to Assignee during Life of Tenant for Life.]—A. being entitled to a reversionary beneficial interest in 12,000*l.* bank stock, standing in the names of trustees, assigned, "during the life of the tenant for life, by the description, 3,000*l.* part of the 12,000*l.* bank stock, subject to the life interest of Mrs. N. therein," for a money consideration. Notice was given to the trustees :—Held, that this carried to the assignee all the bonuses declared subsequently to the assignment, and during the life of the tenant for life. *Armstrong, In re*, 3 K. & J. 486 ; 26 L. J., Ch. 658 ; 3 Jur. (N.S.) 612 ; 5 W. R. 699.

Dividend from Surplus of Insurance Fund not Bonus.]—On the marriage of H. and D. sixteen shares in a company were vested in trustees to pay the interest, dividends, and yearly proceeds to D., the wife, for her life, or such persons as she should appoint, for her separate use, and there was a proviso, that if any bonus should be declared in respect of the shares, they should be invested in augmentation of the settlement. The company, being their own insurers, carried over 5*l.* per cent. on their floating stock to the insurance fund, and declared a dividend out of the surplus, if any, year by year among the shareholders, and carried forward small sums left out of such surplus to the following year, and so on de anno in annum :—Held, that these additional payments were not bonuses, and that the wife was entitled to them for her life. *Hollis* v. *Allan*, 12 Jur. (N.S.) 638 ; 14 W. R. 980.

Income during Interval Undisposed of by Settlement.]—A., on her marriage, assigned 1,000*l.* in trust to pay all interest, dividends, and other profits to M., her intended husband, for life or until bankruptcy, and, after his death or bankruptcy, to permit A. to receive them ; and, after the death of A. and M., principal and all interest to go amongst the children of the marriage ; but in case there should be no children living at A.'s death, then as she should appoint, and, in default of appointment, for the persons entitled as her next of kin, as if she had died intestate and unmarried. M. became

bankrupt in A.'s lifetime; she died in 1865, and M. in 1871; there were no children of the marriage, and A. executed no appointment; the trustees retained the dividends after her death, and, on the death of M., paid the accretions into court:—Held, that the dividends which had accrued between the death of A. and the death of M. were undisposed of by the settlement; that they did not follow the corpus as accessory; and that the administrator of A. was entitled to receive them in trust for the personal representative of M. *Frank* v. *Mackay*, Ir. R. 7 Eq. 287.

Renewed Leases.]—See TRUST AND TRUSTEE.

C. EXECUTED SETTLEMENTS—LIMITATIONS AND INTERESTS CREATED BY.

1. CONSTRUCTION—GENERAL PRINCIPLES.

Intention.]—The intention of parties appearing in a deed always governs the court in constructions. *Hodgson* v. *Bussey*, 2 Atk. 91.

The court will make a favourable exposition in words in marriage settlements to support the intention of the parties; the same as to voluntary settlements. *Ib.*

Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard* v. *Quinchant*, Ambl. 147.

The court will, from the general frame of a settlement, collect the intent, contrary to the express words of a particular clause. *Northumberland* (*Earl*) v. *Egremont* (*Earl*), 1 Eden, 435.

Where parties to a deed of settlement contemplate several states of circumstances, and there is found on the face of the instrument a clear and distinct expression of intention to provide for one event which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events or states of circumstances which have not happened. *Dill* v. *Haddington* (*Earl*), 8 Cl. & F. 168.

Of the intention which is necessary for the efficacy of a deed. *Hughes* v. *Wells*, 16 Jur. 927.

Expediency.]—In the construction of marriage settlements, courts of equity will not act upon any views of expediency or inexpediency of their provisions. *Smyth* v. *Foley*, 3 Y. & C. 142; 7 L. J., Ex. Eq. 34.

Character of Instrument—Result.]—Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested, might create a resulting trust for the settlor, whilst in a will the residuary legatee might take. *Farrer* v. *Barker*, 9 Hare, 744.

Inconsistent Clauses.]—Principles on which the court proceeds in putting a construction upon inconsistent clauses in a settlement. *Bush* v. *Watkins*, 14 Beav. 425.

Power Reserved to Settlor.]—Where owner of estate in voluntary deed reserves power to himself: it is to be construed more favourably than power reserved to a stranger. *Fitzgerald* v. *Fauconberge*, Fitz. 220.

If freeman of London makes voluntary deed in consideration of love and affection only, and reserves power over estate to himself, the property still continues in him, and is subject to custom. *Smith* v. *Fellows*, 2 Atk. 62.

Forfeiture Clause—Trust for Husband till Bankruptcy or Death—Limitation over on Death of Husband—Implication—Interim Income.]—By a marriage settlement certain funds belonging to the wife were settled upon trust to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or alienate the same or until his death, whichever should first happen; and after the decease of the survivor of the wife and husband, then upon trust for the children of the marriage. The husband became a liquidating debtor, and then the wife died, leaving her husband surviving:—Held, that the limitation over had taken effect, and that the income of the trust fund between the death of the wife and the death of the husband belonged to the children. *Tredwell, In re* ([1891] 2 Ch. 640), distinguished. *Akeroyd's Settlement, In re, Roberts* v. *Akeroyd*, 63 L. J., Ch. 32; [1893] 3 Ch. 363; 7 R. 405; 69 L. T. 474—C. A.

General Reference—Time when Gift to take Effect.]—A general reference in a gift to the terms of a former disposition does not determine the time when the gift is to take effect. By a marriage settlement a fund was settled by the husband in favour of the husband and wife during their respective lives, and after the decease of the survivor for the children. Another fund was settled by the husband's mother for herself for life, and after her decease upon such of the trusts thereinbefore declared concerning the first fund in favour of the children as should be then subsisting or capable of taking effect:—Held, that the trust of the second fund in favour of the children arose at once upon the death of the tenant for life in the lifetime of the husband and wife. *Hare* v. *Hare*, 24 W. R. 575.

Joint Tenancy.]—Settlement to permit "all and every the children to take rents, &c., to them and their heirs for ever." They are joint tenants, not tenants in common. *Stratton* v. *Best*, 2 Bro. C. C. 233.

Lands are settled to the use of the husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint tenants, and if any one dies before severance, his share shall survive to the others. There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants. If any of them have a bad opinion of their own lives, they may sever; but if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which the law affords no assistance. *Staples* v. *Maurice*, 4 Bro. P. C. 580.

A sum of money was remitted to England to be secured for the benefit of a married woman and her children, so that the same might not come to the hands of her husband:—Held, that they took as joint tenants. *Bustard* v. *Saunders*, 7 Beav. 92; 7 Jur. 986.

Change of Domicil—Lex loci Contractus.]—On the 2nd August, 1826, A., a domiciled Scotchman, married the plaintiff (then H. G. I., a domiciled Englishwoman), they having two days previously both executed a settlement in writing in the Scotch form, whereby A. bound himself, his heirs, executors, and successors, to pay, after his decease, an annuity to H. G. I., his promised sponse, for her life, and certain portions for the children of the marriage, to be divisible amongst them in manner therein mentioned. The settlement then provided as follows:—"For which causes, and on the other part, H. G. I. assigns over to and in favour of herself and A., her promised spouse, in conjoint fee and life rent, and the child or children that shall be procreated of the intended marriage, divisible as aforesaid, whom failing, H. G. I., her heirs and assigns whomsoever, in fee, all estate, funds, and effects, heritable and movable, real and personal, belonging or due to her, or that may be acquired by her during the subsistence of the intended marriage." It was provided that the provisions in favour of H. G. I. and the children of the marriage should be in full satisfaction from A. of all claim competent to them upon his decease. Upon the death, in 1836, of her father, a domiciled Englishman, the plaintiff became entitled, under his will, to a reversionary interest, expectant on the death of her mother, in one-fourth part of his personal estate. In 1841, A. and the plaintiff changed their domicil, which had continued Scotch since the marriage, to England. In 1842 the plaintiff's mother died, and in the interval between that event and the bankruptcy of A. in 1848, S., the executor and trustee of the testator's will, paid, in various instalments, nearly the whole of the funds bequeathed by the will to the plaintiff to A., upon the joint receipt of himself and the plaintiff:—Held, that the marriage contract was to be construed by the law of Scotland, or with reference to that law, and that, when so construed, its effect was to give a life interest to A. in the property coming to the plaintiff under her father's will, remainder to her absolutely, expectant upon A.'s decease, with a spes successionis only to the children of the marriage; and that, during the joint lives of the husband and wife, the corpus of the property was payable to the husband on their joint receipt. *Duncan* v. *Cannan*, 7 De G. M. & G. 78; 24 L. J., Ch. 460; 1 Jur. (N.S.) 291; 3 Eq. R. 403; 3 W. R. 318.

Held, also, that the plaintiff was not entitled, as against the assignees in bankruptcy of her husband, to have his future income under the settlement impounded to make good her contingent annuity thereunder. *Ib.*

One of the instalments was paid partly in cash and partly by setting off a debt acknowledged by A. to be owing by him to the testator's estate:—Held, that the receipt, which was for the cash only under the description of "balance due to wife," was valid for the whole amount. *Ib.*

2. PARTICULAR WORDS.

"Or," "And."]—Whether the instrument in which the words occur is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intention of the party by whom the word is used. *White* v. *Supple*, 2 Dr. & War. 471; 1 Con. & L. 525.

A power of sale and of exchange was given to trustees of a settlement, at the request of the person for the time being "seised of the freehold and inheritance of the manors":—Held, that reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life who (subject to intervening limitations) had the ultimate remainder in fee. *Malmesbury* (*Earl*) v. *Malmesbury* (*Countess*), *Phillipson* v. *Turner*, 31 Beav. 407.

Held, also, that the word "and" could not be read disjunctively as "or." *Ib.*

By a settlement trustees were to raise 2,000*l.* for A. for life, with remainder to her children, with powers for maintenance, advancement, "or otherwise," and in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the 2,000*l.* given to A. and her children, "and otherwise in like manner," to all intents and purposes, as if such trusts and provisions were there fully repeated:—Held, that this included the gift over to C., and that on the death of B. without children, C. was entitled to the second 2,000*l.* *Shirley, In re*, 32 Beav. 394.

"Eldest or only Son."]—Sir C. D. (who died in 1857), by deed in 1852, appointed a fund to trustees in trust for his daughter Lady W., for life, and after her death in trust for the child or all the children, "except an eldest or only son," if more than one, of Lady W., who should attain twenty-one or marry, and failing such trusts then over. Lady W. died in 1883, having had four children only, viz., Thomas, her eldest born son, who attained twenty-one in January, 1869, and died in April following; Sir F. W., who attained twenty-one in 1880; Helena, who attained twenty-one in 1865; and Edith, who died in infancy, in 1864; so that the fund vested in Helena (subject to let in other children) in the lifetime of the eldest born son, and before he attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which Sir C. D. was a party, to the use of Sir T. W. (the husband of Lady W.) for life, with remainder to the use of the first and other sons of Sir T. and Lady W. in tail male. In March, 1869, Sir T. W. and his son Thomas disentailed the estates, and limited them to the appointees of both, or of the survivor. The joint power was not exercised; but after the death of Thomas, Sir T. W. by will appointed the estates to Sir F. W. for life, with remainder to his sons in tail male. Upon Lady W.'s death, Sir F. W. claimed half the fund, and Helena the whole of it:—Held, that, if the expression "eldest or only son" was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but that if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion. *Domvile* v. *Winnington*, 53 L. J., Ch. 782; 26 Ch. D. 382; 50 L. T. 519; 32 W. R. 699.

Held, also, that the words an "eldest or only son" primâ facie mean an individual, and that as there was an eldest son in existence when the provision vested in Helena, the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take:—Held, therefore, that Sir

F. W. was entitled to one-half of the fund. *Matthews* v. *Paul* (3 Swans. 328; 19 R. R. 207) observed upon. *Ib.*

By a marriage settlement stock was settled, subject to the husband's and wife's life interests therein, upon trusts for the children and issue of the marriage (except an eldest son entitled to certain settled estates), as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children (except as aforesaid) in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or on marriage; and it was provided that if the husband should die in his wife's lifetime, leaving an only child a son, such son should be entitled to the whole trust fund; but if the wife should survive the husband, and there should be only two children, or only one child (except as aforesaid) who should attain twenty-one or marry, such two only children or one only child (except as aforesaid) should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child (except as aforesaid) were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant, and a daughter who married, and became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed, purporting to create a charge upon the settled estates, turned out to be invalid:—Held, upon the construction of the settlement, and without resting the decision upon the invalidity of the charge, that the daughter took an absolutely vested interest in the trust fund, and that it did not go to the husband's representative. *Carter* v. *Ducie*, 41 L. J., Ch. 153; 25 L. T. 656; 20 W. R. 228.

Semble, that if it had been otherwise, the invalidity of the charges would have been sufficient to displace the claim of the husband's representative. *Ib.*

"Entitled."]—"Entitled" means entitled in possession. A gift over of the shares of children in a settlement on death "before they become entitled," does not prevent the shares from vesting at birth. *Jopp* v. *Wood*, 28 Beav. 53. Affirmed 6 N. R. 359; 12 L. T. 689.

By a post-nuptial settlement—reciting that A. had a large family, and was anxious to make a provision for it in the case of his death or of the death of his wife, and, for that purpose, had determined to execute the settlement—leaseholds were assigned to trustees upon trust, in case the wife should survive A., to permit her to take one-third of the profit rents, the other two-thirds to go to the maintenance, &c., of such of their children as should require it; and after the death or second marriage of the wife the entirety to be expended on the education and putting to trade or business of such of the children as should require it; and in case A. should survive his wife, upon trust to permit him to receive the entirety of the rents during his life, one-half to be expended on the maintenance, &c., of such of the children as should require it; and in case A. should neglect so to apply the one-half of the rents, the trustees should receive it and so apply it, and after the death of A. the property to go and become the property of the children of A. and B. as A. shall appoint; and in case of the death of any of the children before they should become entitled to the property, then his or her share to be equally divided among the survivors of such children, and if but one, the whole to go to that one. A. appointed a share to a child who died in his lifetime:—Held, that the children who survived the father took the share so appointed—the word "entitled" being construed "entitled in possession." *Beale* v. *Connolly*, Ir. R. 8 Eq. 412.

Ultimate Limitation to "Right Heirs" of Strangers—No Male Heirs—Joint Tenancy or Tenancy in Common.]—By a settlement, dated in 1856, real estate was settled to the use of trustees during the life of A. upon certain trusts, and after his death to the use of B. for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons successively in tail male, and for default of such issue to the use of the "right heirs" of C. for ever. C. had no estate of his own in the property. He died in 1854. His "right heirs" at the time of his death were three sisters and five daughters of a deceased sister. The preceding limitations all failed. The present survivors of the "right heirs" were four of the five daughters of the deceased sister. The question was whether the heirs took as personæ designatæ or as coparceners. On the one hand it was contended that the persons who were the "right heirs" took as joint tenants, so that the estate was now vested in the survivors; on the other hand, that the "right heirs" took as tenants in common, and that consequently their shares passed by descent or devise to the several parties claiming under them:—Held, that the persons who were the "right heirs" of C. at his death took as personæ designatæ, and as joint tenants, and not as coparceners with descent from them as such; so that on the death of one of them the share did not pass by her will or descend to her heirs, but survived to the others; and, therefore, that the estate was now vested in the four surviving daughters of the deceased sister. *Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 356.

Words of Inheritance, Omission of.]—An equitable estate in fee cannot be formally limited by deed without words of inheritance or their statutory equivalents. *Meyler* v. *Meyler* (11 L. R. Ir. 522) followed. *Whiston's Estate, In re, Lovatt* v. *Williamson*, 63 L. J., Ch. 273; [1894] 1 Ch. 661; 8 R. 175; 70 L. T. 681; 42 W. R. 327.

A conveyance to trustees, without words of inheritance, of the share and interest, to which the conveying party is entitled under a will, passes a life estate only in so much of the property as consists of real estate. *Hudson, In re, Kühne* v. *Hudson*, 13 R. 546; 72 L. T. 892.

Insolvent.]—Meaning of "insolvent" when used in a settlement. *Muggeridge's Trust, In re*, Johns. 625; 29 L. J., Ch. 288; 6 Jur. (N.S.) 192; 1 L. T. 436; 8 W. R. 234.

"Joint and Natural Lives."]—A fund settled on the husband and wife, "during their joint and natural lives":—Held, to be construed "during their joint lives, and the life of each of them." *Smith* v. *Oakes*, 14 Sim. 122.

"Possession."]—A charge was made raisable, when A. or his issue should come into "possession." A jointress who had an estate for life

conveyed to a trustee, in order to enable A., who was tenant in tail in remainder, to suffer a recovery, which he did, having such an interest as enabled him to suffer a recovery:—Held, to be coming into possession within the terms of the deed, and to make the charge raisable. *Hill* v. *Broughton*, 3 Bro. C. C. 180.

Sole.]—In a marriage settlement the word "sole" may, from the circumstances of the case, have a particular and exclusive meaning attached to it. *Massy* v. *Rowen*, L. R. 4 H. L. 288.

"Issue Then in Being"—Vesting of Estate, Time of.]—By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life and after his death to convey the lands and pay the rents and profits "unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage" for such estate or interest and in such shares and subject to such conditions as the settlor should by deed or will appoint. There was issue of the marriage several children who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs and assigns, and joined with him in mortgaging this portion. The son having died in his father's lifetime:—Held, that upon the true construction of the settlement the words "then in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children"; that the appointment was therefore valid, and that the fee passed under the mortgage. *Leader* v. *Duffey*, 58 L. J., P. C. 13; 13 App. Cas. 294; 59 L. T. 9—H. L. (Ir.)

"Then Living."]—By a marriage settlement trustees were to stand possessed of 2,000*l.* in trust for T. E. for life or until he should become bankrupt; remainder to his wife for life; remainder "if she should survive T. E., or in case of her dying in his lifetime, then from and immediately after his decease, or sooner, becoming bankrupt" to the children "then living":—Held, that all the children living at the death of the wife were entitled. *Edgington's Trusts, In re*, 3 Drew. 202.

A settlor conveyed real estate to trustees in fee, to the use of A., B., C., and four others successively for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life, "who should be then living, and to the heirs male and female of his, her, and their body and bodies respectively, in a course of entail," the sons and daughters of A., and their heirs, to take before all the other persons named, and the sons and daughters of B., and their heirs, to take next after the sons and daughters of A. and their heirs (and similarly as to the five others in succession). And the sons of all and every the persons last above named, and the heirs, &c., to take before the daughters and their heirs:—Held, that the daughters of A. took in priority of the sons of B. *Randall* v. *Daniel*, 24 Beav. 193.

Forfeiture Clause—Effect of Words "Commit, Permit, or Suffer."]—Under the terms of a marriage settlement the rents and profits of lands were payable to M. for life, or until he should be adjudged a bankrupt "or should commit, or knowingly permit, or suffer to be committed, any act whereby his interest in all or any of the said several lands, or any part thereof, might become the property of a third party for any time or term whatsoever," or that the lands, or any part of them, should be taken in execution, or any proceedings taken to sell same, by any person or persons whatsoever. A judgment was obtained against M., a writ of fi. fa. issued, and some cows were seized by the sheriff but returned, the debt having been paid:—Held, that under the words "commit, or knowingly permit, or suffer to be committed, any act whereby his interest might become the property of a third party," no forfeiture of M.'s interest in the lands had occurred. *Ryan. In re*, 19 L. R. Ir. 24.

—— **Charging Order—"Assigns."**]—By a marriage settlement the annual income of the trust fund was given to the husband "and his assigns" for his life or until he should make, or attempt to make, any assignment of the income or any part thereof, or to charge or incumber, or attempt to charge or incumber the same; the settlement contained limitations over. The husband mortgaged his life interest, and charging orders, in respect of certain judgments, had been made against his life interest. It was contended that the effect of the addition of the word "assigns" was that the husband's life interest was absolute, and the forfeiture clause void:—Held, that the construction contended for was too wide; that the charging orders were not within the clause; that effect could be given to the clause against alienation and at the same time to the word "assigns," and further that the charging orders were valid against the income up to the date of the mortgage, but that the mortgage operated so as to work a forfeiture of the life interest. *Kelly's Settlement, In re, West* v. *Turner*, 59 L. T. 494.

Construction of Deeds Generally.]—*See* DEED AND BOND.

3. For Children.

a. Of Future Marriage.

Proviso against Marriage without Consent—Remainder to Issue by any Husband.]—A. devises several leasehold estates to two trustees in trust, if his granddaughter married without their consent, to convey the premises to two other trustees in trust for her separate use during her life, and after her death, for the use and benefit of her issue; though she has no children by the first husband, whom she married without the consent of the first trustees, she has only a right for her life, for the issue of any husband are provided for by this settlement. *Champion* v. *Pickax*, 1 Atk. 472.

Possibility of Children by Future Marriage disregarded.]—By a marriage settlement, certain stocks, the property of the lady, are assigned to trustees, upon certain trusts, for the benefit of the intended wife and husband, during their joint lives; and if the wife should survive the husband, having children by him, upon trust for her during her life; and after the death both of her and her husband, upon trust for all her children by her then intended or any future husband, as she should appoint; and, in default of appointment, upon trust for the children of the then intended marriage; and it was provided, that, if the lady should survive her

intended husband, and there should be no children of that marriage who should acquire a vested interest in the property, the stocks should be upon trust for her, and assigned to her; the lady having outlived her husband, and there being no child of that marriage who had acquired a vested interest, it was held that the lady was entitled to the stocks absolutely, without regard to the possibility of there being children of a future marriage. *Hanson* v. *Cooke*, 4 L. J. (O.S.) Ch. 45.

b. Children to be Begotten.

Children in esse Included.]—Provisions for daughters to be born shall extend to daughters then begotten. *Hewet* v. *Ireland*, 1 P. Wms. 426; Gilb. Eq. R. 145.

The words "begotten" and "to be begotten" are the same, as well on constructions of wills as settlements. *Cook* v. *Cook*, 2 Vern. 545.

A settlement of money to be paid to such children "as shall be begotten, &c.," but "that if the husband shall die without any children, then the said money shall be paid to A.," extends to a child in esse at the time the settlement was made. *Slingsby* v. ——, 10 Mod. 398.

Section 3 of the 33 Geo. 2, c. 14 (Bankers Act), applies to a conveyance made in favour of a child or grandchild unborn, as well as to a conveyance made in favour of a child or grandchild in existence at the time of its execution. *Spearing* v. *Delacour*, 1 Dr. & Wal. 591.

Limitation to Children and their Issue.]—By settlement, personal estate was limited, after the death of the husband and wife, on trust for all the children as tenants in common, and the several issue of the body of such children; and failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or, being such, all should die before their shares should become payable:—Held, that the children of the marriage took absolute interest, and that the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share. *Mount* v. *Mount*, 13 Beav. 333.

c. Afterborn Illegitimate Children.

Limitation to, Invalid.] — The objection to the validity of a limitation to unborn illegitimate children, is not founded exclusively on the uncertainty of description, nor semble, is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man or the children of a woman. *Dover* v. *Alexander*, 2 Hare, 275; 12 L. J., Ch. 175; 7 Jur. 124.

—— **Power of Revocation in Favour of.**]—Where a married woman, having legitimate children, and one illegitimate child, separated from her husband, and being enceinte with a second illegitimate child, appointed a fund in favour of her first illegitimate child, reserving a power of revocation as to a moiety in favour of any afterborn children of her body:—Held, that the latter clause was to be construed in its legal sense, and was applicable only to legitimate children, and that afterborn illegitimate children could not take under a subsequent appointment as to the moiety in favour of both the illegitimate children. *Ib.*

Illegitimate Child en ventre sa mère at Date of Settlement.]—An illegitimate child, en ventre sa mère at the date of a settlement, cannot have a reputation of being the legitimate offspring of its parents, so as to enable such child to take under a limitation to children in the settlement. *Shaw, In re, Robinson* v. *Shaw*, 63 L. J., Ch. 770; [1894] 2 Ch. 573; 8 R. 421; 71 L. T. 79; 43 W. R. 43.

Property Retransferred to Settlor.]— Where there was a settlement of personalty in trust for afterborn illegitimate children, the property was, on the bill of the settlor, ordered to be retransferred to him. *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657; 6 Jur. 921.

Estate resulting to Heir of Grantor.]—Where by deed an estate was limited to an afterborn illegitimate son in fee, and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant, and an afterborn illegitimate son attained the age of twenty-one, it was held that the last limitation failed, and that the devised estate resulted to the heir of the grantor. *Lomas* v. *Wright*, 2 Myl. & K. 769; 3 L. J., Ch. 68.

Deed—Limitation to "All the Children" of A. and B.—Illegitimate Children already Born—No Legitimate Children.]—The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born of A. and B. his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children, but before their marriage, B. had several children still living, who were reputed to be children by A.:—Held, that these children were entitled to the property under the limitation. *Gabb* v. *Prendergast*, 1 K. & J. 439; 3 Eq. R. 648; 24 L. J., Ch. 431; 1 Jur. (N.S.) 900; 3 W. R. 395.

Semble, the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before the testator's death. *Ib.*

Will—Limitation to Children by Wife—No Legitimate Children surviving—Wife's Children born before Marriage.]—A husband by his will gave his property in trust for the use of his wife for life, with power to dispose of it by will at her death "among our children," and if she died intestate the property to be divided equally between "my children by her." The testator was twice married. By his first wife he had two children, both of whom died in his life, one of them leaving an only child. By his second wife he had two children, both born before the marriage:—Held, that the two illegitimate children did not take. *Dorin* v. *Dorin*, 45 L. J., Ch. 652; L. R. 7 H. L. 568; 33 L. T. 281; 23 W. R. 570—H. L. (E.)

d. Classes and Vesting.

"Payable" meaning "Vested"—Shares "to be Paid" at Twenty-one—Gift over on Death before Share "Payable."]—By a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after

the death of the survivor "to levy out of the said lands and premises . . . . the sum of 3,000*l.* . . . . to be divided among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen: Provided always that such marriage during minority shall be had by and with the consent and approbation of" the parents: "or the survivor of them: with interest for the same by way of maintenance at the rate of 6*l.* by the hundred to be computed from the day of the death of the survivor of" the parents, "with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable, unmarried, and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . . shall be entitled to any part of" the said sum. A son attained twenty-one and died in the lifetime of his father:—Held, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in *Emperor* v. *Rolfe* (1 Ves. sen. 208) applied, and the son took a vested interest in his share on attaining twenty-one. *Wakefield* v. *Maffet*, 55 L. J., Ch. 4: 10 App. Cas. 422; 53 L. T. 169—H. L. (Ir.)

Period of ascertaining Class—Right to Payment—Afterborn Children.]—Where there is a gift to a class of children upon attaining twenty-one or (if females) marrying, any such children as shall attain that age or (if females) marry, are entitled to be paid their shares immediately. Upon the eldest child attaining twenty-one the class becomes fixed, and no child afterwards born can participate. This rule applies as well to voluntary settlements as to wills. *Emmet's Estate, In re, Emmet* v. *Emmet* (13 Ch. D. 484), and *Watson* v. *Young* (28 Ch. D. 436) discussed and explained. *Knapp, In re, Knapp* v. *Vassall*, 64 L. J., Ch. 112; [1895] 1 Ch. 91; 13 R. 147; 71 L. T. 625; 43 W. R. 279.

Time of Vesting.]—A sum of 2,000*l.* secured by the bond of J. M., the father of the intended wife, was, by a marriage settlement in 1849, vested in trustees upon trust for her separate use for life, and after her decease "in trust for the other or others of the issue of the said intended marriage whether a son or sons, or daughter or daughters, or more remote descendant or descendants, if more than one, in such shares, &c., as the wife should appoint; but so, nevertheless, that no share in the said trust funds shall be absolutely vested in any child or any issue by any such appointment until he being a male shall attain the age of one-and-twenty years, or until she being a daughter shall attain that age or marry; and in default of appointment in trust for all and every the children or child of the marriage who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between and among them, if more than one, in equal shares; and if there should be one such child the whole in trust for such one child: Provided, however, that if any child or children of the said intended marriage shall die in the lifetime of the said G. H. (the husband) and M. M. (the wife) or the survivor of them leaving issue, such issue shall stand and be in the place of his or their parent or parents, and shall be entitled to such share of the said trust moneys as the parent or parents would have been entitled to in case of surviving the said G. H. and M. M. and attaining twenty-one years." The deed contained provisions for maintenance and advancement. M. M. (the wife) died leaving her husband and several children surviving her, one of whom a daughter (A. H.) attained twenty-one and married in 1873 after the mother's death:—Held, that the portion secured by the settlement of 1849 vested in the children of the marriage of G. H. and M. M. at twenty-one or marriage. *Martin* v. *Dale*, 15 L. R. Ir. 345.

And see VESTED CONTINGENT AND FUTURE INTERESTS.

e. Under Powers.

Power to Appoint to Children—Limitation, in default of Appointment, to right Heirs of Settlor—Limitation to Children in default of Appointment not implied.]—By a marriage settlement real estate of the wife was limited successively to the husband and wife for their respective lives, with remainder to such child or children as the husband, or in default of appointment by him, the wife should by will appoint; and in default of appointment, or there being no issue of the said intended marriage, then to the right heirs of the wife. There was issue of the marriage an eldest son and younger children. On the deaths of the husband and wife without having made any appointment:—Held, that there was no implied trust for the children in default of appointment, and that the eldest son took the property as heir of the wife. *Goldring* v. *Inwood* (3 Giff. 139) followed. *Regan's Estate, In re*, 31 L. R. Ir. 247.

"Payable on Marriage, or at such time as Settlor should Appoint"—No Appointment—Misrecital in Will.]—A., by settlement on the occasion of his second marriage, conveyed lands to trustees, upon trust to raise a sum of 600*l.* for B., a daughter of his first marriage, "to be paid and payable to her on her marriage, or to be payable at such other time as he should by deed or will appoint," and subject thereto, upon the usual trusts for the wife and children of the second marriage. By his will A. bequeathed all his property to C., the surviving child of his second marriage, reciting that he made such disposition considering that B. had been sufficiently provided for by his marriage settlement, under which she would be entitled to receive the sum of 600*l.* after his death. B. survived the testator and was unmarried:—Held, upon the construction of the settlement, that B. was entitled to a vested interest in the sum of 600*l.*, liable to be

divested in the event of her dying without having been married, and that the incorrect recital in the will was not an exercise of the power of appointment. *Haverty* v. *Curtis*, [1895] 1 Ir. R. 23.

Two Settled Funds—Appointment of One Only—Hotchpot Clause.]—A marriage settlement declared trusts of the wife's fund in favour of the children of the marriage, with a hotchpot clause. The ultimate trust was in favour of the wife. The settlement also declared trusts of policy moneys on the husband's life by reference to the trusts of the wife's fund, except that the ultimate trust was in favour of the husband. The wife's fund was appointed unequally; the policy moneys went in default of appointment. On a question whether the hotchpot clause operated on both funds:—Held, that the two funds were distinct for the purposes of hotchpot. Such clauses are only read as one with the view of preventing duplication of charges, and with no other object. *Bristol (Marquis) Settlement, In re, Grey (Earl)* v. *Grey*, 66 L. J., Ch. 446; [1897] 1 Ch. 946; 76 L. T. 757; 45 W. R. 552.

Conveyance by Sole Object of Power—"Entitled"—Subsequent Appointment to Object of Power—Estoppel.]—The only child of a marriage, being at the time the sole object of a power of appointment, and entitled, in default of appointment, to the property comprised in the marriage settlement, married, and after her marriage assigned by deed the interest to which she was "entitled under the indenture of settlement" upon certain trusts. Afterwards the donee of the power appointed the property to her absolutely:—Held, following *Sweetapple* v. *Horlock* (48 L. J., Ch. 660; 11 Ch. D. 745), that her interest under the appointment was not assigned by the deed, which comprised only her then existing interest under the settlement, and the deed not being for value she was not estopped from claiming the property absolutely. *Lovett* v. *Lovett*, 67 L. J., Ch. 20; [1898] 1 Ch. 82; 46 W. R. 105.

And see POWERS.

f. Portions, *see* PORTION.

g. Younger and Eldest.

General Rule giving Priority to Charges for Younger Children.]—A father, tenant for life, with power to charge 500*l.* for younger children, and son tenant in tail, resettled the estate to the use that the son should receive a rentcharge of 100*l.* for their lives and that of the survivor, with powers of distress and entry for non-payment; then to the use of the father for life, with a power to charge an additional sum of 1,000*l.* for younger children; and then to the son in tail:—Held, that although if it was the intent to give the annuity priority over the 1,000*l.*, equity would not allow a legal merger to destroy it; yet on the true construction it was not intended that it should exist after the father's death, though granted for the son's life; and therefore that the general rule giving priority in family settlements to charges for younger children should prevail. *Mills* v. *Mills*, 3 Jo. & Lat. 242; 9 Ir. R. Eq. 299.

"Eldest Son"—Portions for Younger Children—Younger becoming the Elder Son—Estates Sold.]—By a marriage settlement an estate was settled on the wife and husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges, which entirely absorbed them. The trusts of the term were if there should be any child or children of the husband and wife, other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises to raise for the portions of such child or children, other than or besides such eldest or only son, 5,000*l.*, to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment, equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold under a paramount title, and produced a sum of about 2,400*l.* In 1842 the eldest son died an infant. In 1882 the surviving tenant for life died, and the portions became payable. There had been no appointment. The younger son, who had become the elder, and had attained twenty-one, claimed to take a share with his sister of the 2,400*l.*:—Held, that the effect of the settlement was to give 5,000*l.* to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or, as in this case, nothing at all, the brother had no right to claim any share in the prior charge. *Reid* v. *Hoare*, 53 L. J., Ch. 486; 26 Ch. D. 363; 50 L. T. 257; 32 W. R. 609.

Exclusion of "Eldest Son entitled to Estate"—Disentail and Mortgage by Eldest Son—Death without becoming entitled.]—A person who is to be excluded from sharing in a portions fund by reason of his being, at a particular time, the eldest son entitled to a settled estate, is ordinarily entitled, if he dies before that time, to share as if he were a younger child; but he is not so entitled when he has concurred, as remainderman in tail, in disentailing the estate, and in raising by mortgage thereof money out of which he received a sum equal in value to a younger child's aliquot share of the fund, as he then would, in effect, be taking a double portion. *Fitzgerald's Estate, In re, Saunders* v. *Boyd*, 60 L. J., Ch. 624; [1891] 3 Ch. 394; 65 L. T. 242; 40 W. R. 29.

Limitation, whether in Tail or in Fee—Younger Child.]—By a marriage settlement lands were limited to the husband and wife successively for life, remainder to the first son of the marriage and the "heirs" of such first son, remainder to the second, third, and every other son, of the marriage, and their respective heirs with remainder to the issue female of the marriage and their heirs, as tenants in common, subject "in case there should be a son, and a younger child or younger children" of the said marriage, to a charge of 1,000*l.* for such younger child or younger children. There was issue of the marriage an only son (who survived his father, but died in the lifetime of his mother), and three daughters:—Held (1), following *Doe* d. *Littledale* v. *Smeddle* (2 B. & Ald. 126; 20 R. R. 377), that under the settlement the son took an estate-tail, and the daughters estates as tenants in common in fee; (2) that the daughters

having succeeded to the estates in fee, under the limitations of the settlement, the portions were not raiseable. *Smith's Estate, In re*, 27 L. R. Ir. 121.

Trust for Younger Children—Uncertainty.]—Property was assigned to trustees, upon trust, after the death of the settlor, in the meantime, and until his eldest son should attain twenty-one, to pay the rents to the settlor's wife, to be applied by her for and towards the maintenance of herself and all the then present and future born children of the settlor; and the settlor declared, that if and when his eldest son should attain twenty-one, the trust property should be in trust for such eldest son, but so that the wish and desire of the settlor thereby declared, that the then present and future born children of the settlor and his wife should participate with him in the same, should be particularly observed:—Held, that a valid trust was created in favour of the younger children to participate, and that it was not void for uncertainty. *Liddard* v. *Liddard*, 29 L. J., Ch. 619; 6 Jur. (N.S.) 439; 2 L. T. 200.

"Children other than and Besides an Eldest or only Son"—Two Daughters only.]—By settlement executed on the marriage of F. with H., a sum of 1,000*l.*, the fortune of the wife H., and 923*l.* 1*s.* 6*d.*, the property of the husband, were vested in trustees in trust for F. for life, and after his decease, in case he survived his wife (which event happened) in trust to pay and assign said funds among his children other than and besides an eldest or only son, as he should appoint, and in default of appointment, then upon the trust declared concerning the trust fund secured by the term of five hundred years for the benefit of F.'s younger children thereinafter mentioned; but if there were no such child or children as those for whom said trust fund was to be provided then in trust for F.'s father. By the same settlement certain lands were conveyed to the use of F. for life, remainder subject to a trust term of five hundred years to the use of his first and other sons in tail male; remainder to the daughters, as tenants in common in tail with remainders over. The trusts of the term of five hundred years were declared to be, that if there should be any child or children of the said F. other than and besides an eldest or only son who by virtue of the limitations before mentioned, should for the time being, be entitled to the lands, then that the trustees should raise for such child or children other than or besides an eldest or only son, as aforesaid, the sums mentioned, 6,000*l.* if one such child, 8,000*l.* if two, and 10,000*l.* if three or more. There are two other clauses as to the vesting of these portions, which contained the words "other than or besides an eldest or only son so for the time being entitled as aforesaid," and an advancement clause which contained the words "other than and except an eldest or only son for the time being entitled as aforesaid." There was issue of the marriage two daughters only, both of whom died in F.'s lifetime, leaving children who became entitled on F.'s death to the settled lands:—Held, first that the clauses in the settlement dealing with the money fund must be read as providing for children other than and besides an eldest or only son. Secondly, that there not being any son of the marriage the daughters did not come within the description of "a child or children other than and besides an eldest or only son," and that consequently the money fund of 1,923*l.* 1*s.* 6*d.* passed to F.'s father under the ultimate trust. *Flemyng's Trusts, In re*, 15 L. R. Ir. 363.

And see PORTION and YOUNGER CHILDREN.

4. FOR ISSUE.

Construction.]—"Issue" in a deed is always a word of purchase. *Bagshaw* v. *Spencer*, 2 Atk. 582.

"Issue" when restricted to Children.]—"Issue," when collocated with parent, is to be taken in the restricted sense of children; and this doctrine applies to a deed as well as to a will. *Barraclough* v. *Shillito*, 53 L. J., Ch. 841; 32 W. R. 875.

The words "issue of the intended marriage," uniformly used in a settlement made on the occasion of a marriage, in the absence of any indication in the context of an intention that they should include all descendants, are to be construed to mean "children." *Denis, In re*, Ir. R. 10 Eq. 81.

By a marriage settlement, reciting an agreement to make a provision for the issue of the intended marriage, property of the wife was vested in trustees after the deaths of the husband and wife, in case there should be issue of the intended marriage, for the use and benefit of such issue, as the husband should appoint, and in default of appointment among such issue share and share alike; but, in case there should be no issue of the intended marriage, or, if issue, in case all such issue should die before attaining the age of twenty-one, or days of marriage, in trust for the use and benefit of the survivor of the husband and wife. Property real and personal of the husband was limited upon precisely similar uses and trusts, save that the ultimate trust was for the husband, his heirs, executors, &c.:—Held, that the word "issue" was to be construed "children." *Ib.*

Where there is an ambiguity in expressions of settlement regarding the issue, the presumptions are taken in favour of the children. *Perfect* v. *Curzon*, 5 Madd. 442; 21 R. R. 331.

Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it be clearly inferred. *Exel* v. *Wallace*, 2 Ves. Sen. 118.

In a marriage settlement, "issue" is construed "children," in regard to personalty. *Marshall* v. *Baker*, 31 Beav. 608; 9 Jur. (N.S.) 396; 7 L. T. (N.S.) 303; 11 W. R. 78.

—— **Primâ facie Includes all Descendants.**]—The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary; but when the word "parent" is used in reference to his "issue," it is confined to his "children." The word "issue" in reference to the word "parent" in a substitutional gift:—Held, from the context of the will, not limited to "children." *Ross* v. *Ross*, 20 Beav. 645.

The word "issue" occurring in a marriage settlement primâ facie includes all descendants,

and in the absence of some controlling or explanatory context is not to be restricted to children only. *Hobbs* v. *Tuthill*, [1895] 1 Ir. R. 115.

—— **Of Children—Quasi-representative Principle.**]—Settlement in trust for children living at death of survivor of husband and wife; but if any child should die in the lifetime of the husband and wife, leaving issue, the share of the child should go equally between his issue:—Held (following *Ross* v. *Ross*, 20 Beav. 645), that although issue is nomen generalissimum, yet that on a quasi representative principle the children only of a child whose share fails take that child's share, the grandchildren not being admitted to take in competition with the children. *Robinson* v. *Sykes*, 23 Beav. 40; 26 L. J., Ch. 782; 2 Jur. (N.S.) 895.

Estates were vested in trustees for sale, and after the death of W. to pay the proceeds amongst the twelve children of W., as described in the settlement, or such of them as should be living at the time of the decease of D. and J., and the issue of such as might be then dead, to be equally divided between them, the issue to take the parent's share; but if any of such twelve children should die in the lifetime of D. and J., or the survivor of them, without leaving issue living at the decease of such survivor, then in trust to pay the share of the child who should die without such issue unto the survivors and survivor of them, and the issue of such as should be dead. Ten of the children survived D., but died in the lifetime of J. G.; one of the ten children left six children, one of whom, by bill, prayed that the trusts might be carried into execution. B., another of the ten children, left two children, one of whom died four months previously to J., leaving four children, and the question was, whether these four children were entitled to the share of their deceased parent:—Held, that the word issue being used in conjunction with that of parent, more remote descendants than children were not included in the word issue, and therefore the grandchildren were not entitled to their parent's share. *Anderson* v. *St. Vincent* (*Viscount*), 2 Jur. (N.S.) 607; 4 W. R. 304.

—— **Of the Marriage.**]—By a marriage settlement certain funds were assigned to trustees, upon trust (after the death of the husband and wife) for the issue of the marriage as the wife should by deed or will appoint; and, for want of such appointment, upon trust for the issue of the marriage, if more than one, in equal shares, the sons at twenty-one and the daughters at twenty-one or marriage; and in case there should be but one child issue of the marriage, or, if more than one, and all but one should die without having become entitled, then in trust for such only or surviving child at the time thereinbefore limited or appointed; and, in case there should not be any issue of the intended marriage, upon certain trusts therein mentioned. The wife by will appointed part of the trust fund to the five children of her late son W. A.:—Held, that the word "issue" in the power of appointment must be construed in its strictly technical meaning, and that therefore the appointment was valid. *Warren's Trusts, In re*, 53 L. J., Ch. 787; 26 Ch. D. 208; 50 L. T. 454; 32 W. R. 641.

There is no absolute rule that, because the word "issue" is used in one or more clauses of a settlement as meaning "children" only, it must receive the same construction in every other clause. *Ib.*

By a post-nuptial settlement, executed at a time when one child of the marriage was alive, after reciting that it was intended to provide for the present and future issue of the wife by A., her husband, a fund was settled upon trust to apply the interest, after the death of the wife, to and amongst the present and future issue of the marriage, for their maintenance during the life of the husband as he should direct; and, after the death of the husband and wife, to and amongst such issue as the husband and wife, or the survivor of them, should appoint; and in default of such appointment then to be divided amongst them, share and share alike, with benefit of survivorship: proviso, that, in case the husband should survive the wife, and that the issue of the marriage should happen to die unmarried, or being married, should die without leaving issue in the lifetime of the husband, then the fund should go to the husband, his executors, administrators, or assigns:—Held, that the word "issue" meant children; and, therefore, that the children of the marriage took the fund, in default of appointment, to the exclusion of the grandchildren. *Dixon, In re*, Ir. R. 4 Eq. 1.

"**Children and Issue.**"]—By a marriage settlement, a sum of money was settled upon trusts for the husband for life, then for the wife for life, and, after the death of the survivor, upon trust to pay the principal among all the children and issue of the intended husband, to be by him begotten on the body of the intended wife; and if there should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband and wife, upon other trusts:—Held, that the children of the marriage, including those dying in the lifetime of the survivor of the husband and wife, took the fund, and that no other issue were entitled. *Gordon* v. *Hope*, 3 De G. & Sm. 351; 18 L. J., Ch. 228; 13 Jur. 382.

"**Issue**"—"**Such Children.**"]—By articles relating to leases pur autre vie, and for years, and to money, it was agreed that said leases for lives and for years should be conveyed to trustees, in trust (after successive life estates to D. and J.). "After the decease of J., to the issue of J. and A., in such shares and proportions as the said J. should appoint, and for want of such appointment to go to such children equally, share and share alike; and for default of such issue, to the heirs, executors, and administrators of said J. during said leases; the money or the lands agreed to be purchased therewith, to go to issue of said J. and A., in such shares and proportions, &c. And for want of such appointment, to be equally divided among such children, share and share alike; and if no children of said marriage, or all should die before twenty-one," then a power to dispose of said money:—Held, that "issue" is to be construed "children," and that the issue of J. and A. took the absolute interest in the chattel property, and a quasi fee in the freehold property; that a quasi estate tail cannot be barred by will, semble. *Campbell* v. *Sandys*, 1 Sch. & Lef. 281; 9 R. R. 33. S. P., *Williams* v. *Jekyl*, 2 Ves. Sen. 681.

By a deed of 1828, B., on the marriage of his son E. with V., in order to provide for their "issue," conveyed a chattel real upon trust for

E. for life; and after his death, if there should be no issue then living, for V. for life; but if there should be "children" living at E.'s death, as to one-half or one-third of the premises, according as there should be one or more of such "children," for V. for life, as to the residue, for the maintenance, &c., of such "child or children;" and after the death of the surviving parent, in trust for the "issue" as E. should appoint; in default of appointment, share and share alike; if but one "child," in trust for such only child; and if "no issue" should outlive the surviving parent, in trust for B. absolutely. E. died in 1877, without having appointed, leaving V. and several children, who then contracted to sell the premises to G., the personal representative of B. agreeing to join in the conveyance. The title having been objected to by G.'s counsel, on the ground that it was doubtful whether "issue" should be construed as "children," or as "descendants," and the vice-chancellor, on a summons under s. 9 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), having allowed the objection:—Held, on appeal, that no issue more remote than children took any estate under the limitations of the settlement, and that the order below should be discharged. *Biron, In re*, 1 L. R. Ir. 258.

By marriage settlement a fund was settled upon trust after the death of the survivor of husband and wife, for their child or children then living, to be paid at his or their respective ages of twenty-one; and in case both husband and wife should die without leaving any lawful issue, then according to the husband's appointment; and in default, in case there should be no such child or children, as aforesaid, then over. The wife survived her husband, and all her children, two of whom attained twenty-one, left issue surviving the wife:—Held, that "lawful issue" was to be restricted to children, and that the gift over took effect. *Heath's Settlement, In re*, 23 Beav. 193.

Limitation of the trust fund in a marriage settlement, to the husband for life, and after his decease for the wife for life, and after the decease of the survivor the fund to go to the issue of the marriage, in case there should be any living at the death of the husband and wife, in such manner as the father should appoint, and in default of appointment then to such issue in equal shares, and if but one then the whole to go to such only child; and in case there should not be any issue of the marriage living at the death of the survivor, then to go to such person as the husband should appoint:—Held, that the word "issue" was to be construed "child," and that an appointment made by the father, upon the death of the only child of the marriage, in his lifetime, although leaving a child, was valid. *Swift* v. *Swift*, 8 Sim. 168; 5 L. J., Ch. 376.

By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one the whole to be paid to such only child, or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them as aforesaid on their attaining twenty-one if sons, or if daughters on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the bonds in question, either on her attaining twenty-one or on her marriage under that age. *Lang* v. *Pugh*, 1 Y. & C. C. C. 718; 6 Jur. 939.

"Issue of Body" Extended to Grandchildren.]—F., in order to make some provision for his daughter M., the wife of T. S., and for her issue, by deeds, in 1799 and 1802, assigned premises to trustees, upon trust, after keeping the premises in repair, &c., to pay to or otherwise permit or suffer M. to receive and take the residue of the rents for life; and upon her decease, leaving issue of her body by T. S., upon trust to stand possessed of the premises for such issue, to be a vested interest as they should attain twenty-one. M. survived F., and died in 1854, leaving by T. S. seven children, one of whom intermarried with R. S., and died leaving three children, two of whom who survived claimed to be entitled to a share of, and in the premises comprised in the deeds of 1799 and 1802:—Held, that the word "issue" was not confined to the children of M., but included grandchildren. *South* v. *Searle*, 2 Jur. (N.S.) 390; 4 W. R. 470.

"Issue" in Power Extended by Context.]—By a post-nuptial instrument executed in pursuance of a marriage contract, a fund was directed to be vested in trustees, in trust to pay the interest to the wife for life to her separate use; after her death to the husband for life, and after the death of the survivor to pay the principal to the issue of the marriage in such proportions as the wife might appoint, and failing such appointment, to and among the child or children of the marriage equally among them, and to the issue of any of them who might have died leaving lawful issue, per stirpes. There were five children of the marriage. In 1853 the wife appointed the fund among them. In 1861, after her death, the husband appointed the fund among the same five children. One of these children, a girl, had married, and was, at the time of her father's death, enceinte of a child, which was subsequently born:—Held, that issue in the agreement was used in its extended sense, and therefore, as the power did not authorise an exclusive appointment, both appointments were invalid, and the fund was divisible among the five children in default of appointment. *Donoghue* v. *Brooke*, Ir. R. 9 Eq. 489.

Gift over of Chattels on Death without Issue.]—Plate was limited by settlement to trustees for R. E. of C. for life, and then for T., his eldest son, for life, and after his death for the first son of his body and the executors, administrators, and assigns of such son; and if the eldest son of T. should die under twenty-one without leaving issue male of his body living, at his death in trust for the second, third, and other sons of T. Then followed similar limitations to the second, third, and other sons of R. E. of C.; and there was a gift over "if there shall not be any son of R. E. of C. or of T. who shall live to attain twenty-one, or shall die under that age leaving issue male of his body living at his death":—Held, that the word "issue" in the gift over

meant "such issue," and there was no implied gift to T., and that, on the death of T. without issue, there being no other son of R. E. of C., the gift over took effect. *Cardigan* v. *Curzon Howe*, L. R. 9 Eq. 358; 22 L. T. 640; 18 W. R. 878.

5. For Heirs. Heir-at-Law.

"Heirs," whether a Word of Purchase or of Limitation.]—In a deed the extensive and ordinary signification of the word "heirs" will be limited where the intention of the parties to the deed is perfectly apparent. Therefore, where by a deed of settlement after marriage certain premises were conveyed to trustees to the use of A. the husband for life, remainder to trustees to preserve contingent remainders, remainder to the use of B. (the eldest son of A.) and the heirs of the said B., and for default thereof to the use of C. the second son, and all and every the other sons successively in tail male, remainder to the use of the daughters, share and share alike as tenants in common in tail male, with remainders over: B. having died without issue:—Held, that B. having been only tenant in tail under the limitation in the settlement of his decease without issue male, C., the second son, was only entitled to an estate in tail male, and did not take as heir-at-law to his brother B. *Wall* v. *Wright*, 1 Dr. & Wal. 1.

Term Settled in Trust for Wife.]—If she should so long live, and after her decease in trust for her husband, if he should so long live, and after her decease in trust for the heirs of the body of the wife by her husband, their executors, administrators, and assigns, and for default of such issue remainder over. The husband died, never having had any issue, and the wife survived him:—Held, that the term was not vested in the wife, and the words "heirs of the body" were not words of limitation but purchase; and the lease was directed to be deposited in court for the benefit of all parties. *Hodgeson* v. *Bussey*, 2 Atk. 89; 9 Mod. 236.

One possessed of a term for years, on his marriage assigns it to trustees in trust for himself for life, remainder to his wife for life, remainders to the heirs of the body of the wife by the husband. They have a son. This is a good limitation to the heirs of the body of the wife, and they are words of purchase and not of limitation. *Dafforne* v. *Goodman*, 2 Vern. 362; Pre. Ch. 96; 2 Free. C. C. 23.

As to where the words "heirs of the body" have been held words of purchase in the same sense as "issue." *Theebridge* v. *Kilburne*, 2 Ves. Sen. 233.

—— **According to Custom of Manor.**]—R. M., being seised to him, his heirs, and assigns, according to the custom of the manor of Taunton Deane, of certain premises within the manor, in pursuance of articles made in contemplation of marriage, surrendered the premises to trustees, upon trust to permit the settlor, his heirs and assigns, to hold and enjoy the premises till the marriage, and after the solemnisation thereof upon trust for the settlor for life, and after his decease upon trust for the intended wife for life in bar of all dower and thirds, and after the death of the survivor of the husband and wife upon trust to surrender the premises into the hands of the lord, to the use of the children of the marriage, their heirs and assigns, according to the custom, as tenants in common, such surrenders to be made at the costs and charges of the children, who should be entitled to take the same by virtue thereof; and in default of issue of the marriage, that should be living at the death of the survivor of the husband and wife, then upon this special trust and confidence, to surrender the premises into the hands of the lord of the manor for the time being, to the use and behoof of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last mentioned to be made at the costs and charges, in all things, of the person or persons who, by virtue of the last mentioned condition or limitation, should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of the widow, her mother. The widow continued in possession of the premises till her death. It being admitted that the widow was, according to the custom, the heir of the settlor, at the time of his death, and that his youngest sister was such heir at the time of the widow's death, it was held that by virtue of the ultimate limitation in the articles, the youngest sister was entitled to call for a conveyance of the customary premises, from a party in whom the legal estate had become vested, and who also claimed the equitable interest through the widow and the daughter. *Locke* v. *Southwood*, 1 Myl. & Cr. 411. Affirmed, sub nom. *Bush* v. *Locke*, 3 Cl. & F. 721; 9 Bligh (N.S.) 1.

Ultimate Remainder to Heirs of Settlor's Grandfather—Contingent.]—A., in a conveyance to uses reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of S. R., his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R.; and to the intent that the said estates might continue in the family and blood of his late mother on the side of her father, settles them to the use of himself for life, remainder to heirs of his body, for default of such issue, as he should appoint, and for default of appointment to use of right heirs of S. R., with power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R. at the expiration of the estate previously limited. *Cholmondeley* v. *Clinton*, 2 J. & W. 1; 22 R. R. 84; 2 Mer. 173; 16 R. R. 167.

Limitation to "Heir female"—Daughters as Purchasers.]—Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten, and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor. At the time when this deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters and also several sons of the marriage survived him:—Held, that under the limitation to the "heir female," the daughters took a life estate in the lands as purchasers. *Chambers* v. *Taylor*, 2 Myl. & Cr. 376; 6 L. J., Ch. 193.

"Right Heirs of E., deceased, and J."—

Construction—Gavelkind Lands.]—By a voluntary settlement A. and his cousin limited certain gavelkind lands to a relative, C., for life, with remainder to her issue, and for default of such issue, "to the use of the right heirs of E. deceased, and J."—who was then living—"the two sisters of the said A., their heirs and assigns as tenants in common for ever":—Held, the court declining to read the limitation as a limitation to "the right heirs of E., deceased, and of J.," that J. herself took a vested remainder in fee simple in a moiety of the property expectant on the death of C. without issue; and, accordingly, that on the death of C., who survived J., and died without issue, the moiety passed to J.'s co-heirs in gavelkind. *Hawes* v. *Hawes*, 14 Ch. D. 614; 43 L. T. 280.

Heir-at-law of One at Death of Another.]—R. S., by deed, conveyed to trustees real estate in the Isle of Man, upon trust in the first instance to permit him, the settlor, to receive the rents and profits thereof during his life, and upon his death, in trust to pay out of the rents accruing from such land an annuity of 40*l.* to H. A. during his life, and to pay the residue of such rents to J. A., her heirs or assigns; and upon H. A.'s death, in trust to convey the said lands to J. A. and her heirs, if then living, or if she should be then dead, unto the heirs-at-law of the said J. A., and the heirs and assigns of such heir-at-law. R. S., the settlor, died intestate and unmarried; J. A. died, leaving H. A. her heir-at-law; then H. A. died, leaving J. E. S. his heir-at-law, and who then became heir-at-law of J. A. Upon a bill filed by J. E. S. against the surviving trustee under the deed for the conveyance of the estate:—Held, by the judicial committee, affirming the decree of the court of chancery of the Isle of Man, that J. E. S. took by purchase under the ultimate limitation, as the person answering the description of heir-at-law of J. A. at the death of H. A., and a conveyance decreed. *Cain* v. *Teare*, 4 Moore, P. C. 249; 7 Jur. 567.

Sum Reserved on Settlement of Lands—Settlor's Heir takes in Default of Appointment.]—Upon settlement of lands to be sold in trust for several purposes, the residue is given to B. and his heirs, reserving only 200*l.* to be paid to such person as settlor should appoint. Settlor died without appointment; the 200*l.* shall go to his heir, and not to B., or his assigns. *Anon.*, 1 Comyn, 345.

Limitation of Personalty to Right Heirs of Wife.]—Under a limitation in a marriage settlement of certain personal property of the wife after the death of the survivor, and in default of issue of the marriage, to the right heir or heirs of the wife:—Held, that the husband, by the death of his wife without issue, was not entitled as her administrator to an absolute interest in the settled property. *Newenham* v. *Pittar*, 7 L. J., Ch. 300.

—— **Of Survivor of Husband and Wife.**]—Personal estate was settled on a husband and wife successively for life, with remainder to their children; and, in failure of children, "then to the right heirs" of the survivor of the husband and wife:—Held, that, under the last limitation, the heir-at-law of the survivor, and not the next of kin, was entitled. *Hamilton* v. *Mills*, 29 Beav. 193; 3 L. T. 766.

—— **Of Term for A. and his Wife for their Lives, Remainder to Heirs of A. and his Wife.**]—A long term of years is assigned upon trust for A. for ninety-nine years, if he lived so long, and then to his wife for her life, remainder to the heirs of A. begotten on his wife. The whole term does not vest in A., but, after the death of him and his wife, shall go to all their children equally. *Ward* v. *Bradley*, 2 Vern. 23.

6. For Executors and Administrators.

—— **General Effect of Limitation to.**]—The effect of a settlement by deed, limiting property to the executor or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under the statute of distributions. *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559; 21 L. J., Ch. 465; 15 Jur. 1091.

Falling in of Intermediate Life-interests.]—Limitation in a deed of personal property to the executors, administrators, and assigns of A., after the death of B. and C., does not fail by the death of B. and C. in the lifetime of A. *Horseman* v. *Abbey*, 1 J. & W. 381; 21 R. R. 188.

Limitation to Executors for their own Use and Benefit.]—Upon a limitation of funds in a settlement, "to the executors, &c., of the settlor, to and for his and their own use and benefit":—Held, that the executors did not take beneficially, but only in their representative character. *Hames* v. *Hames*, 2 Keen, 646; 7 L. J., Ch. 123.

By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and after her death for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should, by deed or will, appoint; and in default of appointment, for his executors and administrators. The husband died in the wife's lifetime, having appointed her executrix, but without exercising his power:—Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier* v. *Squire*, 3 Russ. 467; 5 L. J. (O.S.) Ch. 186; 27 R. R. 112.

J. by settlement assigned an annuity to trustees upon trust to pay the same to his wife during their joint lives for her separate use, and after her decease to sell and invest and stand possessed of the proceeds upon trusts for children, in default as he should by deed or will appoint, and in default of appointment upon trust to pay, assign, and transfer the same to the executors or administrators of J. to and for their own use and benefit. J. by his will gave the whole residue of his property to trustees upon trust to convert and invest and to pay the interest to his wife for life, with remainders over. The wife died, and her personal representative claimed to have the reversion of the annuity sold, and the executors of J. claimed for their own benefit under the limitation in the settlement:—Held, that they took only in their representative character, and that the reversion of the annuity must be sold. *Johnson* v. *Routh*, 27 L. J., Ch. 305; 3 Jur. (N.S.) 1048; 6 W. R. 6.

Personal estate belonging to an intended husband was settled in trust for him for life, with successive trusts for the wife durante viduitate and in the children (if any) of the marriage, in

the usual form, with an ultimate limitation to the husband, his executors, administrators, or assigns, for his and their own use and benefit. The wife survived and married again. The first husband died intestate, and on the ultimate limitation taking effect, the wife claimed her share in his assets under the statute of distributions:—Held, though she had by her second marriage forfeited her life estate, she had not forfeited her claim to a distributive share in the husband's assets, and that his personal representatives took in trust for his next of kin under the statute, and not beneficially. *O'Brien* v. *Hearn*, 18 W. R. 514.

By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and, in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit," but in case the wife should survive the husband upon trust, during her life, to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock:—Held, that she was not entitled. Semble, that a limitation in a settlement "to the executors and administrators of A. for their own use and benefit," unconnected with any other limitation showing more specifically who are to take, is void for uncertainty. *Marshall* v. *Collett*, 1 Y. & C. 232.

An obligation to make a settlement on his wife, by deed, expressed to be made in order to make such provision, conveyed property to trustees in trust to permit him and his assigns to receive the dividends "to and for his and their own entire use and benefit during the joint lives of himself and his wife;" and in case A. B. survived his wife then in trust, after her death, to assign it to him, "his executors, administrators, and assigns, to and for his and their own use and benefit;" but if his wife should survive him then to her for life, and afterwards to assign it "unto the executors or administrators of A. B. to and for his and their own use and benefit." The wife survived:—Held, that, subject to her life interest, the fund belonged to the next of kin of A. B. and not to his administrator. *Meryon* v. *Collett*, 8 Beav. 386; 14 L. J., Ch. 369; 9 Jur. 459.

By a marriage settlement, the ultimate trust declared of a copyhold estate (the property of the husband) was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate, which was her property. The wife survived, and took out administration to her husband:—Held, that she was not entitled to hold the former estate for her own exclusive benefit, but for the benefit of herself and her husband's next of kin. *Wellman* v. *Bowring*, 3 Sim. 328.

Construction on settlement; ultimate limitation "to use of executors or administrators for their lives, and assigns for ever," as to what benefit they take. *Wellman* v. *Bowring*, 1 Sim. & S. 24. Affirming 2 Russ. 374; 1 L. J. (o.s.) Ch. 27.

Ultimate Trust for Wife's Executors or Administrators of her own Family—Next of Kin at her Death Entitled.]—In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of her own family, and the ultimate trust of the husband's chattels was for his executors or administrators of his own family:—Held, that though the same words were used mutatis mutandis in both limitations, yet the court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death; and with respect to the husband's chattels, his executors or administrators simply. *Smith* v. *Dudley*, 9 Sim. 125; 2 Jur. 322.

—— **Wife's Heirs, Executors, and Administrators—Husband Entitled as Administrator.**]—By a marriage settlement the reversion in real estate was conveyed to trustees in trust, at the request of the husband and wife, or of the survivor, to sell, and the proceeds were settled on the husband and wife for life, with remainder to the children, and in default thereof to such person as the wife should appoint, and in case of no appointment to the use of the heirs, executors, and administrators of the wife, according to the nature and property of the premises. The wife died without issue, and without having exercised the power. The husband took out administration to his wife, and required the trustees to sell the reversion:—Held, that he was entitled to have it sold, and to have the proceeds as administrator to his wife. *Warburton* v. *Hadfield*, 6 L. J., Ch. 203; 1 Jur. 164.

The ultimate trust in a marriage settlement of a fund belonging to the wife was to her executors or administrators:—Held, first, that the surviving husband, who was her administrator, and not her next of kin, was entitled; and, secondly, that if by those words her next of kin were intended, then that the next of kin at the death of the wife, and not of the husband (who was tenant for life), were entitled. By marriage settlement, a fund belonging to the wife was settled on the husband and wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case no children should attain vested interests (which happened), then as the wife should appoint; and in default, unto the executors or administrators of the wife. The wife predeceased the husband, and made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest:—Held, that the ultimate limitation was in favour of the wife's administrator, and not of her next of kin. *Allen* v. *Thorp*, 7 Beav. 72; 13 L. J., Ch. 5.

—— **Next of Kin Entitled.**]—By an antenuptial settlement, money, the property of the wife, was settled in trust for her separate use for life, for her husband for life, and for the children of the marriage, equally subject to her appointment by deed or will, and in default of children, for such persons as she should appoint by deed or will, and in default of appointment, that the trustees should pay and transfer the same to her executors or administrators; and the husband covenanted, that in case he should die without issue in his life, and make no appointment, the same should remain for the use and benefit of her executors, administrators, and assigns:—Held, that by the "executors or administrators" of the wife, her next of kin were

meant. This case was appealed, and the appeal was heard, but before judgment was given it was compromised, the Lord Chancellor having expressed his dissent from the decree below. *Daniel* v. *Dudley*, 11 Sim. 163. See *S. C.* on appeal, 1 Ph. 1.

Trust in a marriage settlement to raise a sum of money charged on the settled estate at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife:—Held, upon the whole scope and context of the instrument, a trust for the next of kin of the wife, although she died in the husband's lifetime. *Bulmer* v. *Jay*, 3 Myl. & K. 197. Affirming 4 Sim. 48.

—— **Assignee of Wife Entitled.**]—The ultimate trust in a settlement of a fund, in default of and subject to the appointment by will of the lady, was "for her executors and administrators." The lady, having survived her husband, assigned the fund; it was:—Held, that the assignee had a good title, and the fund was ordered to be transferred to him. *Bulmer* v. *Jay* (supra) not followed. *Page* v. *Soper*, 1 Eq. R. 540; 1 W. R. 518.

—— **Husband entitled jure mariti.**]—A sum of money was bequeathed in trust for several tenants for life in succession, with reversion to such person or persons as one of them, who was a married woman, should by will appoint, and in default of such appointment, "to and for the benefit of her executors or administrators." There was no appointment:—Held, that the husband took the fund jure mariti. *Att.-Gen.* v. *Malkin*, 2 Ph. 64; 10 Jur. 955.

—— **Wife and after-taken Husband entitled to Transfer of Fund.**]—By a marriage settlement the wife's property was vested in trustees, in trust for her separate use for life, independently of her then or any future husband, without anticipation, with remainder (in the events which happened) as she should, notwithstanding her coverture, appoint by will, and, in default of appointment, in trust for her executors and administrators:—Held, that the lady and an after-taken husband were entitled to a transfer of the settled fund. *Malcolm* v. *O'Callaghan*, 5 L. J., Ch. 137.

Ultimate Trust for Husband's Executors, Administrators, or Assigns—Husband's Residuary Legatees Entitled.]—The ultimate limitation of a fund in a marriage settlement, after the death of a husband and wife, was to the husband, if he survived his wife; but if the wife survived, then, after her death, to such person as the husband should appoint, and in default, "to his executors, administrators, or assigns." The wife survived, and the husband made no appointment:—Held, that his residuary legatees, and not his next of kin, were entitled. *Howell* v. *Gayler*, 5 Beav. 157; 11 L. J., Ch. 398.

—— **Real Estate upon same Trusts—Husband's Heirs Entitled.**]—A man settles personal estate upon himself and his wife for their lives, and then upon their children, and, in default of children, upon himself, his executors, administrators, and assigns, and afterwards directs real estates to be settled upon the same trusts as near as can be as affect the personalty. Upon the death of the settlor without children, the real estate, subject to the life interest of the widow, goes to his heirs. *Ford* v. *Ruxton*, 1 Coll. C. C. 403.

7. For Personal Representatives.

Legal Representatives — Context necessary to explain Words.]—The words "legal representatives" used in a deed cannot be acted upon by the court unless some context be found in the deed to explain them. *Tipping* v. *Howard*, 15 Jur. 911.

—— **"In due course of Administration"—Next of Kin Denoted.**]—In a settlement the words "to pay to legal representatives in a due course of administration," amount to a direction to pay to next of kin, and not to executors or administrators. *Briggs* v. *Upton*, 41 L. J., Ch. 519; L. R. 7 Ch. 376; 27 L. T. 62; 21 W. R. 20—C. A.

By an ante-nuptial settlement real and personal estate was vested in trustees, for sale and investment of the proceeds; and after the marriage, for payment of the income to the husband and wife during their joint lives, and the life of the survivor, and then for the benefit of the children and issue of the wife, as she should by deed appoint, and in default for her children and issue. If there were no children of the marriage, the whole of the trust moneys and premises were to be held by the trustees for such person and persons as the wife should, notwithstanding any coverture, by deed or will appoint; and in default of appointment, then "to pay or transfer the trust moneys and premises unto the legal representatives of the wife in a due course of administration":—Held, that the words "legal representatives in a due course of administration," denoted the next of kin of the wife according to the statutes, and not the husband. *Ib.*

—— **"At time of Death"—Next of Kin Denoted.**]—A fund was settled on A. for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that legal personal representatives meant next of kin according to the statute of distributions. *Robinson* v. *Evans*, 43 L. J., Ch. 82; 29 L. T. 715; 22 W. R. 199.

In Incorrectly Framed Settlement.]—By an incorrectly framed settlement, a sum of money was settled on trusts for A. for life, with trusts in remainder for her children; and if she should die without issue, in trust to pay a portion of the fund to B. or her legal representatives:—Held, that the words legal representatives were either words of limitation, so as to give B. an absolute interest, or were intended to provide for her being dead at the date of the settlement, or were void for uncertainty. *Topping* v. *Howard*, 4 De G. & Sm. 268.

Wife's Property—Husband not Entitled.]—Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled. *Bailey* v. *Wright*, 1

Swanst. 39; 1 Wils. Ch. 15; 18 Ves. 49; 18 R. R. 151.

—— **Husband's Executors taking Administration of Wife's Estate.**]—By a marriage settlement, the wife's real and personal estate was assigned to trustees on trust to pay the annual income to the husband for life, remainder to the wife for life, remainder as she should by deed or will appoint; and in default for her personal representatives. The wife predeceased her husband, intestate and without issue. After the husband's death, his executors took out administration of the wife's estates:—Held, that they were entitled to the fund. *Best, In re*, 43 L. J., Ch. 545; L. R. 18 Eq. 686; 22 W. R. 599.

Fraud—Fictitious Consideration—Resulting Trust of Excess for Personal Representatives of Appointor.]—J. S. M. being entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment to his next of kin, and being in prison for debt, and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.* and other sums therein stated to have been previously lent and advanced to him by H. C. By a subsequent deed, in consideration of 1,854*l.* therein stated to be due from J. S. M. to H. C., and of 1,000*l.* paid by J. S. M. and others, J. S. M., by the direction of H. C., appointed that the principal should, on his death, be transferred to J. S. M. and others, with a proviso that they should assign the same to H. C. on payment of 1,000*l.* and interest, and all further advances. The 1,854*l.* or any part of it, had not, in fact, been advanced by H. C.:—Held, that this was a clear fraud. Held, that the appointment was well executed; that the next of kin of J. S. M. had no claim; that H. C. was a trustee for the personal representatives of J. S. M., for the excess beyond the money received by J. S. M. *Miller* v. *Minet*, Tam. 481.

8. For Next of Kin.

a. Who are Entitled as.

Words used Simpliciter denote "Nearest of Kin."]—A. assigned a fund to trustees, upon trust to pay the interest to B. for his life, and after his decease to pay, transfer, and assign the same among B.'s children; and if no child of B., from and immediately after the decease of B., upon trust to pay, transfer, and assign the same as A. should appoint; and in default of appointment, to pay, transfer, and assign the same to such person or persons as should at the time of the decease of A. be A.'s next of kin. A. died in the lifetime of B., without having made any appointment, and B. died without issue. B. is not excluded from the benefit of the limitation to A.'s next of kin. *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J., Ch. 200. And see *S. C.*, 2 Myl. & K. 82; 3 L. J., Ch. 17.

B. was the only surviving brother of A., and there were children of a deceased brother of A.:—Held, by the lords commissioners (overruling *Phillips* v. *Garth*, 3 Bro. C. C. 64; *Hinckley* v. *Maclarens*, 1 Myl. & K. 27, and the decision in the present case at the rolls), that the words "next of kin," used simpliciter, are to be taken to mean "nearest of kin," and that, consequently, B.'s personal representatives were entitled to the whole fund. *Ib.*

"Next of Kin in Blood"—Reference to Intestacy—Statute of Distribution.]—The expression "next of kin" or "next of kin in blood," coupled with a reference to the intestacy of the propositus, and with or without a direction for division, means "statutory next of kin." The same construction applies although the limitation to such next of kin prima facie creates a joint tenancy. In such a case the statutory next of kin take as joint tenants if a joint tenancy is possible: otherwise they take as tenants in common. *Gray, In re, Akers* v. *Sears*, 65 L. J., Ch. 858; [1896] 2 Ch. 802; 75 L. T. 407.

Ultimate limitation by deed after death and failure of issue of A. "to the person and persons who shall be next of kin in blood to A. at the time of her decease in case she had so died intestate and unmarried:"—Held, a limitation to her next of kin according to the Statute of Distribution. *Ib.*

Next of Kin of Wife's "own Blood and Family."]—On limitation by settlement to next of kin of said A. P. of her own blood and family, as if she had died sole and unmarried, the next of kin take as under the Statute of Distribution. *Cotton* v. *Scarancke*, 1 Madd. 45; 15 R. R. 208.

"Next of Kin in Blood according to the Statutes of Distribution"—Exclusion of Widow.]—In a post-nuptial settlement the ultimate limitation of a fund settled by the husband was for his "next of kin in blood according to the statutes for the distribution of intestates' effects, and in the manner in which the same would have been distributed if he had died possessed thereof intestate." The husband died in the lifetime of his wife:—Held, that his widow was not entitled to share in the fund with his next of kin. *Fitzgerald, In re*, 58 L. J., Ch. 662; 61 L. T. 221; 37 W. R. 552.

—— **"In due course of Administration"—Exclusion of Widow and Executors.**]—In a marriage settlement, the ultimate limitation of a fund provided by the husband was, "for his next of kin or personal representatives in a due course of administration according to the statute of distributions." There was a similar limitation, mutatis mutandis, of the fund provided by the wife. The court, rejecting the claims of the husband's executors and of his residuary legatee, and excluding his widow:—Held, that the next of kin were entitled to the fund provided by the husband. *Kilner* v. *Leech*, 10 Beav. 362; 16 L. J., Ch. 503; 11 Jur. 859.

—— **Of Wife at Death—Exclusion of Husband.**]—Under a limitation in a settlement (in the event of the wife dying without leaving children in the lifetime of the husband), in trust for such persons as at the death of the wife would have become entitled thereto under the statute for the distribution of the personal estate of intestates, the husband does not take. *Noon* v. *Lyon*, 33 L. T. 199.

Under a limitation, in a marriage settlement, of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial

interest, is not entitled. *Bailey* v. *Wright*, 1 Swan. 39 ; 18 Ves. 49 ; 1 Wils. Ch. 15 ; 18 R. R. 151.

Trust, under marriage settlement, for the next of kin of the wife, subject to her appointment by will, with two witnesses, appointment in favour of the husband by an unattested will being void ; the children are entitled, not the husband, who is next of kin to his wife, and whose claim to her personal property is not, in that character, under the statute, but jure mariti, and in this case, according to the plan of the settlement, he was not intended. *Watt* v. *Watt*, 3 Ves. 244.

Trust Defeated by Appointment to Executors —Husband Entitled.]—By a marriage settlement a fund was settled upon such trusts as the wife should, notwithstanding coverture, by deed or will appoint : and in default of appointment, in case (which happened) there should be no issue of the marriage, in trust for such persons as should at the death of the survivor of the husband and wife be the next of kin of the wife. By her will, which purported to be in exercise of the power, the wife devised and bequeathed all her real and personal estate, over which she had any disposing power, to her executors therein named. She then gave several legacies, which did not exhaust the fund, and appointed executors. She died in her husband's lifetime :—Held, that the fund was by the appointment all converted into the wife's general personal estate, and hence that the unexhausted portion belonged to the husband, and not to the persons entitled in default of appointment under the settlement. *Brickenden* v. *Williams*, L. R. 7 Eq. 310 ; 17 W. R. 441.

Wife Illegitimate — Husband entitled as Administrator.]—By a marriage settlement, a fund, the property of the wife, was settled on her, and her husband and their issue, and in default of issue on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her :—Held, that the crown was not entitled to the fund, but that it belonged to the husband as administrator to his wife. *Hawkins* v. *Hawkins*, 7 Sim. 173.

Articles Signed after Marriage—Husband entitled as Wife's Administrator.]—Proposals for a settlement of a lady's property, to be executed before marriage, were prepared in England, and sent out to the parties abroad. Before they reached their destination the parties married. The husband and wife then signed the proposals. The proposals were for a settlement on the wife for life, remainder to the husband for life, remainder to the children of the marriage ; in default of children, as the wife should dispose by will ; in default of such disposition, to the wife's next of kin. Part of the property (which was all personalty) was standing in her own name and right at the time of her marriage ; part consisted of her share of a fund vested in the names of trustees of her mother's marriage settlement, and in which the lady had only a reversionary interest, her mother being still alive. The wife shortly after the marriage died intestate, and without issue. The husband took out letters of administration to her estate :—Held, that he was entitled to all her personal estate for his own use, and not subject to any trust. *Pownall* v. *Anderson*, 2 Jur. (N.S.) 857 ; 4 W. R. 407.

Next of Kin Tenants in Common.]—By a marriage settlement personal property of the intended wife was settled, the ultimate trust being for such person or persons as at the time of the decease of the wife should be her next of kin "under and according to" the statute of distributions :—Held, that the next of kin of the wife took as tenants in common, and not as joint tenants. *Ranking, In re*, L. R. 6 Eq. 601.

An ultimate limitation in a marriage settlement was "for the next of kin of the wife, as if she had not been married, and not including the husbands of both or either of her sisters" :—Held, that the sisters, who were her next of kin, took as joint tenants. *Lucas* v. *Brandreth*, 28 Beav. 274.

—— **Joint Tenants.**]—By the settlement made on the marriage of E. M., the ultimate limitation of personal property was, "to such person or persons as at the time of the death of E. M. should be her next of kin." E. M. died, leaving a father, mother, and a child :—Held, that, under this limitation, the father, mother, and child took as her next of kin in joint tenancy. *Withy* v. *Mangles*, 10 Cl. & F. 215 ; 8 Jur. 69. Affirming 4 Beav. 358 ; 10 L. J., Ch. 391.

By a marriage settlement, the wife's portion was limited to the wife for life, with remainder to the husband for life, with remainder to the children of the marriage, to be vested at twenty-one or marriage ; and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint, and in default of appointment in trust for her next of kin :—Held, that the children of the marriage were not excluded from taking under the ultimate limitation. *Ib.* And see *Gray, In re, Akers* v. *Sears*, supra, col. 978.

Children Entitled as Nearest of Kin notwithstanding Appointment to Husband.] — A father gave his residuary estate to trustees for his daughter for life, and after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, and in default of appointment as she should by deed or will generally appoint, and in default of appointment under that power to her nearest of kin, according to the statute of distributions. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment :—Held, first, that there was an implied gift to the objects of the first power in default of appointment. *Jeffery, In re*, 42 L. J., Ch. 17 ; L. R. 14 Eq. 136 ; 26 L. T. 821 ; 20 W. R. 667.

Held, secondly, that if not, the appointment was conditional on there being no children, and they took as nearest of kin as in default of appointment. *Ib.*

Brother, Sister, and Deceased Brother's Daughter entitled equally.]—By an antenuptial settlement moneys, the property of the wife, were settled in trust to pay the interest to her during her life, and in the event of her death in the lifetime of her husband, then as to the principal as she should appoint ; and in the

event of her dying without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next of kin of the wife," free from the control or debts of her husband. The wife died in the lifetime of her husband, without leaving any issue her surviving. She was survived by a brother, a sister, and niece (the only child of a deceased brother):—Held, that the niece was entitled to one-third part of the moneys. *Kidd* v. *Frasier*, 1 Ir. Ch. R. 518.

Sister, excluding Deceased Brother's Children.]—Limitation by settlement of personal property to next of kin, in equal degree, passes the property to a surviving sister, in exclusion of children of deceased brother. *Anon.*, 1 Madd. 36.

Wife's Next of Kin at Death or Re-marriage of Husband—Divorce and Re-marriage.]—A fund was settled on marriage in trust, after a life interest to the wife and other limitations, for the wife if she should survive her husband, but if she should die in his lifetime, in trust for the husband for life, or until he should marry again, and upon his decease or marriage as aforesaid, in trust for such persons as at the time of his death or marriage should be the next of kin of the wife. The marriage was dissolved by decree; both husband and wife married again, and the wife died:—Held, that the next of kin of the wife at her death were entitled to the fund, the words "his death or marriage" being read as meaning the determination of the prior interests. *Mathew, In re*, 24 W. R. 960.

Held, also, that the husband's interest was destroyed by his second marriage in the lifetime of the wife. *Ib.*

b. Time for Ascertaining.

Ultimate Limitation to Next of Kin of Husband.]—By a marriage settlement a fund was settled on the wife, if she should survive her husband, for her life, remainder to her children, who, being sons, should attain twenty-one, or being daughters should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should by deed or will appoint: and, in default of appointment, in trust for his next of kin, according to the Statute of Distributions, and as if he had died intestate. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him; then the son died under twenty-one; and lastly, the wife died:—Held, that the fund vested in the son, as his father's next of kin, at the father's death, and not in the persons who were the father's next of kin at the son's death. *Smith* v. *Smith*, 12 Sim. 317.

By a marriage settlement a sum of 500*l.* was settled upon trust to pay W. the interest for her life, and in the event of there being no issue of the marriage, and of H. dying in her lifetime without having executed the power of appointment reserved to him, "then upon trust immediately upon the death of W. without leaving H., or any child or children, grandchild or grandchildren, her surviving, to pay the principal and all interest which may be then due thereon to such person or persons as, under the statute of distributions, would be entitled to the same as the next of kin of H. in case H. shall have died intestate":—Held, that the next of kin of H. at the time of his death were the parties entitled to the fund, and not his next of kin at the death of W. *Day* v. *Day*, Ir. R. 4 Eq. 385; 18 W. R. 417.

Ultimate Limitation to Next of Kin of Wife.]—In a marriage settlement, which gave successive life interests to the wife and husband, the ultimate limitation of personal property, in the event of the husband surviving the wife, was in trust for the person or persons who, under the statutes for the distribution of the estates of intestates would, on the decease of the wife, have been entitled thereto in case she had survived the husband, and had then died possessed thereof and intestate. The wife predeceased the husband:—Held, that the class of persons to take under the limitation ought to be ascertained as at the date of the death of the wife, and not as at the date of the death of the husband. *Bradley, In re, Brown* v. *Cottrell*, 58 L. T. 631.

By a marriage settlement, certain personal property was settled upon trust for the husband and wife for their respective lives, and after their death for the issue of the marriage, and in case of failure of issue, and of the wife dying in the lifetime of the husband (which events happened), upon trust for such person or persons, other than and except the husband, "as should then be the next of kin of the wife, and would have been entitled thereto under the statute of distributions, in case she had died sole, unmarried, and intestate":—Held, that her next of kin at her death, and not those at the death of her husband, were entitled. *Wheeler* v. *Addams*, 17 Beav. 417; 1 W. R. 473.

In a limitation in a deed, on a particular event, to the "then" next of kin of A., the word "then" was held to refer to the event, and not to the time of its happening. *Ib.*

A limitation to the next of kin of a wife, after the death of the surviving husband and failure of children:—Held, to be an exception to the general rule, and to mean not the wife's next of kin at her death, but at the death of the surviving husband. *Pinder* v. *Pinder*, 28 Beav. 44; 29 L. J., Ch. 527; 6 Jur. (N.S.) 489.

By a marriage settlement moneys belonging to the wife were limited to the husband and wife successively for life, with remainder to the issue of the marriage; but if there should be no issue of the marriage who should acquire a vested interest, then, in case the husband died in the lifetime of the wife, in trust for the wife absolutely; but if the wife should die in the lifetime of the husband, then, after the decease of the husband (in default of appointment by the wife), in trust for the persons who, under the statutes for the distribution of intestates' effects, would then be entitled to the personal estate of the wife, in case she had survived her husband, and had died possessed of the same intestate. The husband survived the wife:—Held, that the period when the class of next of kin was to be ascertained was the death of the husband, and not the death of the wife. *Ib.*

By a marriage settlement, personal estate of the wife was settled in trust for the husband and

wife for their lives, and afterwards for the children of the marriage, and in default, for the wife, if she survived her husband, but if she predeceased him, then (subject to his life interest) for such person as, at the death of the wife, would, under the statute, have been entitled to her personal estate, as her next of kin, in case she had survived her husband, and had afterwards died intestate. The husband survived the wife:—Held, that her next of kin, ascertained at the husband's death, were entitled. *Chalmers* v. *North*, 28 Beav. 175; 6 Jur. (N.S.) 490; 8 W. R. 426.

By a marriage settlement, dated in 1844, trust funds to which the wife was entitled were settled upon trusts for the benefit of the wife and husband during their respective lives and for the benefit of the child or children of the marriage. The settlement then provided that if there should be no child the trust funds should remain upon the trusts following: if the husband should die in the lifetime of the wife, then, after his decease and such failure of issue as aforesaid, in trust for the wife absolutely; but if the husband should survive the wife, then, after the decease of the husband so surviving the wife and such failure of issue as aforesaid, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of" the wife in case the wife, "having survived" the husband, "had died possessed of the same intestate, and to be divided between or amongst the same persons respectively, if more than one, in the shares and proportions in which the same respectively would, under or by virtue of the said statutes, be divisible among the said persons respectively." There was never any issue of the marriage. The wife died in 1886; and the husband died in 1888. The question was, when the class of next of kin of the wife entitled to the trust funds was ascertainable—whether at the death of the wife or of the husband:—Held, that the wife's next of kin entitled to take were to be ascertained, not at the time of her own death, but at the time of the death of her husband. *King's Settlement, In re, Gibson* v. *Wright*, 60 L. T. 745.

By a marriage settlement dated in 1839 certain property was vested in trustees upon trust for the appointees of the wife, and in default for her for life for her separate use, and after her death for the intended husband for life, and after the decease of the husband and the wife, in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto in case the wife, having survived the husband, were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes. The wife died in the lifetime of the husband. Her next of kin under the statutes at her death, and those persons who would be her next of kin if she had survived her husband and died immediately after his death were not altogether the same, and the question was, which of these two classes was to take:—Held, that the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died immediately after him. *Beach, In re, Clarke* v. *Hayne*, 59 L. J., Ch. 195; 42 Ch. D. 529; 61 L. T. 161; 37 W. R. 667.

c. On Dying Unmarried.

Construction — Without ever having been Married.]—Where there is a gift over in the event of a person, who is not married at the time, dying "unmarried," it means without ever having been married. *Heywood* v. *Heywood*, 29 Beav. 9; 30 L. J., Ch. 155; 7 Jur. (N.S.) 228; 3 L. T. 429; 9 W. R. 62.

In a limitation in a marriage settlement, giving the whole fund, after the death of the parents, to an only child, if but one should have died "unmarried and without issue," the word "unmarried" was construed "without having been married," and one having married:—Held, that the clause became inoperative. *Ib.*

Trust funds were directed to be paid, after the death of the survivor of husband and wife, in the event of there being only one child of the marriage, or, there being more than one, if all but one should have died unmarried and without issue, to such only child; but if there should be more than one child, in default of appointment by the husband and wife, to all the children equally, the shares to be vested at twenty-one or marriage. There were several children of the marriage; some had attained twenty-one, and two of them were married, of whom one had issue:—Held, that the contingency contemplated by the settlement could not happen, and that an appointment in favour of one of the children was valid. *Ib.*

The primary and usual meaning of the word "unmarried," in the absence of any context showing a different meaning, is "without ever having been married." *Blundell* v. *De Falbe*, 57 L. J., Ch. 576; 58 L. T. 621.

By a marriage settlement property belonging to the wife was settled in the events which happened, subject to the life interests of the husband and wife, in trust "for such person or persons as, under or by virtue of the statute for the distribution of intestates' effects, would at the time of the decease of the wife have been entitled to her personal estate as her next of kin in case she had died intestate and unmarried":—Held, that in the absence of anything in the settlement showing a contrary intention, the word "unmarried" must be construed to mean "without ever having been married." *Ib.*

—— **Not Having a Husband at the Time.**]—The word "unmarried" in one part of a settlement, held to mean not having a husband, although in another it was clearly used in the sense of "without having been married." *Pratt* v. *Mathew*, 8 De G. M. & G. 522; 4 W. R. 772.

A fund was settled in contemplation of marriage, for the wife for life, then for the husband for life, then for the children of the marriage equally (subject to a power of appointment among them), to be paid at twenty-one, or in the case of daughters, on their attaining that age or marrying; and in the event of any of them, being a son or sons, dying under twenty-one, or being a daughter or daughters dying under that age, and "unmarried," the share of such child was to accrue among the others, with an ultimate trust, in the event of no child attaining a vested interest, and of the wife dying in the husband's life, for such person or persons as would have been entitled to her personal estate under the statute of distributions, if she had died "unmarried" and intestate:—Held, that

the word "unmarried" in the ultimate trust was to be construed "not having a husband at the time." *Ib.*

Operation of 3 & 4 Will. 4, c. 106, s. 3.]—The 3 & 4 Will. 4, c. 106, s. 3, does not apply to the ultimate limitation in a marriage settlement by a woman to the persons who would have been entitled if she had died intestate, and without having been married. *Heywood* v. *Heywood*, 5 N. R. 441 ; 34 L. J., Ch. 317 ; 11 Jur. (N.S.) 633 ; 13 W. R. 514.

By a marriage settlement real estate, of which the lady was seised as heir to her maternal grandfather, was conveyed to trustees, upon trust for the lady and her heirs until the marriage, and after the marriage upon trust for the lady for life ; with remainder, in default of issue of the marriage, in trust for the lady and her heirs, if she survived her husband ; but if she predeceased him, then in trust for the person or persons who would at her death have become entitled to the property if she had died intestate, and without having been married. The lady died without issue in her husband's lifetime :—Held, that the ultimate trust being for the benefit neither of the settlor nor of the heirs of the settlor, was unaffected by 3 & 4 Will. 4, c. 106, s. 3, and that the persons intended to take thereunder were those who would have been entitled if the settlement had never been executed ; and, consequently, that the heir ex parte maternâ took the property, by purchase, under the settlement. *Ib.*

Effect to Exclude Marital Right, but not Children.]—The words "unmarried, or without having been married," when used in a settlement, and applied to the wife, are intended merely to exclude the marital right, and not to defeat any interest which the children might otherwise be entitled to as next of kin of their mother. *Pratt* v. *Mathew*, 22 Beav. 328. Affirmed, 25 L. J., Ch. 686 ; 2 Jur. (N.S.) 1058 ; 4 W. R. 772.

In a marriage settlement of the wife's property which contains no express provision for children or issue, the words "without having been married" in an ultimate trust for the wife's next of kin will not exclude a child as against nephews and nieces. *Ball's Settlement, In re* (infra), *Upton* v. *Brown* (infra, col. 987), and *Arden's Settlement, In re* (W. N. [1890] 204), followed. *Emmins* v. *Bradford* (infra, col. 988) disapproved. *Stoddart* v. *Savile*, 63 L. J., Ch. 467 ; [1894] 1 Ch. 480 ; 8 R. 372 ; 70 L. T. 552 ; 42 W. R. 361.

By a marriage settlement, a moiety of the settled fund was assured in trust after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint ; and in default of appointment, to such person or persons as at her decease would have been entitled to the clear residue of her personal estate under the Statute of Distributions, in case she had died intestate without having married. On the death of the wife, in the lifetime of the husband, without having exercised the power :—Held, that the children of the marriage were entitled. *Norman's Trusts, In re*, 3 De G. M. & G. 965 ; 22 L. J., Ch. 720 ; 17 Jur. 444. Reversing 1 Eq. R. 53 ; 1 W. R. 220.

By marriage articles, the personal property of the intended wife was agreed to be settled for her separate use for life ; and after her death, in case she died before her husband, in trust for such persons as would be entitled as her next of kin, in case she had died intestate and unmarried :—Held, that the children of the marriage, and not the persons who would have been her next of kin if she had died without having ever been married, were entitled. *Maugham* v. *Vincent*, 9 L. J., Ch. 329 ; 4 Jur. 452.

By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died, leaving her husband and one child surviving :—Held, that the trust funds went to the child. *Ball's Settlement, In re*, 48 L. J., Ch. 279 ; 11 Ch. D. 270 ; 40 L. T. 880 ; 27 W. R. 409.

Child of Second Marriage Excluded.]—By a marriage settlement funds were vested in trustees, for the intended wife and husband successively, for their lives, and after their deaths for the children of the marriage, as the husband and wife during their joint lives, or the survivor, should appoint ; and in default of appointment, for the children equally, or for one child if only one, the shares to vest in sons at twenty-one and in daughters at twenty-one or marriage ; on failure of issue who should acquire a vested share, as the wife should, notwithstanding her coverture, by deed or will appoint ; and in default of such appointment, and so far as the same should not extend, then as the husband should by will or deed appoint ; and in default of appointment by him, for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the wife, if she had died possessed thereof intestate and without having been married, with a power to the trustees after the death of the husband, or during his life with his consent, to advance one-half of the respective shares of the sons towards placing them out in any business, employment, or advancement in the world. There were two children of the marriage, who died infants. The wife survived the husband, married again, and had by her second marriage one son (the plaintiff), and died intestate, without making any appointment of the fund, leaving the second husband (her administrator) surviving :—Held, that the next of kin of the wife, excluding the plaintiff, were entitled to the funds. *Hardman* v. *Maffett*, 13 L. R. Ir. 499.

Construed "without a Husband at time of Death"—Children of Second Marriage entitled.]—In a settlement, the expression "in case she (the wife) had died intestate and unmarried" :—Held, equivalent to "in case she had died intestate and a widow." *Saunders, In re*, 3 K. & J. 152.

Accordingly, under a limitation, at the wife's death, to the persons who, in the event above mentioned, would have been entitled to her personal estate :—Held, her first husband having died without issue, that her children by a second husband, who survived her, were the persons designated. *Ib.*

A marriage settlement gave a fund to trustees for M. (the intended wife) for life, and after his decease, as to one moiety for the husband, and as to the other moiety for the children, at such ages as the wife, notwithstanding her coverture, should appoint, and in default of appointment, among the children, as tenants in common to be vested at twenty-one or marriage ; and if there

should be no child, as to the whole for the husband for life; and after his decease for any person the wife, notwithstanding her intended or any future coverture, might appoint; and in default of appointment, "for the person or persons who, at the decease of F., should be of her blood and in kin to her, and who in their own right, or in right of their representatives, would have been entitled to the same under the Statute for Distribution, in case M. had died possessed thereof intestate and unmarried." The wife died with her first child, which survived her only one day. She had not exercised the power of appointment:—Held, that "unmarried" in this settlement meant being without a husband at the time of death, that consequently the fund went to the child, as the wife's next of kin, and on its death passed to its father. *Clarke* v. *Colls*, 9 H. L. Cas. 601. Affirming *S. C.*, nom. *Mitchell* v. *Colls*, 1 Johns. 674; 29 L. J., Ch. 403; 6 Jur. (N.S.) 292; 8 W. R. 208.

"Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument where it is used. *Ib.*

Illegitimate Child entitled under Special Provision.]—On the marriage of a widow who had an illegitimate daughter, funds belonging to her were settled on trust for her separate use, without power of anticipation, with remainder to her appointees by deed or will, and in default of appointment for her absolutely, if she should survive her intended husband; but if she died in his lifetime the fund was to be held in trust for the persons who would have been entitled under the statutes for the distribution of the effects of intestates, if she had died intestate and without having been married. And it was declared that her illegitimate daughter should for the purposes of that trust be deemed to be her lawful child. The settlement contained no express provisions for children or issue. The marriage having taken place, and the wife having died in the husband's lifetime, without lawful issue and without having made any appointment under the power:—Held, that not the wife's next of kin, but her illegitimate daughter, was entitled to the trust funds. *Wilson* v. *Atkinson*, 4 De G. J. & S. 455; 4 N. R. 451; 33 L. J., Ch. 576; 11 L. T. 220. Reversing 33 Beav. 536.

Son by Former Marriage Entitled.]—By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bankruptcy. Provisions were then made for the children of the marriage and a son of the wife's former marriage. And it was declared that, if the son of the former marriage should die under twenty-one, and if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject and without prejudice to the trusts before declared, and after the death of the husband, and of the son of the former marriage under twenty-one, and the default or failure of children of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, and, subject thereto, in trust for her next of kin as if she had died intestate and "without having been married." The wife died first, without having exercised the power of appointment. There was no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition:—Held, that the infant son was entitled, as sole next of kin of his mother, to the trust fund. But held, that the trust for the next of kin did not arise until after the death of the husband, and that consequently he was entitled to the income of the trust fund for his life, and that this interest had vested in the trustee under his liquidation. *Upton* v. *Brown*, 48 L. J., Ch. 756; 12 Ch. D. 872; 41 L. T. 340; 28 W. R. 38.

Children of Former Marriage Excluded.]—By a settlement on the marriage of a widow, containing a recital that she had three children by her former marriage, but no other reference to such children, the trust property was settled, in the events which happened, in trust, subject to her life interest, for the persons who would have been entitled thereto if she had died possessed thereof "without ever having been married." She died, leaving the said children surviving:—Held, that the property went to the persons who would have been entitled thereto if she had died a spinster. *Emmins* v. *Bradford*, *Johnson* v. *Emmins*, 49 L. J., Ch. 222; 13 Ch. D. 493; 42 L. T. 45; 28 W. R. 531.

Wilson v. *Atkinson* (supra) explained. *Ball's Settlement, In re*, supra, col. 986, and *Upton* v. *Brown* (supra) disapproved. *Ib.*

Husband Excluded.]—Upon the construction of a covenant in a marriage settlement, whereby the lady's personal estate was to be limited in the events which happened, in trust for her next of kin, by force of the statute for distribution of intestates' estates, in case she had died a feme sole and unmarried; her next of kin (excluding the husband) were held entitled. *Grafftey* v. *Humpage*, 1 Beav. 46; 8 L. J., Ch. 98; 3 Jur. 622.

Widow Excluded.]—A widow, as such, cannot take under a limitation to the next of kin of her husband, according to the statute of distributions. In a marriage settlement, the ultimate limitation of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute of distributions of personal estate of persons dying intestate, if the husband had died intestate without having been married to A.," his wife. The wife died, and the husband married again and died:—Held, that his widow took nothing under this limitation. *Cholmondeley* v. *Ashburton* (*Lord*), 6 Beav. 86; 12 L. J., Ch. 337.

Brother Entitled — Children of Deceased Brother Excluded.]—In a marriage settlement a sum of stock was given to trustees, after the death of husband and wife, upon trust, in case the wife died first, "for such person or persons as at the time of the death of the husband should be the next of kin of the wife and would be entitled to her personal estate and effects, his, her, and their executors, administrators, and assigns, as if she had died sole and unmarried." On the death of the husband only one brother was living, but there were children of the other

brothers:—Held, that the brother surviving at the death of the husband took the whole fund as the next of kin designated in the settlement. *Webber's Settlement, In re*, 17 Sim. 221; 19 L. J., Ch. 445.

Express Exception.]—Personal estate brought into settlement by B. stood limited on trust for the person or persons (exclusively of A. and his representatives) who under the statute of distributions would have become entitled, if B. had died possessed thereof, a feme sole and intestate. A. was B.'s brother. At B.'s death her statutory next of kin included three daughters of A.:—Held, that the term representatives meant those who represented A. as statutory next of kin of B.; and that A.'s daughters were therefore excluded from taking under the settlement. *Lindsay* v. *Ellicott*, 46 L. J., Ch. 878.

9. For Volunteers.

Principle—Where Contract founded on Marriage.]—A father living on affectionate terms with his daughter is the proper person to recommend and advise her, and her natural agent in matters relating to the preparation and provisions of her marriage settlement, and there is no occasion for any independent legal advice beyond that of the family solicitor who is preparing the settlement. If, however, the father is taking under the settlement a benefit from the daughter, she ought to be separately advised. *Smith* v. *Iliffe* (post, col. 1049) disapproved. *Wollaston* v. *Tribe* (ante, col. 901) doubted. *Tucker* v. *Bennett*, 57 L. J., Ch. 507; 38 Ch. D. 1; 58 L. T. 650—C. A.

The court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage, the principles on which it would act in considering provisions contained in a voluntary settlement—Per Cotton, L.J. *Ib.*

Post-nuptial Settlement — Voluntary as to Children.]—Where a post-nuptial settlement has been executed by a husband and wife in consideration of an exchange of interests between them, such a settlement, though for value as between themselves, is voluntary as regards the children of the marriage, and specific performance of a covenant to surrender copyholds cannot be enforced by them. *Green* v. *Paterson*, 56 L. J., Ch. 181; 32 Ch. D. 95; 54 L. T. 738; 34 W. R. 724—C. A.

Voluntary Settlement — As against Person Claiming through Settlor.]—A court of equity will not, where there has been a voluntary settlement, interfere to disturb that settlement in favour of a person whose claim is derived only through the settlor. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; 23 L. T. 636.

—— **By Mortgagor—Sale by Mortgagee under Powers — Title to Surplus Money.**]—A. B. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates and all his interest therein to grantees to uses to hold, subject to the mortgage and to a power of raising a sum of money for himself, to the use of himself for life, with remainder to his first and other sons in tail, with remainders over. The mortgagee afterwards sold the estates under the power of sale in the mortgage, and after retainer of his debt and costs paid the balance of the sale moneys into court under the Trustee Relief Act. Upon a petition for payment out, A. B. contended that the sale had destroyed the voluntary settlement, and that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by A. B. himself:—Held, that the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mortgagee should exercise his power, and that the volunteers under the settlement were entitled as against the settlor to the fund in court. *Walhampton Estate, In re*, 53 L. J., Ch. 1000; 26 Ch. D. 391; 51 L. T. 280; 32 W. R. 874.

Right to Redeem Mortgage.] — One that claims under a voluntary conveyance may redeem a mortgage. *Howard* v. *Harris*, 1 Vern. 193.

Right to Compel Settlor to bring Suit against Trustees.]—Persons claiming under a voluntary settlement cannot insist on their settlor incurring the expense of a suit as they allege for his own benefit, to set aside a settlement of accounts between himself and his trustees under which he has been found entitled to the specific sum settled, and by which he professes to be bound, and which he believes to be accurate. *Parker* v. *Bloxam*, 20 Beav. 295.

—— **To Sue to Set Aside Adverse Deed.**]—In 1860 A. sold and conveyed some property to B.; afterwards, in 1864, A. by a deed, reciting that the deed of 1860 was invalid, voluntarily conveyed the property to trustees for himself for life, with remainder to his children:—Held, that the infant children of A. could maintain a suit, as sole plaintiffs, to set aside the deed of 1860, the right to sue being incidental to the property conveyed. *Dickinson* v. *Burrell*, 35 Beav. 257; L. R. 1 Eq. 337; 12 Jur. (N.S.) 199; 13 L. T. 660; 14 W. R. 412.

Defence to Voluntary Deed, when Restrained.]—Equity will not take away any defence the party may have at law to a voluntary deed; but if deed for good consideration had been discharged by voluntary release, such defence would be restrained. *Praund* v. *Turner*, Fitzg. 105.

Trust for Payment of Debts—Non-communication to Creditors—Death of Settlor—Charge on Estate—Revocation.]—By a deed of settlement of an estate, made as part of a family arrangement, a father and son appointed the estate, after a life interest therein to the father, to the use of trustees, upon trust, with the consent of the settlors, and after their deaths at the discretion of the trustees, to sell the same or any part, and apply the proceeds, and the rents and profits until sale, in payment of all the debts of the father; and upon further trust to convey the unsold part to the uses of a settlement of even date, under which the father was tenant for life, with remainder to the son for life, with remainder to his first and other sons in tail. The creditors were not parties to the deed, nor was it communicated to them. After the father's death part of the estate was sold and the proceeds applied in payment of all the debts of the father

except one due to his sister; and the unsold portion was subsequently re-conveyed to the uses of the settlement of even date. After the death of the son the executors of the only unpaid creditor claimed payment of her debt as against the owner of the settled estate:—Held, that the case fell within the authority of *Synnot* v. *Simpson* (5 H. L. Cas. 121), and not *Garrard* v. *Lauderdale* (*Lord*) (3 Sim. 1; 2 Russ. & M. 451); and that as there was a trust created by the deed in favour of the creditors which became irrevocable on the death of the father, the estate was liable to satisfy the debt. *Priestley* v. *Ellis*, 66 L. J., Ch. 240; [1897] 1 Ch. 489; 76 L. T. 187; 45 W. R. 442.

10. For Survivors.

Rule of Construction.]—In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take, and the contingency to which the survivorship refers, is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument. *Bouverie* v. *Bouverie*, 2 Ph. 349; 16 L. J., Ch. 411; 11 Jur. 661.

Successive Deaths.]—On the marriage of J. A. and S. A., stock was settled by deed upon trust after their death, and failure of issue of the marriage, to transfer the same unto, amongst, and between J. F., R. F., W. F., and E. F., equally, provided that if either of them, J. F., R. F., W. F., and E. F., should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue; but in case either of them should die without having lawful issue, then the share of him, her, or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage; J. F. and R. F. died in the lifetime of J. A. and S. A. leaving issue. W. F. survived J. F., and died in the lifetime of R. F. without issue; E. F. survived both J. A. and S. A.:—Held, that E. F. was entitled by survivorship to W. F.'s share in the fund. *Acott's Settlement*, *In re*, 28 L. J., Ch. 383.

"Survivors" construed "others."]—When an estate was settled to A., B. and C., as tenants in common for life, with successive remainders to their issue male and female in tail, remainder "in case one or two of the said A., B. and C. should happen to die without issue of her or their bodies, then, as to the share or shares of such one or two so dying without issue, to the use of all and every the daughter and daughters of such survivor or survivors, as tenants in common in tail":—Held, that the word "survivors" might be construed "others," and that the daughters of one of the tenants for life, who did not survive, were entitled under the limitation. *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66.

The word "survivor" in one of the clauses of a settlement may be read "other" in order to effectuate the clear intention of the parties, notwithstanding that the word may require to be read in its natural sense in other clauses of the settlement referring to the same fund. *Palmer*, *In re*, 44 L. J., Ch. 247; L. R. 19 Eq. 320; 32 L. T. 9.

By a deed dated in 1824, E. and S., spinsters, settled funds in trust for themselves in equal shares for life, and after the death of either of them without issue in trust as to a moiety of the income for the survivor for life, and in case either or both died without leaving children, then as to the income of her moiety in trust for the survivor of E. and S. with remainder to her children. E. died in 1868, leaving two children. S. died in 1873 without having been married:—Held, that the word "survivor" in the gift over of S.'s moiety, contingent on her dying without leaving children, might be read as "other," and that the children of E. were entitled to it. *Ib.*

"Survivor" read as "other." *Smith* v. *Osborne*, 6 H. L. Cas. 375; 3 Jur. (N.S.) 1181; 6 W. R. 21.

Period of Distribution referred to.]—A post-nuptial settlement, executed when at least one child of the marriage was alive, recited an intention to provide for the present and future issue of the marriage, and directed that, after the death of the wife, the trustees should pay and apply the interest of a certain sum of money amongst the present and future issue according to appointment, and in default of appointment share and share alike, with benefit of survivorship; proviso, that if the husband survived the wife, and that the issue of the marriage died unmarried, or, being married, died without leaving issue, in the lifetime of the husband, the sum should be paid to him, his executors, &c. The wife survived her husband:—Held, that the words "with benefit of survivorship" referred to the date at which the fund became distributable, and that that date was the death of the wife. *Dixon*, *In re*, Ir. R. 3 Eq., 22. But see *S. C.* on appeal, Ir. R. 4 Eq. 1.

A fund was settled by deed in trust for A. for life, and then for her children, and in default of children to B., "if then living," but in case of B.'s death before A., in trust for "the surviving children" of B. by her deceased husband:—Held, that the survivorship had reference to the death of A. *Reid* v. *Reid*, 30 Beav. 388.

11. Life Estates in Realty.

Limitation to Wife and Heirs of her Body, with Obligation to Divide among Children at her Death.]—On marriage, the husband executes a deed-poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten 100*l.* a-piece at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children, as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his lifetime with part of his personal estate, shall be considered as personal estate, and be disposed of accordingly. *Lowther* v. *Westmoreland*, 1 Cox, 64.

Limitation "on Default of Such Issue"—Following Life Estate to Husband and Division among Children.]—By a marriage settlement estates were limited to the wife and the husband for their lives, with remainder to the heirs of the body of the husband on the body of the wife and

their heirs; and if more children than one, equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs:—Held, that the husband did not take an estate in tail special, but for life only, and that the children took by purchase as tenants in common in fee in remainder. *North* v. *Martin*, 6 Sim. 266.

Surrender of copyhold to the use of surrenderor for life, remainder to the use of A. for life, remainder to the use of the child or children of A., and for want of such issue to the use of B. Semble, A. takes an estate for life. *Widdowson* v. *Harrington* (*Earl*), 1 J. & W. 532.

Estates for Life and in Fee—Tenancy in Common.]—Under a limitation of real estate in a marriage settlement, after the death and failure of issue of the husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue living at the time of the failure of issue of the marriage, as tenants in common":—Held, that nephews and nieces took life estates, and that the eldest son of a nephew deceased at the time of such failure of issue took in fee. *Marshall* v. *Peascod*, 2 J. & H. 73.

Real estate was conveyed to trustees upon an ultimate trust to convey and divide the trust estate to and among all the children of the settlor, and the issue of such children who should be living at the death of the wife of the settlor, as tenants in common:—Held, that the children took life estates only. *Tatham* v. *Vernon*, 7 Jur. (N.S.) 814; 9 W. R. 822.

Words of Inheritance Rejected.]—A marriage settlement vested freehold leases in trustees "to hold to the use of A. and his heirs and assigns, from the perfection of these presents, for and during the term of his natural life, without impeachment of waste," with a power to lease, remainder to the trustees to preserve, and from the decease of A. to secure a jointure to B. (A.'s wife). Then followed a covenant by A., charging the jointure on after-acquired estate, with power of distress; "and further that the lands, after the decease of the survivor of A. and B., in case there should be but one child of the marriage, to the use of such only child, and the heirs of his or her body lawfully issuing; and in case there should be more than one such child, then to such children in such shares and proportions as A. shall by deed or will appoint; and in default of such appointment, then to the use of all the children, as tenants in common, share and share alike":—Held, that the words "and his heirs" should be rejected, and that A. took a life estate. *Hammersley, In re*, 11 Ir. Ch. R. 229.

Held, also, that the clause beginning "and further," is a limitation in continuation of, and direct sequence upon, the limitations to trustees to preserve. *Ib.*

—— **Omitted.**]—By a settlement made on the marriage of a widow, having children, real estate was conveyed by her to a trustee and his heirs upon trust, for her separate use for life, with remainder in trust for her children as tenants in common (omitting the limitation to their heirs):—Held, that they took life estates only. *Holliday* v. *Overton*, 15 Beav. 480; 21 L. J., Ch. 769. Affirmed, 16 Jur. 751.

The rule that the estate of the cestuis que trustent is commensurate with that given to the trustees, is inapplicable to limitations in a deed; therefore, where an estate was limited to trustees in fee, but the trust in favour of the cestuis que trustent wanted the ordinary words of inheritance:—Held, that they took life estates only. *Ib.*

A conveyance to trustees, without words of inheritance, of the share and interest, to which the conveying party is entitled under a will, passes a life estate only in so much of the property as consists of real estate. *Hudson, In re, Kühne* v. *Hudson*, 13 R. 546; 72 L. T. 892.

By a marriage settlement, real estates were conveyed to trustees "and their heirs," upon trusts for the parents for life, and afterwards for the children; and in default, as the wife should appoint; and in default, for her next of kin. The gift to the next of kin contained no words of inheritance:—Held, that they took for life only. *Lucas* v. *Brandreth*, 28 Beav. 274.

A., by a voluntary settlement, in 1838 conveyed freeholds to trustees upon trust (together with a sum of stock already transferred) for himself for life, and after his death in trust for his reputed son, W., when and in case he attained twenty-one, with a trust for maintenance if he should be under twenty-one at the settlor's death. And in case W. should die under twenty-one, or die in the settlor's lifetime, without leaving issue living at his decease, then over. There were no words of limitation in the trust for W. There was a power of sale in the settlement, but no trust to invest the proceeds in land. A. died in 1849, having made his will in 1843, which recited the settlement and confirmed it, except as to the stock which had been sold. W. attained twenty-one, and died in 1872:—Held, that W. took a life estate only in the freeholds under the settlement, and that there was a resulting trust for the settlor. *Middleton* v. *Barker*, 29 L. T. 643.

Remainder in a settlement, after successive estates tail in the sons to the daughters as tenants in common, and not as joint tenants, and in default of such issue to the right heirs of the father, admitted, without argument, an estate for life only in the daughters. *Snell* v. *Silcock*, 5 Ves. 469.

Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor. At the time when this deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters, and also several sons of the marriage, survived him:—Held, that under the limitation to the "heir female," the daughters took a life estate in the lands as purchasers. *Chambers* v. *Taylor*, 2 Myl. & Cr. 376; 6 L. J., Ch. 193.

Restoration of Life Estate by Resettlement—Power of Sale.]—J. W., by his will, devised hereditaments, subject to certain prior charges and estates, to the use of J. O. and his assigns during his life, with remainder to the use of his first and other sons in tail male. The will

contained a power of sale exercisable by the trustees "at the request in writing of any person who by virtue of this my will shall be tenant for life in possession" of the hereditaments. J. O., and his eldest son F. O., by disentailing deed, conveyed the settled hereditaments to a trustee to hold the same [subject to the prior uses and estates (other than the uses or estates limited to J. O. during his life), but discharged from the said estate in tail and all subsequent estates] to such uses as J. O. and F. O. should by deed jointly appoint, and, in default of such appointment, to such and the same uses, and subject to such and the same powers as were subsisting immediately before the execution of the disentailing deed. By deed of resettlement, J. O. and F. O. jointly appointed that the hereditaments should from that date [but subject to the prior uses and estates (other than the uses and estates limited to J. O. and his assigns for his life), and subject also to certain mortgage debts which had been created] remain to the uses thereinafter declared; and, subject to certain rent-charges, the hereditaments were limited to the use of J. O. and his assigns during his life "in restoration and by way of continuance and confirmation of the former life estate of J. O. under or by virtue of the will," with remainders over. It was then provided that nothing therein contained should prejudice or affect the power of sale contained in the will:—Held, that J. O. was still tenant for life in possession by virtue of the will, and that the power of sale was therefore still exercisable by the trustees of the will at his request. *Wright to Marshall, In re*, 54 L. J., Ch. 60; 28 Ch. D. 93; 51 L. T. 781; 33 W. R. 304.

12. Life Interests in Personalty.

Life Interest by Implication.]—By a marriage settlement, a portion to which the wife was entitled was assigned, in trust, for her separate use during the coverture, and in case she should die in her husband's lifetime, then in trust for him during his life, and after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, and in default of such issue, in trust for such persons as the wife should by deed or will appoint. The wife survived the husband:—Held, that she was entitled to the interest of the portion for her life. *Tunstall's case*, 3 Sim. 312.

Settlement of sum of money upon trust, to be transferred to surviving parent, for the benefit of him or her, and any child or children of the marriage:—Held, upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children. *Chambers* v. *Atkyns*, 1 Sim. & S. 382; 1 L. J. (o.s.) Ch. 208.

A marriage settlement declared the trusts of a sum of stock to be, that, during the joint lives of the husband and wife, the dividends should be paid to the wife for her separate use; and if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely; and if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband:—Held, that the wife took, by implication, a life interest in the trust fund. *Allin* v. *Crawshay*, 9 Hare, 382; 21 L. J., Ch. 873.

A father, by deed, settled certain leaseholds upon his son absolutely, and also a rent-charge and stock in the funds upon him for life, with remainder to his children. He afterwards, by deed, revoked all the benefits given to his son by the first deed, and declared that all estates, shares, right, interest, and benefit given to his son by such deed, should be and remain to trustees, their heirs, executors, and administrators, upon trust, during the joint lives of his son and his son's wife, to pay the rents, interest, dividends, profits, and annual income thereof to his son's wife for her separate use, and after his son's death then to her during life or widowhood, with remainder to the children:—Held, chiefly upon the strength of the term "dividends," that the stock and rent-charge (as well as the leaseholds) passed to the wife for her life, and not during the life of the son only. *Angell* v. *Dawson*, 3 Y. & C. 308; 8 L. J., Ex. Eq. 50.

—— **With power of Disposition by Will.**]—Settlement by a feme sole, in contemplation of marriage, of part of her fortune, in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband; and after the death of the survivor, to transfer the capital according to her appointment by will; and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, &c., according to the statute of distributions. An interest for life only in the widow, with a power of disposition by will. *Anderson* v. *Dawson*, 15 Ves. 532.

—— **To determine on Alienation—Marriage Settlement.**]—L. was entitled to a life interest under a voluntary settlement in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age, with remainder over. The settlement contained a proviso for the determination of his life interest and the acceleration of the subsequent remainders if he should alien, dispose of, mortgage, charge, or in any wise incumber his life interest, or if by reason of bankruptcy, insolvency, or otherwise the income of the funds could no longer be personally enjoyed by him, but would but for that proviso become vested in or payable to any person or persons other than him. By a subsequent settlement made on his marriage, L., amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of L., and after his death, upon such request or at such discretion as therein mentioned, to sell the same, and pay the income of the proceeds to L. during his life, and after his death to his wife during her life, with remainder for the issue of the marriage, as L. and his wife jointly, or the survivor, should appoint, and in default for all the children of the marriage in equal shares:—Held, that no forfeiture of L.'s life interest was produced by the marriage settlement, for the assignment contemplated by the forfeiture clause was one by reason of which the income of L.'s share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit. *Lockwood* v. *Sikes*, 51 L. T. 562.

Gift to Widow "for the Use of Herself and Children, but at her Disposal."] — A. having been indebted to the estate of B., in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, A. executed to C. another bond, for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—Held, that the widow took a life interest in the money secured by the bonds. *Fowler* v. *Hunter*, 3 Y. & J. 506.

Absolute Interest not Reduced except in favour of Children.]— When either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, and any daughter who dies without issue takes her share absolutely. *Sidway Hall Estate, In re*, 37 L. T. 457.

—— **By Inconsistent Words.**]—A term settled to the husband for life, remainder to the wife, her executors, administrators, &c., for the residue of the term, for her jointure; and for the better settling the term on her "for life" for her jointure, a covenant to renew and insert her name. The addition of those words will not reduce it to an estate for life. *Clarke* v. *Hackwell*, 2 Bro. C. C. 304.

It is declared by a marriage settlement, that a trustee is to lay out a sum of money, which the husband had agreed to settle in the purchase of any public stocks or funds, or annuities for the life of the intended wife, in his own name, in trust for her, and that he was during her life to pay her the dividends and other produce of the stock or annuity so to be purchased, to her separate use during her life:—Held, that the wife is entitled absolutely to a sum of 3 per cent. stock purchased with the money, and not merely to a life interest in it. *Smith* v. *King*, 1 Russ. 363.

Forfeiture—Interest determinable on Alienation—Advance of Trust Fund to Tenant for Life.]—By a settlement made in 1878 property belonging to the settlor was assigned to trustees upon trust to pay the income to the settlor until death or bankruptcy, or until he should "assign, charge, or incumber the income, or do or suffer anything whereby the same or some part thereof would through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, become payable to or vested in some other person." The settlor borrowed from the surviving trustee the greater part of the trust fund on his personal security, and, having spent the money, became bankrupt:—Held, that prior to bankruptcy there had been no forfeiture of the settlor's life interest, and the limitation until bankruptcy being void under the bankruptcy law, the settlor's life interest passed to his trustee in bankruptcy. *Brewer's Settlement Trusts, In re, Morton* v. *Blackmore*, 65 L. J., Ch. 821; [1896] 2 Ch. 503; 75 L. T. 177; 45 W. R. 8.

13. ESTATES IN FEE OR IN TAIL.

Estate Tail—Proviso as to Failure of Issue.]—Lands were limited to the use of the settlor for life, remainder to D., his heirs and assigns, but if D. should die without issue, then to T., his heirs and assigns; but if both D. and T. should die without issue, then to the issue male of the settlor:—Held, that D. and T. took estates tail. *Morgan* v. *Morgan*, 39 L. J., Ch. 493; L. R. 10 Eq. 99; 22 L. T. 595; 18 W. R. 744.

By settlement made in 1852 A. conveyed freehold property to trustees upon trust for A. for life, and after her death, in the event of B. and C., the daughters of A., surviving A., upon trust for B. and C. as tenants in common, and after the deaths of B. and C. upon trust for their issue as they should appoint, and in default of appointment upon trust for their children share and share alike; and in case of the death of either B. or C. in the lifetime of A., without leaving issue, then upon trust for the survivor and her heirs and assigns for ever; and in default of issue of either of them, in trust for D. and E. (the sons of A.), their heirs and assigns as tenants in common, and to their heirs for ever. B. died in the lifetime of A. unmarried. C. survived A. and died unmarried, having by her will disposed of her share in the property to her niece F. for life, with remainder to F.'s children. C. entered into possession of the property on the death of A., and on the death of C., F. entered into possession:—Held, that on the death of C. without issue the property passed to D. and E. as tenants in common in fee simple. *Morgan* v. *Morgan*, supra, followed. *Arthur* v. *Walker*, [1897] 1 Ir. R. 68.

An estate vested in a trustee in fee was directed to be held by him for a feme sole for life, independent of any husband; and in case she should leave issue, "the property shall pass to such issue as she may direct," with a gift "in case she should die without issue":—Held, that she took an estate tail. *Tierney* v. *Wood*, 19 Beav. 330; 23 L. J., Ch. 895; 2 W. R. 577.

Where by a deed of settlement after marriage, certain premises were conveyed to trustees to the use of A., the husband, for life, remainder to trustees to preserve contingent remainders, remainder to the use of B. (the eldest son of A.) and the heirs of the said B., and for default thereof to the use of the second, third, fourth, &c., and all and every the other sons of the said A. severally and successively in tail male, remainder to the use of the daughters, share and share alike, as tenants in common in tail male, with remainders over, B. having died without issue:—Held, that B. having been only tenant in tail under the limitations in the settlement, on his decease without issue male, the second son was entitled but to an estate in tail male, and did not take as heir-at-law to his brother B. *Wall* v. *Wright*, 1 Dr. & Wal. 1.

—— **Limitation for Life, Remainder to Heirs Male of Body.**]—A., upon his marriage with B., settles his estate to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for one thousand years, remainder to his brother C. for life, remainder to the heirs male of his body hereafter to be begotten; and then declares the trust of the term, that if there should be no issue male of the bodies of A. and B. begotten, that should live to the age of twenty-one years, or be married and

have issue, and that there should be a daughter or daughters of the bodies of A. and B., such daughter should have 4,000*l.* for her portion; and if two or more, they to have 5,000*l.* equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum of 100*l.*, to be paid her half-yearly for her maintenance: if two or more, the like sum to be paid them half-yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of premises, or of part; provided that if the father should in his lifetime prefer them in marriage, with portions equivalent, or the remainderman should, after the father's death, or that there should be no daughter who should attain the age of twenty-one or be married, then the term to cease. B. died in the lifetime of A., leaving no son, but three daughters, who are all unmarried; C. took an estate tail under this settlement, and the portions may be raised for the daughters in the lifetime of A. their father. *Hebblethwaite* v. *Cartwright*, Cas. t. Talbot, 30.

—— Remainder in Strict Settlement for Life, &c.]—F., by a deed executed on the marriage of his daughter W. with H., covenanted that he would stand seised of certain premises to his own use for life, and after his decease, that his heirs, executors, administrators, and assigns should convey the premises to trustees to the sole and separate use of W. for life, and, after her decease, to the eldest son of the marriage and to his issue "in strict settlement for life, with remainder to the issue of such issue ad infinitum, for the life of each successive issue ad infinitum," according to priority of birth and seniority of age, males to be preferred to females, with similar limitations to female issue in default of male; and, in default of all issue, as the settlor should appoint. There was issue of the marriage one son and three daughters. F. and H. having died:—Held, that the son was entitled to an estate tail in the premises, and not merely to an estate for life. *Thompson* v. *Thompson*, 18 W. R. 1136.

Estate Tail in Remainder—Effect of Recovery and Resettlement.]—An act of parliament reciting a will by which estates were decreed to A. for life, remainder to his first and other sons in tail, remainder to B. in tail, and that B. had suffered a recovery to the use of A. in fee, directed the estates to be sold, and other estates to be purchased and conveyed to such of the uses of the will as at the time of the sale should be existing undetermined, and capable of taking effect. The estates were sold, and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, &c.:—Held, that B. did not take an estate tail in the purchased estates. *Wortham* v. *Machinnon*, 4 Sim. 483.

Estate in Fee — Proviso as to Failure of Issue.]—Surrender of a copyhold to the use of baron and feme for their lives, and heirs and assigns of the said baron and feme, and for default of such issue, to the right heirs of the surrenderors. This is an estate in fee, and not an entail in the baron and feme; otherwise had it been the case of a will. *Idle* v. *Cook*, 1 P. Wms. 70.

By a statement made in 1817, freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of M., deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of M., their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying unto and equally between persons named. M. had two children, one of whom, B., died intestate and unmarried, the other, C., intestate as to his share, but leaving a daughter, D.:—Held, that the interest taken by D. under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue. *Olivant* v. *Wright*, 47 L. J., Ch. 664; 9 Ch. D. 646; 38 L. T. 677.

Limitations of Chattels Real — Absolute Interest.]—The trust of a term is limited to W. for life, remainder to R. for life, remainder to the heirs of the body of R., and for want of such issue to the executors of W.:—Held, that it vests in R. *Tatton* v. *Molineaux*, Poll. 24.

A., on his marriage, assigns a term for 1,000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of his body of the husband and wife, remainder to the husband's right heirs. The wife dies, leaving issue; the whole term vests in the husband, and he may assign it. *Webb* v. *Webb*, 1 P. Wms. 132; 2 Vern. 668.

A., seised in fee, demises to B., his executors, &c., for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue; then in trust for the heirs of the body of the husband; and in default of such issue, then in trust for the heirs of the survivor of the husband and wife. Husband and wife have issue a son, and the husband dies, and then the son dies in the lifetime of the mother, without issue; the mother administers to her husband and assigns the term to the defendant. Decreed, her assignee well entitled, and that the term should not go to the heir of the husband as attendant on the reversion. *Hayter* v. *Rod*, 1 P. Wms. 360.

Trust of a chattel real for S. for life, and immediately after her death, for the "heirs of her body," with limitations over; the whole interest vested in S. *Theebridge* v. *Kilburne*, 2 Ves. Sen. 233.

A marriage settlement, after reciting that it had been agreed that a cottage, &c. (which the husband held for the remainder of a term of 2,000 years), should be settled on the husband for life, and after his decease on the wife for life, by way of jointure, and after their several deceases on the issue of the marriage, and in default of issue on W. C. and his heirs, executors, &c., assigned the cottage to a trustee for the remainder of the term in trust, to permit the husband to receive the rents for so many years of the term as should expire in his lifetime, and after his decease in trust to permit the wife to receive the rents during her natural life, and after their several deceases to permit the heirs of the body of the husband begotten on the body

of the wife to receive the rents so many years of the term as should expire in the life or lives of him, her, or them respectively, and after the several deceases of the husband and wife, and in default of issue of the body of the husband and wife, as before limited, to permit W. C., his heirs, executors, &c., to receive the rents for all the residue of the term :—Held, that the term vested in the husband absolutely under the first limitation. *Bartlett* v. *Green*, 13 Sim. 218 ; 12 L. J., Ch. 148 ; 6 Jur. 1099.

☞ *See also* ESTATE, and SHELLEY'S CASE, RULE IN.

14. VESTED, CONTINGENT, AND FUTURE INTERESTS. *See* that article.

15. CHARGES.

Estate Settled subject to Term for Annuities.]—Estates being settled subject to a term for twenty-one years, and certain annuities being payable thereout, the party entitled to the possession, subject to the term, on the estates being cleared of all charges, except the annuities, would be entitled to the beneficial enjoyment during the residue of the term, keeping down the annuities ; and the term would be available for the annuitants to enforce payment. *Ferrand* v. *Wilson*, 4 Hare, 368 ; 15 L. J., Ch. 41 ; 9 Jur. 860.

Charge — Settlor's Representative eventually entitled to Charge.]—A., being entitled in fee to real estates, subject to a trust to raise 6,000*l.* for B., and in the event of her death without children, for A., on his marriage, conveyed the estate to the trustees of his marriage settlement, subject to the trusts to raise the 6,000*l.* on the trusts (in the will creating it) mentioned, and died, living B. On B.'s death without children, A.'s representative filed a bill to establish the charge. The court held that the charge was subsisting, and directed the principal, interest, and costs to be raised by a sale or mortgage of the real estate. *Johnson* v. *Webster*, 2 Sm. & G. 136 ; 23 L. J., Ch. 480 ; 18 Jur. 619. *And see* 4 De G. M. & G. 474 ; 24 L. J., Ch. 300 ; 1 Jur. (N.S.) 145 ; 3 Eq. R. 99 ; 3 W. R. 84.

Covenant by Settlor to Assign Benefit of Mortgages Paid off.]—T., the owner in fee of the equity of redemption of lands which were subject to a mortgage of 4,000*l.*, of which 2,000*l.* had been paid off partly by T. and partly by other persons, but which was kept alive for the benefit of the parties paying off the same ; and T. having become possessed of the benefit of the whole of such 2,000*l.* which had been paid off by articles for a settlement executed previously to marriage, covenanted to settle the land, and also to assign the benefit of the charge of 2,000*l.* then paid off, and all sums of money which he should at any time thereafter be entitled to receive, whether principal or interest, from any person or persons whomsoever as mortgagee or mortgagees by purchase or assignment from the then mortgagee of all of the lands in question to trustees upon certain trusts. T., having paid off the remaining 2,000*l.* and the mortgage debt, and securities having been assigned to a trustee for him, afterwards became insolvent :—Held, that as between the assignees in the insolvency and the trustees of the settlement, the latter were entitled to the benefit of the 2,000*l.* thus paid off. *Cochrane* v. *St. Clair*, 1 Jur. (N.S.) 302.

Settlement subject to Scheduled Debts—Charge to Pay Debts raised by Mortgage—Priority of Mortgagee.]—A father, upon the marriage of his son, executed a settlement, in 1821, conveying a freehold and a chattel real (which latter was recited to be subject to a mortgage) to trustees, to hold, subject to the charges and incumbrances affecting the same, and specified in the schedule annexed to the settlement, for a term of 500 years ; and, subject to that term, and the aforesaid charges and incumbrances, upon certain other trusts. One of the trusts of the term of 500 years was to raise a sum of 7,000*l.*, after the death of the father, for the sole use of him and his personal representatives, and to be disposed of as he should direct. There followed, however, a proviso, that the 7,000*l.* should, in the first instance, be subject to the payment of all his debts then affecting the premises, and to his covenants therein contained for payment (inter alia) of the incumbrances affecting the premises, it being the true intent of the settlement, that the residue of 7,000*l.* left after those payments should be disposable by the father. The father also covenanted that the premises were free from incumbrances, other than such charges and incumbrances as, at the time of, or immediately before, the execution of the settlement, affected the premises and were a lien thereon, and specified in the schedule. Both judgment and simple contract debts were specified in the schedule. In 1825 the mortgagee of the chattel real having advanced a further sum to the father and son, part of which was applied in payment of three of the judgment debts specified in the schedule, the father and son remortgaged the chattel real, and mortgaged the freehold to him for the aggregate debt ; and for better securing the same, the father, reciting his power under the settlement, directed that the trustees of the 500 years' term should, after his decease, raise 7,000*l.* and apply it in payment of whatever might then remain due on foot of the aggregate mortgage debt. The judgments paid off were also assigned as a collateral security to the mortgagee. In a foreclosure suit by the mortgagee :—Held, that so much only of the advance by him in 1825 as was applied in payment of the three judgment debts ranked equally in point of priority with the other judgment and simple contract debts specified in the schedule ; and, accordingly, that all the judgment and simple contract debts specified in the schedule were well charged by the settlement upon the term of 500 years and the 7,000*l.* to be levied thereout ; and that the remaining portion of the advance made in 1825 ranked subsequently to all those judgment and simple contract debts :—Held, also, that the mortgage of 1825 did not operate as a revocation of the settlement, in respect of the debts specified in the schedule. *Greene* v. *Stoney*, 13 Ir. Eq. R. 301.

Settlement—Charge—Fine and Resettlement—Second Charge—First Charge not Barred.]—By a marriage settlement in 1779, lands were conveyed to the use of the husband (the settlor) for life ; the remainder to the wife for life ; remainder to the children as they or the survivor should appoint ; and in default of appointment, to the heirs of the body of the wife by the husband ; and in default of such issue the lands to stand charged with a sum of 2,000*l.* to the wife's father, his heirs and assigns. In 1798 the husband and wife, by a deed reciting the first deed that

there was no issue of the marriage, and that they intended to bar all the estates and provisions in the former settlement, and to settle the lands to new uses thereby declared, covenanted to levy a fine for that purpose, to enure to such uses as they should appoint; and in default of such appointment, to the use of the husband for life; remainder to trustees for a term of years, remainder to the wife for life, and after the decease of both, to the use of the heirs and assigns of the husband; and as to the term, upon trust to raise 2,000*l.*, and pay the same to the wife, or as she should appoint, and in case of her death without appointment, to her next of kin. The fine did not bar the first charge. On a bill by the representative of the wife's father, who was also one of the next of kin of the wife (after the death of the husband and wife without issue or appointment), to procure both sums of 2,000*l.* to be raised out of the settled lands:—Held, that notwithstanding the recital in the deed of 1798, of the intentions of the parties, the first charge of 2,000*l.* should be extinguished, and although such charge still remained, yet the trusts of the term for raising the second charge of 2,000*l.* were not therefore inoperative, but the same must still be carried into execution; and that both sums of 2,000*l.* must therefore be raised. *Farr* v. *Sheriffe*, 4 Hare, 512; 15 L. J., Ch. 89; 10 Jur. 630.

—— **Revocation and Devise subject to same Charge.**]—A., seised of remainder in fee, expectant on estate tail in N., limited same to himself for life, remainder to trustees for ninety-nine years, in trust (amongst other things) to raise and pay such sums of money, and to such persons as A. should by deed or will appoint; and he reserved to himself general power of revocation of all uses thereby limited. A. afterwards by deed appointed that when said estate tail should be spent, and term came into possession, trustees should raise 2,000*l.* for W.; and covenanted that if estate tail should be spent in his own lifetime, then he would pay 2,000*l.* unto W.; but if not till after his death, and he should revoke said term of ninety-nine years, then that his heirs, executors, &c., should, within a year after estate tail should be spent, pay 2,000*l.* to W., with proviso that if N. should suffer recovery of premises, and bar remainder in fee, 2,000*l.* should not be payable. A. afterwards, by will, revoked all uses of first settlement, "to all intents and purposes whatsoever, as if same had never been limited"; and thereby devised all said premises, "subject nevertheless to payment of said sum of 2,000*l.* to W.," in manner therein mentioned. A. died, and afterwards N. died; 2,000*l.* remained in charge on devised premises after death of N., notwithstanding revocation of term; and personal estate of A. was not applicable to it. *Wilson* v. *Darlington* (*Earl*), 1 Cox, 172; 2 P. Wms. 664, n.

Term to raise Sums for Father, Eldest Son, and Younger Children — Extinguishment of Charges.]—Where by the settlement the wife's fortune was settled in trustees, subject to a life interest in the husband and wife, as to one moiety to the eldest son, and the other amongst the younger children: and a plantation estate of the husband was conveyed to trustees for a term of 500 years, to raise a sum for the husband, if he should so appoint, and subject thereto, for a term of 1,000 years, to raise a sum for the eldest son, then a sum for younger children, and again a sum for the eldest, with proviso for raising their portions according to priority, as stated in the settlement; the husband exercising his right, the trustees borrowed the amount of the trustees of the wife's fortune, executing a mortgage of the husband's estate in the first term: on the death of the husband and wife, leaving five children, the husband, after devising other property, and directing payment of debts, appointed his eldest son his executor and residuary legatee, who entered into possession of the father's settled estate, paid the interest of the younger children's fortunes until he became lunatic, and shortly after died intestate and unmarried; no settlement was ever entered into, nor any other evidence of his intention to extinguish the charges to which he was under the settlement entitled:—Held, that, as being most for his benefit, the charges were to be deemed not extinguished, and that he was not bound to apply the rents and profits in reduction thereof, but that a sum received as compensation for slaves, as between the several charges, ought to be so applied, and that his personal representative was bound to account for interest on that sum during the life of the intestate. *Clarendon* (*Earl*) v. *Barham*, 1 Y. & C. C. C. 688; 12 L. J., Ch. 215; 6 Jur. 963.

Bill by Owner of Estate against Chargees.]—Bill by an owner of an estate, subject to a charge, against the persons claiming to be interested in the charge, supported. *Vyvyan* v. *Vyvyan*, 4 De G. F. & J. 183; 31 L. J., Ch. 158; 8 Jur. (N.S.) 3; 10 W. R. 179.

Estate Charged with Jointure — Settlement of Surplus Value.]—Part of certain estates was limited for a term of one hundred and fifty years, to secure a jointure of 400*l.* to S. E. By a deed of the same date, H. E. and G. E., in pursuance of a power in the settlement, after reciting that charge, demised the same part to P. for ninety-nine years from the death of the survivor, "in trust that the said S. E. and her assigns should, during her life, have, divide, and take the yearly surplus value and produce of the premises so charged, and the surplus issues and profits thereof over and beside the said annuity":—Held, that S. E. was entitled to the whole estate so demised, free from contribution even to charges upon the settled lands prior to the settlement. *Evans* v. *Evans*, 1 W. R. 215—L.JJ.

Bond Payable on Marriage—Settled Portion not Subject.]—A. lent B. and C. 200*l.* and took their bond for 800*l.*, payable on the marriage of either, or on the death of either's father. B.'s father died, and C. married, but his portion was vested in trustees; equity would not subject this portion to the payment of C.'s bond. *Rich* v. *Sydenham*, 3 Ch. Rep. 75.

Real or Personal Estate Liable—Term—Annuities—Trust for Settlor until Default in Payment.]—By a marriage settlement, reciting that the intended husband had agreed to secure to his intended wife, in the manner thereinafter mentioned, an annuity, by way of pin-money, during his life, and another annuity, by way of jointure, if

she should survive him, certain real estates were demised to trustees for a term upon trusts thereinafter mentioned. The settlor then covenanted to pay the annuities; and the indenture then declared the trusts of the term to be for the settlor, until default should be made in payment of the annuities; and then upon trust to secure the same:—Held, that, as between the real and personal representatives of the settlor, if there was no debt due at the time of the execution of the settlement, and no augmentation of the personal estate of the settlor, the real estate of the settlor was primarily liable for the payment of the annuities, unless some intention to the contrary appeared upon the face of the deed; and that the form of the deed in this case did not show any such intention. *Loosemore* v. *Knapman*, 2 Eq. R. 710; Kay, 123; 23 L. J., Ch. 174; 2 W. R. 664.

——**Covenant to Exonerate from Prior Charges.**]—Covenant in a marriage settlement to exonerate the estate from certain charges not created by the settlor:—Held, to entitle the settlor's heir, on whom the reversion in fee descended, to have the estate exonerated out of the settlor's personal estate. *Barham* v. *Clarendon* (*Earl*), 10 Hare, 126; 17 Jur. 336; 1 W. R. 96.

—— **Principle of Apportionment.**]—On the apportionment of charges between real and personal estate, the respective values of such real and personal estate are to be taken as they are when the apportionment is made, and not on such values at any anterior time. *Robinson* v. *London Hospital* (*Governors*), 10 Hare, 29; 22 L. J., Ch. 754.

As between several Estates—Condition not Apportionable.]—A testator directed that a specific sum of 10,000*l.*, to which he was entitled, should be applied in paying off a charge on his B. estate, if established; and that in case it should be so applied, then a charge of 13,000*l.*, to which his D. estate was liable, should not be raised thereout, but out of his B. estate. After his death, the charge on the B. estate having been established, the sum of 10,000*l.* was applied in paying it off. Subsequently, his other personal estate having proved insufficient for payment of his debts, a decree was made for refunding the 10,000*l.* out of the B. estate; but it was disputed whether the whole of it was wanted for payment of debts:—Held, that the disposition in favour of the D. estate was upon a condition which was not apportionable; and that, unless the B. estate got the full benefit of the 10,000*l.*, the owners of the D. estate had no title to throw any part of the 13,000*l.* on the B. estate. *Caldwell* v. *Cresswell*, L. R. 6 Ch. 278; 24 L. T. 564.

Sale to Pay off Mortgage.]—A testator devised his estate upon trust during lives out of the rents to pay his debts, to keep up the mansion-house, to pay an annuity to his daughters, and subject thereto to pay the rents to his wife and daughters. There were mortgages which exhausted the rents:—Held, that one of the daughters and wife might have part of the estates sold to pay off the mortgage. *Cooke* v. *Cholmondeley*, 4 Drew. 244.

By a marriage settlement leaseholds were settled by the intended wife to such uses as she should, notwithstanding coverture, appoint. She appointed them to herself and her husband; they were then sold, and the proceeds invested in consols in the name of the husband. The fund was afterwards applied with other money arising from the wife's separate estate in paying off a charge of 5,000*l.* on freehold estates also comprised in the settlement. Nothing was said or done at the time of payment off as to keeping alive the charge. Fifteen years afterwards, at his wife's death, the husband set up a claim against the estates for the 5,000*l.*:—Held, that the husband was a trustee for the wife as to the fund out of which the 5,000*l.* was paid off, and that the payment off was in exoneration of the settled estates. *Smith* v. *Harding*, 6 N. R. 333.

Mortgage to Pay Debts and Buy Interest of Tenant for Life.]—The debts of A. were charged on his real estates, which were limited to his widow for life, remainder to B. for life, remainder to his first and other sons in tail male, remainder to C. for life, remainder to his first and other sons in tail male, remainder to the right heirs of A., whose heir B. was. A bill was filed by the creditors of A. against his widow, and against B. and C., they having neither of them issue at that time, praying to have their debts raised by sale or mortgage; and by a decree a sufficient sum was directed to be raised by mortgage to pay the debts, and to pay 1,500*l.* to the widow, which she had agreed to take in lieu of her life estate. After the deaths of the widow of B. without issue, and of C.:—Held, that the eldest son of C. was not bound by the decree, but was let in to redeem on payment only of what was raised to pay the debts without paying the sum raised for the widow. *Blount* v. *Winterton* (*Earl*), Romilly's Notes of Cases, 169.

16. Other Limitations and Interests.

Limitation to Settlor for Life determinable on Alienation—Validity.]—A marriage settlement of the settlor's own property was made on trust to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons"; and, from and after the determination of the trust in favour of the settlor, upon trust to pay the income to his wife during her life:—Held, that the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband. *Detmold, In re, Detmold* v. *Detmold*, 58 L. J., Ch. 495; 40 Ch. D. 585; 61 L. T. 21; 37 W. R. 442.

Interest Defeasible on Death without leaving any Child Living.]—Leaseholds were, by deed, conveyed to trustees, in trust for the settlor for life, and after her decease in trust to assign them to Thomas, his executors, administrators, and assigns absolutely. But if Thomas should die without leaving any child living at the time of his decease, then in trust to assign to Philip:—Held, that the death referred to was not confined to a death in the life of the tenant for life, and that Thomas did not, upon the death of the settlor, become absolutely entitled to the leaseholds. *Milner* v. *Milner*, 34 Beav. 276.

Gift over on Death of Issue—Effective where no Issue.]—By a marriage settlement, property

belonging to the intended wife was conveyed to trustees, upon trust (after the death of the husband and wife) for the children of the marriage, in the usual way. It was then declared that if all the children should die, the trustees should convey the property to A., B., and C. There never was any issue of the marriage:—Held, that although the language of the deed only provided for death of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593; 6 Jur. (N.S.) 1325; 3 L. T. 263; 9 W. R. 11.

—— **After absolute Gift.**]—A settlor settled 1,000*l.* upon trust for his illegitimate daughter. The settlement contained a proviso that if at her death the daughter should not be under coverture (which event happened), the money should be held in trust for her, her executors, administrators, and assigns. Then followed a clause, that if any interest in the fund would, but for that proviso, be held in trust for the crown, or belong to the trustees of the settlement, then this money was to be held upon trusts in favour of the settlor and his widow:—Held, that the gift over after the absolute gift was void for repugnancy, and that the crown took. *Wilcocks, In re*, 45 L. J., Ch. 163; 33 L. T. 719; 24 W. R. 290.

—— **On Death of Persons Dead before Date of Settlement.**]—By a voluntary deed a settlor gave property to A., B., C., and D. in equal shares. He provided that if any of the four should die in his lifetime leaving specified issue, the share of him or her so dying should be in trust for the children of him and her so dying; and that if any of the four should die in his lifetime, without leaving such issue, the share of him or her so dying should go over and accrue and be added to the other shares. A. and B. were dead at the date of the settlement, the former leaving issue, the latter without issue:—Held, that the gifts over of the shares of A. and B. did not fail by reason of their being dead at the date of the settlement. *Barnes* v. *Jennings*, 35 L. J., Ch. 675; L. R. 2 Eq. 448; 14 W. R. 831.

Money Payable to Wife under Post-nuptial Contract.]—A husband, by post-nuptial contract, after granting an annuity to his wife, bound himself, his heir, and executors, to pay her, or any person appointed by her, in writing, during her life, with or without the husband's consent, or whether she should survive or predecease him, and have issue or not, the sum of 3,000*l.*, or other lesser sum, as she should direct, at the first term of Whitsunday or Martinmas next after the husband's death, in case he should survive or predecease her without leaving issue of the marriage, or at the first of those terms after failure of the issue, in case she should survive leaving issue of the marriage, or at any of the said terms after any of these events; so that no part of the said sum should be raised during the life of the husband, or the joint existence of the wife and the issue of the marriage: with proviso, that in case the wife should survive the husband and the issue of the marriage, and recover payment of the said sum or any part of it, her annuity should suffer restriction equal to the interest of the sum recovered. The wife survived the husband, and died without having had issue, and without recovering or disposing of any part of the 3,000*l.*:—Held, that, in the event which happened, the 3,000*l.* belonged to the wife's estate, and her personal representative was entitled to it against the husband's estate. *Dill* v. *Haddington*, 8 Cl. & F. 168.

Wife's right of Disposition under Covenant—After-acquired Property.]—Covenant, that wife shall be at liberty to dispose of her personal estate, does not extend to property acquired after marriage. *Pilkington* v. *Cuthbertson*, 2 Bro. P. C. 7.

Husband's Life Interest in Wife's Property—Wife's Proof in Bankruptcy.]—By the terms of the bankrupt's marriage settlement, the wife's property was settled upon her in case of the bankrupt's death, or the parties being divorced, but the bankrupt was entitled to the interest for his life, and in case he survived his wife he was to have a certain share of this property:—Held, that the wife might, in the name of her trustee, make such proof as the commissioners might think she was entitled to. *Saunders, Ex parte*, 3 Deac. & C. 568.

—— **Becoming absolute on Death of only Son.**]—Settlement after marriage of stock, which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife; in default of heir male, to the heirs female, &c., with a clause that if the husband should settle lands of equal value to the like uses, the stock should be reassigned to him; a son being afterwards born, who died in the lifetime of the father, without issue and under age:—Held, that the property vested in the father, and passed by his will. *Le Rousseau* v. *Rede*, 2 Eden, 1.

Hotchpot—Money only—Interests in Possession and Reversion.]—By the testator's first marriage settlement a sum of 14,000*l.* was settled upon the testator for life, remainder to the first wife for life, remainder to the children of that marriage who should attain twenty-one. There were four children who lived to attain twenty-one. The first wife died, and the testator made his will, giving all his property to his children equally. The testator then married again, on which occasion 5,000*l.* was settled, after his decease, to the second wife for her life, remainder to the children of that marriage. There was but one child. After the birth of that child the testator executed a codicil giving certain annuities to his second wife, and in other respects confirming his will, except that he directed that previous to the equal division among his children the trustees were to take into consideration what each class of children would be entitled to under the marriage settlements of their respective mothers; and whichever family should be individually least provided for, they should, in the first place, be severally entitled to receive out of the general estate so much as would make his or her share equal in amount to what each child of the other family would be entitled to under his or her mother's marriage settlement. The testator died leaving his second wife surviving, and one child of the second marriage:—Held, that the subject of the settlement being nothing but money, the reversionary nature of the provision for the child of the second marriage was not to be regarded, although the provision for the children of the first marriage took effect in possession immediately on the testator's decease. But, semble,

that this might be otherwise in case the subject matter had been anything else than money. *Williamson* v. *Jeffreys*, 18 Jur. 1071.

Limitation to Issue subject to Annuities and Jointure.]—Limitation in an article on marriage to A. for life, subject to annuities for the lives of B. and C. and a charge for a jointure for D., if she should survive A., and after the death of said B. and C., A. and D., then to the use of the issue, &c. The limitation to the issue is not to await the deaths of A., B., C., and D., but they are to take upon the death of A., subject to the charges for B., C., and D. *Bushell* v. *Bushell*, 1 Sch. & Lef. 95; 9 R. R. 21.

Trust for Accumulation—Trust for Benefit of Mortgagees.] — By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should, during the period of twenty-one years from the death of the settlor, receive out of the rents of the estate the annual sum of 1,000*l.* and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period, as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund, and the whole future rents of the estate:—Held, that the mortgagees were cestuis que trust under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent. The doctrine of *Garrard* v. *Lauderdale* (2 Russ. & My. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Fitzgerald's Settled Estates, In re*, 57 L. J., Ch. 594; 37 Ch. D. 18; 57 L. T. 706; 36 W. R. 385—C. A.

Protector of Settlement—Who is.]—The person who, under the Fines and Recoveries Act, s. 22, is the protector of the settlement, as being the "owner of the prior estate" to the estate tail, is the person who is beneficially entitled to the rents and profits. A freehold estate was devised to trustees for a term of ninety-nine years, if the testator's son M. should so long live, upon trust to manage the estate and to pay thereout a yearly sum of 250*l.* to M. for life; and, subject thereto, to pay the surplus of the rents and profits to the person for the time being entitled in reversion immediately expectant upon the term to the rents and profits. Upon the expiration or sooner determination of the term, the estate was devised to the use of the testator's son H. for life, with remainder to H.'s sons in tail male:—Held, that H. was the protector of the settlement. *Ainslie, In re, Ainslie* v. *Ainslie*, 54 L. J., Ch. 8; 51 L. T. 780; 33 W. R. 148.

Husband and Wife—Interest by Entireties.]—By marriage settlement, made in 1868, mortgages were assigned to trustees, upon trust to pay, during the joint lives of the husband and wife, the interest, dividends and annual produce of the trust funds, upon the joint order or receipt of husband and wife, and after the death of either to pay the same to the survivor for life. The settlement contained a covenant by the husband that the money due on the mortgages was well secured, and that he would make good any deficiency:—Held, that as between husband and wife this trust created an interest by entireties, and that they were entitled to an interest per tout only; and that arrears of interest accrued in the life of the husband belonged to his estate, and could not be considered as choses in action of the wife not reduced into possession by the husband. *Chamier* v. *Tyrell*, [1894] 1 Ir. R. 267.

—— **Chattel Real — Joint Tenancy — Severance.**]—By a paper writing, not under seal, executed on the marriage of A. with B. in 1855, reciting an agreement by A.'s father, C., to make over to A., C.'s right, title, and interest in a certain farm, held for a chattel term, in consideration of B.'s fortune, it was witnessed that C., who was an executing party to the document, "covenanted and agreed with A. that he (C.) did thereby grant and assign to A. and B." the said farm, to hold the same to the said "A. and B., their heirs, executors, administrators, and assigns" for the residue of the term:—Held (1) that the instrument passed an immediate interest in the farm to A. and B. as joint tenants; and (2) that A., the husband, not having disposed of the farm during the coverture, the joint tenancy was not severed, and that, at the death of A., B., who survived him, became solely entitled to the farm. *Lonergan* v. *Hoban*, [1896] 1 Ir. R. 401.

Personalty—Limitation to Use of Husband and Intended Wife, and Husband's Children by former Marriage and Children of Intended Marriage—Joint Tenancy—Springing Use.]—A settlor assigned certain tenancies from year to year and personal chattels to trustees to hold upon trust for the settlor until his then intended marriage, and after the marriage to the use of the settlor, his intended wife, the settlor's children by a previous marriage, and any issue to be born of the intended marriage:—Held, that the husband and wife, with the children of the first and second marriages, took as joint tenants, the class of unborn children to be opened when and as necessary, so as to include new members. *O'Hea* v. *Slattery*, [1895] 1 Ir. R. 7—C. A.

Jointure in Lieu of Dower and Thirds at Common Law or otherwise—Statute of Distributions—Widow's Share under, whether Barred.]—By marriage settlement, lands of the husband held for lease for lives renewable for ever, and lands of the wife held for a term of years, were settled upon trust, after the death of the husband, that the wife, in case she should survive him, should receive for jointure, in lieu bar and satisfaction of all dower and thirds, to which she might at common law or otherwise be entitled, the annual sum of 50*l.* charged upon all the said lands. The settlor died intestate as to portion of his personal estate leaving his widow and two children surviving:—Held, that the widow was barred from any share of the undisposed of personalty. *Coyne* v. *Duigan*, [1894] 1 Ir. R. 138.

17. Failure of Limitations, Resulting Trust.

Husband's Leaseholds—Failure of Wife's Life Interest—Resulting Trust for Settlor.]—Property agreed to be settled consisted of leaseholds in possession and of money to be received on the husband's death, which was to be invested in the usual securities, and the trustees were to stand possessed of the leaseholds in trust for the husband for life, and after his death of one moiety of the leaseholds, stocks, funds, and securities, for the wife for life in case she survived her husband, and of the other moiety of the leaseholds, stocks, funds, and securities after the husband's death, and of the whole of the stocks, funds, and securities after the wife's death, in trust for the children. The wife died in the husband's lifetime:—Held, that there was a resulting trust as to the leaseholds for the husband, the settlor. *Wilson* v. *Paul*, 7 Sim. 620.

Wife's Portion—Remainders Void for Remoteness—Resulting Trust for Wife's Father as Settlor.]—By the marriage settlement of A. and the daughter of B., to which B. was a party, after reciting that B. had agreed to "give" 3,000*l.* "as a marriage portion or fortune with his daughter," and that it had been agreed that 500*l.* should be paid to the husband for his own use and the residue invested, it was declared that the 2,500*l.* should be held in trust for the husband for life, remainder to the wife for life, remainder to children of the marriage according to appointment, and in default of children attaining twenty-five or marrying, to the representatives of the wife as therein mentioned. The father died. The husband survived the wife and died. No appointment was made, and the remainders in default being void for remoteness, the husband's executors claimed the 2,500*l.* on the ground that the settlement showed an absolute gift to the wife:—Held, that there was a gift by the father for the purposes of the settlement only, and that the trusts having failed, his representatives were entitled. *Nash's Settlement, In re*, 51 L. J., Ch. 511; 46 L. T. 97; 30 W. R. 406.

Resulting Trust for Wife.]—A father, on the marriage of his daughter M., covenanted with the intended husband to pay a sum of 500*l.*, "the marriage portion of his daughter," to be vested in trustees upon trust to pay the said M. 30*l.* a year (the interest thereof) during her life, and, after her death and that of her husband, to hold the same to the use of the issue of the marriage. The husband died in the lifetime of his wife, and there was no issue of the marriage:—Held, that as to so much of the 500*l.* as was not exhausted by the uses of the settlement, there was a resulting trust for M. *Ward* v. *Dyas*, Ll. & G. t. Sugd. 177.

Settlement upon marriage, of wife's property, only upon certain trusts for husband, wife, and children, in one event for husband absolutely; but making no provision for the event that happened, a resulting trust for the wife. *Langham* v. *Nenny*, 3 Ves. 467.

Estate of Wife included by Mistake—Resulting trust for Wife in Fee.]—In 1773 A. married B., who was seised in fee of estates in Denbighshire. By their marriage-articles they covenanted that M. and N. should stand seised of B.'s estates (which were mentioned by their names), to the use of A. and B. for their lives, and the life of the longer liver of them, remainder to the use of their first and other sons in tail. B. had an estate in Denbighshire called Plas Madoc, which was not mentioned in the articles. A. and B. had two sons. In 1802 they and their eldest son conveyed all their estates, including Plas Madoc, to a tenant to the præcipe, and afterwards suffered recoveries of them for the purpose of barring all estates tail, reversions, and remainders in the estates, and resettling them to such uses as A. and B. and their elder son should appoint, and in default to A. B. for their lives, and the life of the longer liver of them, remainder to such uses as the elder son should appoint, and in default to such uses as the said estates were and stood limited to by the articles:—Held, that the ultimate limitation was wholly inoperative at law, and that it had no effect in equity upon Plas Madoc, and that, subject to the powers and life estates, there was a resulting use as to it for B. in fee. *Youde* v. *Jones*, 14 Sim. 131. *S. C.*, 8 Jur. 547. And see *S. C.* at law, 13 M. & W. 534; 14 L. J., Ex. 70.

—— **Disentailed and Sold—Resettlement of Purchase Money not Executed—Resulting Trust for Wife.**]—A. is entitled in remainder, under the marriage settlement of her father and mother in 1767, to a share of certain real estates as tenant in common in tail. A settlement is executed upon her first marriage in 1790, she being then an infant. A second marriage is contracted by her while still an infant. A fined is levied in 1808, and the settled property conveyed to a purchaser. A deed is executed declaring the trusts of the purchase-money, which as to A.'s share is to be held upon the trusts of the settlement in 1790. A. and her husband, though named as parties, do not execute this deed, nor is there any evidence of their assent to it:—Held, that A.'s interest was unaffected by this deed of 1808, and remained upon the trusts of the original settlement of 1767, so that she was entitled absolutely to her share of the purchase-money. *Fozard's Trusts, In re*, 1 K. & J. 233; 3 W. R. 219. And see *S. C.* on appeal, 24 L. J., Ch. 441; 3 W. R. 341.

Joint Fund of Husband and Wife—Resulting Trust for Husband's Heir.]—Money, part of which is the husband's, and other part the wife's, is on marriage to be laid out in land, and settled to the husband for life; remainder for the wife for life; remainder to the heirs of their two bodies, and the uses go no further. The heir of the husband shall have the whole. *Lechmere* v. *Carlisle*, 3 P. Wms. 217.

Advanced Rents—Resulting Trust for Husband's Heir.]—Lands were settled at marriage on trustees, that if wife survived she should receive the then profits. Husband made leases and advanced the rent:—Held, heir entitled to advanced rent. *Lawley* v. *Lawley*, 9 Mod. 32.

Wife's Portion to be Invested in Land—Not so Invested—Claim by Husband's Executor.]—By marriage articles agreed that 500*l.*, the wife's portion, should be invested in a purchase of lands to be settled on husband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to the plaintiff, the wife's brother, in fee. The wife dies without issue and then the husband dies; the 500*l.* not to be laid out. Whether this money is to be taken as land and

go to the plaintiff, to whom the fee is limited, or as money, and go to the executor of the husband. *Symons* v. *Rutter*, 2 Vern. 227 ; Pre. Ch. 23.

Appointment by Infant—Appointor Illegitimate—Death under Age—Failure of Ultimate Limitation to Next of Kin—Resulting Trust for Administrator.]—An infant had a life interest and a general power of appointment under her mother's will. She made a settlement in exercise of the power, with the sanction of the court, under the Infants Settlement Act, 1855. She died while still an infant, and the ultimate limitation in the settlement, which was in favour of the infant's next of kin according to the statutes of distribution, failed by reason of the infant's illegitimacy :—Held, that there was a resulting trust in favour of the infant herself, and that the property appointed passed to her surviving husband, who was her administrator, and not to the persons entitled under the mother's will in default of exercise of the power of appointment. *Scott, In re, Scott* v. *Hanbury*, 60 L. J., Ch. 461 ; [1891] 1 Ch. 298 ; 63 L. T. 800 ; 39 W. R. 264.

Husband's Life Interest Determined by Second Marriage—Resulting Trust of Income for Wife's Administrator.] — By a marriage settlement, dated in 1875, personal property of the wife was settled upon trust for the wife for life, and after her death upon trust to pay the income to the husband "so long as he shall remain unmarried, and from and after the death of the survivor" to hold the capital in trust for the children of the marriage as the husband and wife or the survivor should appoint, and in default for sons at twenty-one and daughters at that age or marriage. There was a power of advancement exercisable with the consent of the husband and wife or the survivor during their lives. The ultimate trust in default of issue was for the wife if she survived, and if the husband survived for the appointee of the wife by will, and, in default, for her next of kin as if she had died without having been married. The settlement also comprised a policy on the life of the husband which was settled upon like trusts, except that if the wife survived and married again the policy moneys were to be held upon the same trusts as if she were then dead. Then there was a covenant in the common form for the settlement of other and after-acquired property of the wife. There were six children of the marriage. The wife died in 1886, and the husband took out administration to her estate. In January, 1889, he married again. The question was, who, since the husband's second marriage, was entitled to the income of the property of the wife which was included in the settlement :—Held, that, upon the marriage again of the surviving husband, there was a resulting trust of the income during the rest of his life to the legal personal representative of the wife ; and that the husband, as administrator of his wife, was entitled to the undisposed of income. *Wyatt, In re, Gowan* v. *Wyatt*, 60 L. T. 920.

Daughter's Portion Charged on Realty — Resulting Trust for Legatee of Settlor's Personalty.]—A., by a settlement, covenanted with the trustees that, in the event of his dying in the lifetime of his daughter, C., before she should have attained twenty-one or married, his heirs, executors, or administrators should, within six months after his death, pay to the trustees 10,000*l*., with interest thereon, from the day of his death ; and it was declared that, in the event of C. having no child who should attain twenty-one or marry, then the fund, after her death, should form part of A.'s personal estate. By the same deed, A. charged all his real estate with this sum. A. afterwards, in consequence of a requisition made by persons who were advancing him money on mortgage, paid the 10,000*l*. to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to A. himself, on mortgage of part of the estates originally subject to the charge, and the rest of it to other persons. A. died, leaving a will, by which he bequeathed his personal estate to B., and his real estate to D. C. died an infant, and unmarried, within five months after his death :—Held, that no part of the 10,000*l*. belonged to the devisees of the real estate, but that the whole belonged to the legatee of the personalty. *Tucker* v. *Loveridge*, 2 De G. & J. 650 ; 27 L. J., Ch. 731 ; 4 Jur. (N.S.) 939 ; 6 W. R. 786. Affirming 1 Giff. 377.

Rule of Construction—Shares not Vested—Resulting Trust under Settlement for Settlor—Under Will for Residuary Legatee.]—Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains. Shares under a settlement being held not to be vested, might create a resulting trust for the settlor ; whilst in a will the residuary legatee might take. *Farrer* v. *Barker*, 9 Hare, 744. See also *Rochford* v. *Hackman*, 9 Hare, 475 ; 21 L. J., Ch. 511 ; 16 Jur. 212.

—— **In Voluntary Settlements and Wills.**]—If in voluntary deeds and wills there is no declaration of trusts of term, it results to donor ; but, secus, if for valid consideration, and in nature of contract for benefit of wife and issue. *Brown* v. *Jones*, 1 Atk. 190.

Voluntary Settlement—Limitations not Exhaustive—Resulting Trust for Settlor.]—A., by a voluntary settlement, in 1838, conveyed freeholds to trustees upon trust (together with a sum of stock already transferred) for himself for life, and after his death in trust for his reputed son, W., when and in case he attained twenty-one, with a trust for maintenance if he should be under twenty-one at the settlor's death. And in case W. should die under twenty-one, or die in the settlor's lifetime, without leaving issue living at his decease, then over. There were no words of limitation in the trust for W. There was a power of sale in the settlement, but no trust to invest the proceeds in land. A. died in 1849, having made his will in 1843, which recited the settlement and confirmed it, except as to the stock which had been sold. W. attained twenty-one, and died in 1872 :—Held, that W. took a life estate only in the freeholds under the settlement, and that there was a resulting trust for the settlor. *Middleton* v. *Barker*, 29 L. T. 643.

—— **Ultimate Trust by Reference to "Indenture of even Date, and made between the same Parties"—No such Indenture—Resulting Trust for Settlor.**]—By a voluntary settlement executed on the 2nd December, 1873, certain property was settled upon trust for W. during his

life, with remainder to his children. And it was declared that, if there should be no child of the said W. who should take a vested interest in the trust property, the trustees were to stand possessed of the trust property in trust for J. and her child or children, "subject to the like trusts, limitations, provisoes, declarations, and agreements as are expressed and declared of and concerning certain trust property and premises settled, comprised in, and assured by a certain indenture bearing even date with these presents, and made between the said Charles Wilcock and Mary his wife of the one part, and the said Thomas Charles Wilcock of the other part." No such indenture was ever executed. At the time, however, when the settlement was prepared an indenture was prepared and engrossed by which certain property was settled upon trust for J. for life, with remainder to her children. This indenture, however, was never executed, but instead thereof a deed was prepared conveying the property to J. absolutely. This deed was executed on the same day as the settlement, but it was not made between the same parties. W. died without leaving a child: —Held, that no trusts were sufficiently declared either for J. or for J. and her children. Consequently there was a resulting trust for the benefit of the settlor. *Wilcock, In re, Wilcock* v. *Johnson*, 62 L. T. 317.

18. Covenants for Title.

Covenant against Incumbrances — Incumbrance discovered between Execution of Articles and Conveyance.]—In articles, there was to be a covenant in the conveyance that certain lands were free from incumbrances. Lord chancellor said this is not a covenant that the lands are free, and if any incumbrance is discovered between the execution of the articles and sealing the conveyance, whereof the party had no notice, that incumbrance shall be discharged before the sealing of the conveyance, as the concealment of it would be a fraud; though against all incumbrances discovered afterwards there is only the party's own covenant to protect a purchaser. *Vane* v. *Bernard* (*Lord*), Gilb. Eq. R. 6.

—— **Lease by Settlor Ultra Vires — Appointee under Settlement bound.**]—A., seised of an undivided moiety of Whiteacre, conveyed it on his marriage, in 1775, to the use of his first and other sons, reserving to himself a power of leasing for three lives. A. having subsequently purchased the other undivided moiety of Whiteacre, in 1785 leased the entire of Whiteacre to B. for lives renewable for ever. In 1797, on the marriage of G., A.'s eldest son, Whiteacre was conveyed by A. to the use of A. for life, remainder to the use of G. for life, remainder to the use of such of the sons of G. as G. should appoint to; and A. in his covenant against incumbrances excepted leases bonâ fide made by him. G. having appointed Whiteacre to his son, W., died in the lifetime of A., leaving W. his eldest son him surviving. On the death of A., W. filed his bill to set aside the lease of that moiety of Whiteacre comprised within the settlement of 1775, as contrary to A.'s leasing power:—Held, that W., as claiming under the settlement of 1797, was bound by the lease of 1785, and could not set it aside. *Steele* v. *Mitchell*, 2 Dr. & Wal. 568; 3 Ir. Eq. R. 11.

Absolute Covenants restricted by Subsequent Qualified Covenants.]—Where a settlor, in the settlement executed on the marriage of his son, enters into absolute covenants for title with the father of the lady, and lower down in the same deed enters into qualified covenants for title to the same lands with the trustees of the settlement. Semble, that the latter covenants restrain the generality of the former, although entered into with different persons. *Martyn* v. *Macnamara*, 2 Con. & L. 541; 4 Dr. & War. 411.

A father, seised of lands under a lease for three lives, by a deed reciting that he was seised in fee, or of some other sufficient estate of inheritance, conveyed them, upon the marriage of his son, in strict settlement, by words applicable to lands held in fee simple; and the father and son covenanted that the lands should continue, remain, and be for ever thereafter to the uses of the settlement, and that free from all former gifts, grants, titles, and incumbrances made or suffered by the father and son, or either of them:—Held, first, that these two covenants, for quiet enjoyment and freedom from incumbrances, were so connected, grammatically, that the general words of the former were limited and contracted by the restrictive expressions in the latter. *Thompson* v. *Thompson*, Ir. R. 6 Eq. 113. And see *Robinson* v. *Ommanney*, 52 L. J. Ch. 440; 23 Ch. D. 285; 49 L. T. 19; 31 W. R. 525.

Held, secondly, that, in the absence of evidence of fraudulent intention on the part of the settlor, the error in the recital did not amount to such misrepresentation as would entitle the eldest son of the marriage to compensation out of his grandfather's assets. *Ib.*

Covenant in Voluntary Settlement — Subsequent Mortgage by Settlor.]—A voluntary settlement of freeholds contained a covenant for quiet enjoyment. The settlor afterwards included the settled property in a mortgage, together with other property:—Held, that the parties claiming under the settlement were entitled: 1st, to throw the mortgage primarily on the unsettled property; and, 2nd, to prove on the covenant against the settlor's estate. *Hales* v. *Cox*, 32 Beav. 118; 1 N. R. 344; 8 L. T. 134; 11 W. R. 331.

The settlor, previously to a mortgage, had repurchased the share taken by one of the sons under the settlement, and after the mortgage he voluntarily resettled it:—Held, that the parties claiming under the resettlement were entitled to throw the mortgage primarily on the unsettled property, but not to prove under the original covenant. *Ib.*

—— **Prior Judgment subsequently Paid Off.**]—K. being seized in fee of L. and other lands, subject to a judgment not recovered against himself, conveyed away L. by a voluntary deed, in which he covenanted to do any act required for further, better, and more effectually granting and releasing the lands to the grantee and his heirs, and he devised the other estates. The judgment was paid off by a sale of a portion of the devised estates:—Held, that the devisees had no equity for contribution against the owner of L. *Ker* v. *Ker*, Ir. R. 3 Eq. 489.

—— **Assignment of Chattels—Same subsequently Assigned—Covenant for Title—Known Defect.**]—By a deed of gift in 1886 A. assigned

certain chattels to X. absolutely. By a voluntary deed in 1888 A. assigned the same chattels to Y. absolutely, and covenanted with Y. that he had good title to assign the same free from incumbrances, and that he would warrant and defend the same unto Y. against all persons whomsoever. At the date of the execution of the deed of 1888 Y. was aware of the existence of the deed of 1886. On A.'s death X. asserted her title to the chattels, and brought an action against A.'s executors for their recovery, which was compromised on the terms of the executors giving up the chattels to X. To assist the executors in carrying out this compromise Y. surrendered to them the chattels comprised in her deed. In an action to administer the testator's estate Y. claimed compensation for the loss of the chattels so surrendered:—Held, that as the deed of 1888 constituted an assignment of the chattels themselves, and not merely A.'s estate and interest in them, there had been a breach of the covenant and that Y. was entitled to damages in respect of such breach, and that the fact that Y. knew of the defect at the time the deed of 1888 was executed made no difference to her right. *Ford, In re, Gilbert* v. *Gilbert*, 63 L. T. 557.

D. EXECUTED SETTLEMENTS, HOW ENFORCED.

1. In General.

Defaulting Party cannot Enforce.]—No party to a marriage settlement can take anything under its provisions, who is himself a contracting party, and has failed to fulfil his part of the contract. *Houston* v. *Barry*, 5 Ir. Eq. R. 294.

The rule of equity which prevents a party from receiving any interest under a settlement until he has discharged more obligations or covenants, to which he is liable under it, applied to the case of a policy of assurance assigned to the trustees as a security for the payment of the sum which the husband had covenanted that his representative should pay after his death, and against a purchaser of the husband's interest under the settlement from his assignees under a fiat in bankruptcy. *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583. Affirmed 13 L. J., Ch. 173; 9 Jur. 299.

Default of payment of the consideration on one part does not vitiate a marriage contract. But the defaulting party cannot enforce the contract against the party injured by his default. *Compton* v. *Ormsby*, 2 Sch. & Lef. 602.

The assignees of a bankrupt who had covenanted for the payment, after his death, of 4,000*l.* to the trustees of his marriage settlement, were held not entitled to a share in a sum to which his wife was entitled in reversion at her marriage, without performing the covenant, notwithstanding a proviso in the settlement that the heirs, executors, or administrators of the husband should pay all other debts which the husband should owe at his death in preference to the 4,000*l.*, and that they should not be bound to pay it unless his assets should be more than sufficient to pay all his other debts. *Corsbie* v. *Free*, Cr. & Ph. 64; 5 Jur. 790.

Semble, the husband's covenant did not operate as a purchase of the wife's reversionary share under the will, but:—Held, that at all events the husband's assignees were not entitled to receive the share without performing the covenant. *Ib.*

Trustees refusing to maintain Suit—Heir-at-law Plaintiff on Doubtful Title.]—Where the plaintiff in his original bill made out title to an estate, and prayed relief as heir-at-law; but afterwards, and after all the defendants had answered, discovered a marriage settlement, by which the estate stood limited to a trustee for the use of the plaintiff, his brother, and sister, in equal shares; and it being doubtful, upon the construction of the settlement, whether the plaintiff, his brother, and sister, were entitled to vested or merely to contingent interests:—Held, that the estate being limited to the heir of the settlor in case the supposed contingency should never arise, and the trustees having refused to become plaintiffs, the plaintiff might, in the character of heir-at-law, maintain a suit for the purpose of protecting the property. *Reed* v. *Cussen*, Sau. & Sc. 161.

Enforcing Payment of Annuity.]—A., becoming a party to a settlement executed on the marriage of his nephew, granted to the intended wife an annuity, to commence after his death, charged on lands of which he declared himself entitled at law or in equity to an estate in fee-simple. He gave her a power of distraining on these lands for the annuity (subject, however, to any charge on them which he had created or might create for his own wife), and he also created a term of years in the lands, which he assigned to trustees to hold for the purpose of satisfying the annuity by entry and distress, subject as aforesaid. On A.'s death, proceedings were instituted by other parties in chancery, and a decree was pronounced declaring that he was only entitled to a life estate in the lands which he had charged. The annuity fell into arrear:—Held, that the settlement gave the annuitant a right to proceed against the personal estate of the grantor for satisfaction of the annuity. *Monypenny* v. *Monypenny*, 9 H. L. Cas. 114; 31 L. J., Ch. 269.

Decree for Execution of Trusts.]—Trusts of marriage settlement decreed to be carried into execution. *Clarendon (Earl)* v. *De Clifford (Lady)*, 6 Jur. 962.

Wife's Lien upon Estate of Husband and his Father.]—A wife has a lien upon the estate of her husband and his father, where they are parties to the marriage contract, and the wife's fortune is paid to the son; so if the fortune is paid to the father, or to clear incumbrances. *Probert* v. *Morgan*, 1 Atk. 440; Amb. 6; 2 P. Wms. 544.

Part of Estates Recoverable without showing Title to whole.]—Where several estates are settled upon children, the children may recover part of those estates without showing title to the rest of the settled property. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

But when estates and other property forming a mixed fund are settled, subject to a power of appointment, there the court, where the parties entitled to this mixed fund are numerous, will not, as against a purchaser of part of the mixed fund in which purchase one of its objects acquiesced, act as against that purchaser without knowing all the dispositions of that mixed fund. *Ib.*

Settlement on condition not Fulfilled—Subsequent Mortgage by Settlor.]—By a proviso in a marriage settlement, the deed was to be void if the marriage was not had in ten months. The heir cannot set up this settlement to defeat a mortgage made by his father, after his father had sworn that he was not married within the ten months. *Jones* v. *Purefoy*, 1 Vern. 45.

Court will not Interfere to Defeat Intention of Settlement.] — Semble, the court of chancery will not assist persons claiming under parties to a marriage settlement, where the effect of such interference will be to defeat the scope and object of the settlement. *Duberly* v. *Day*, 16 Jur. 581.

Administration of Trusts—Interest—Costs.] —By a marriage settlement certain funds were settled upon trust to invest and pay the annual produce during the joint lives of the husband and wife as therein mentioned, and after the death of one of them to the survivor for life, and after the death of the survivor to distribute among the children of the marriage as the husband and wife should jointly appoint, and in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, and the wife made several successive appointments in favour of certain of her children, and appointed the residue in favour of another child. The wife having died, and an action having been brought for the administration of the trusts of the settlement, and it appearing that the appointees had assigned (in some cases to two or three persons) and incumbered their shares :—Held, first, that interest was payable in respect of the several appointments at the rate of 4*l.* per cent. per annum as from the death of the tenant for life ; secondly, that the costs must be borne rateably by the appointed shares, one set of costs to be allowed to each child in respect of the several appointments to him, the several assignees of such appointments to stand on the same footing, and to divide the costs allowed in respect of such child's share rateably between them. *Hill's Trusts, In re, Hill* v. *Equitable Reversionary Interest Society*, 75 L. T. 477.

2. Voluntary Settlements.

General Rule against Enforcing.]—Specific performance of a voluntary settlement refused. *Brownsmith* v. *Gilborne*, 2 Stra. 738.

Court, in general, will not decree performance of voluntary agreements. *Wycherley* v. *Wycherley*, 2 Eden, 177.

Equity will not carry a voluntary agreement beyond the letter. *Basse* v. *Gray*, 2 Vern. 693.

Relief denied against the breach of a condition in a voluntary settlement. *Longdale* v. *Longdale*, 1 Vern. 456.

Discretionary in a court of equity, whether it will aid voluntary conveyances where there is no remedy at law. *Bold* v. *Corbett*, Pre. Ch. 84.

The validity of a voluntary deed affecting freehold, which the grantor had retained in his possession, was held to be a question of law which the court refused to decide. *Dillon* v. *Coppin*, 4 Myl. & Cr. 647 ; 9 L. J., Ch. 87 ; 4 Jur. 427.

Where deed is not sufficient to pass the estate, but party must come into equity, court never executes a voluntary agreement. *Colman* v. *Sarrell*, 1 Ves. 54 ; 1 R. R. 83.

Where necessary to come to equity to raise an interest by way of trust there must be at least a meritorious consideration. *Id.* 55.

Bill to have a voluntary deed delivered up dismissed ; cross-bill to execute it retained for a year, with liberty to sue upon a covenant in the deed. *Id.* 50 ; 3 Bro. C. C. 12.

No costs to any party claiming under a contract, not meritorious, even though recovered upon ; not even to a trustee. *Id.* 55.

Court will not assist volunteers without a consideration so as to constitute a trust, unless the legal conveyance constituting the trust is actually made, when it will enforce the equitable interest, though there is no consideration. *Ellison* v. *Ellison*, 6 Ves. 656 ; 6 R. R. 19.

As against Husband.]—By a voluntary settlement a husband and wife assigned all the property which the wife then was or which she or her husband in her right might become entitled to, upon certain trusts for the benefit of the wife, the husband, and the children of the wife, by her present or any future husband. A bill filed by the wife against the husband to carry the trusts of this deed into effect was dismissed at a re-hearing, as it had been at the first hearing. *Ellis* v. *Nimmo* (ante, col. 902) observed on. *Holloway* v. *Headington*, 8 Sim. 324 ; 6 L. J., Ch. 199.

Consideration Illicit.]—Bill to enforce parol agreement not stating any consideration, and consideration being proved illicit, a general demurrer allowed. *Matthews* v. *Lane*, 1 Madd. 558.

As against Creditors of Settlor.]—The court will not carry a voluntary conveyance by a bankrupt into execution against his assignees. Secus, of a conveyance for good consideration before the bankruptcy. *Tyrell* v. *Hope*, 2 Atk. 562.

An annuity was granted by deed in consideration of love and affection to C., charged on certain hereditaments, and upon the "moneys, securities for money, and other effects" of the grantor. At the date of the deed the grantor was entitled to a reversionary interest in stock standing in the names of trustees. The annuity was regularly paid for more than twenty years by the grantor, but on his death his personal estate proved insufficient to pay his debts, and the real estate was not enough to provide for the annuity :—Held, so far as the charge on the reversionary interest in the stock was concerned, that the deed depended only upon contract, and did not create a perfect and complete equitable charge in favour of C., and that, as there could be no specific performance of a contract in favour of a volunteer, C. had no priority over the creditors of the grantor. *Donaldson* v. *Donaldson* (Kay, 711) discussed. *Lucan (Earl) In re, Hardinge* v. *Cobden*, 60 L. J., Ch. 40 ; 45 Ch. D. 470 ; 63 L. T. 538 ; 39 W. R. 90.

After Sale of Settled Lands by Settlor.]—Court of equity will not act in favour of a mere voluntary settlement, and therefore upon a subsequent purchase with notice, and covenant to lay out the money to the same uses, will not lay hold of the money. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 93 ; 11 R. R. 151.

Distinction upon the want of consideration upon a contract merely voluntary; this court will do nothing but take jurisdiction upon a trust actually created, unless perhaps against a party having a right to put an end to it by his own act under a sole power of revocation, by analogy to the distinction between the cases where an entail can be barred by fine, and where a recovery is necessary. *Id.* 99.

As against Executor of Settlor.]—The testator, by a voluntary deed, covenanted with trustees that in case A. and B., his two natural sons, or either of them, should survive him, his (the testator's) executors and administrators should, within twelve months after his death, pay to the trustee named in the deed 60,000*l.*, upon trust for such of them (A. and B.) as should attain twenty-one and be living at the time of his death; and if neither of them, having survived him, should attain twenty-one, then upon trust for him (the testator), his executors and administrators. The testator retained the deed in his own possession until his death, and did not communicate it either to the trustees or to A. and B. The testator, by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. and B., and his legitimate children. After the death of the testator the deed of covenant was found amongst his papers. A. survived the testator, and attained twenty-one:—Held, that although the deed of covenant was voluntary, it nevertheless created a trust for A., and that the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator. That the deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor. *Fletcher* v. *Fletcher*, 4 Hare, 67; 14 L. J., Ch. 66; 8 Jur. 1040.

Where Property is actually Vested in Trustees.]—H., by a voluntary deed, assigned, inter alia, moneys secured on mortgage, notes of hand, furniture, and other effects, to W. upon trust for himself the settlor for life, and after his death upon trust (among other payments) to pay 40*l.* to the plaintiff. He afterwards devised and bequeathed all his property, real and personal, upon trusts in which the plaintiff took no interest. Upon a bill filed by her to have the general trusts of the previous voluntary settlement carried into execution:—Held, that she was entitled to relief not extending beyond that portion of the trust property which was charged in her favour; and that it was not necessary that the other persons entitled under the same set of trusts should appear as plaintiffs. Held, also, that the deed was sufficient to vest in the trustee the notes of hand, &c., upon which the trust was fastened; and that the trustee, who was himself the principal cestui que trust, having concurred in allowing the settlor to receive moneys thereunder, and having joined with him in committing a breach of trust, was liable to the plaintiff; and, as a defendant, had no right to ask that the trust of the settlement should be carried out to an extent greater than was necessary in order to enable the plaintiff to enforce her claim. Directions as to the costs of all parties to the suit. *Parnell* v. *Hingston*, 2 Jur. (N.S.) 854; 4 W. R. 794.

Residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death:—Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement. *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., Ch. 577; 16 Jur. 625.

Where a man, having, by voluntary deed, assigned to a trustee certain choses in action, and other personal chattels, in trust for himself for life, and after his death for other parties, afterwards by will disposed of the property so assigned, and the trustee and cestuis que trustent under the settlement filed their bill against the executors and legatees, praying that, after payment of testator's debts, the residue might be paid to the trustee, the bill was dismissed with costs; and this decision was affirmed by the chancellor who observed that the suit might have been so framed by making the trustee a defendant, and by alleging difficulties in the way of the execution of the trusts, or by making the trustee alone plaintiff, as to enable the court to give relief. He therefore dismissed the bill without prejudice to the institution of any other suit. *Ward* v. *Audland*, 8 Sim. 571; C. P. Cooper, 146; 2 Jur. 652.

A trustee under a voluntary settlement of chattels, policy of assurance, and mortgage, filed a bill against the representatatives of the settlor for the recovery thereof:—Held, that if the property was legally vested in the plaintiff, he might recover it at law, and apply it on the trusts; but if otherwise, then, as the deed was voluntarily, the court could afford the plaintiff no assistance in recovering it. *Ward* v. *Audland*, 8 Beav. 201; 14 L. J., Ch. 145; 9 Jur. 384.

A cestui que trust, though a volunteer, can enforce his rights against the trustee, as soon as the trust funds come to the hands of the trustee. A. was indebted to three creditors, B., C., and D.; B. obtained a judgment and sued out a right of fi. fa. Before the writ was executed, A. gave a bill of sale to C., upon trust to pay himself and D., but D. was no party to the bill of sale, and had not assented to it:—Held, that in the absence of any question arising out of the law of bankruptcy, the bill of sale gave priority to D. as well as to C. over B. *Westbury* v. *Clapp*, 3 N. R. 633; 12 W. R. 511.

If husband, even after marriage, conveys his wife's fortune to a trustee for her separate use, and the trustee is guilty of a breach of trust, the court will oblige him to make satisfaction to the cestui que trust. *Smith* v. *French*, 2 Atk. 243.

Money never Paid to Trustee—Untrue Recital—Promise to Pay.]—A trustee executed a settlement declaring trusts of 2,000*l.* belonging to the

settlor (a married woman), which sum was thereby untruly recited to be in his hands, upon the faith of a promise by her to pay the sum to him out of her separate estate. The sum was never paid:—Held, that neither the trustee of the settlement, nor a volunteer under it, could enforce the promise. *Marler* v. *Tommas*, 43 L. J., Ch. 73; L. R. 17 Eq. 8; 22 W. R. 25.

Contract Abandoned by Parties.]—A., by deed, contracted with B., in consideration of 100*l*., to maintain, educate, and apprentice B.'s child; and if he had no child of his own, on B.'s child attaining twenty-one years, to give him all his real and personal estate at his death, subject to a life interest for his widow. It appeared, from the circumstances of the case, probable that the apparent consideration of 100*l*. was not, in fact, paid, or intended by either party to be paid, and that it was stated in the deed pro formâ only. There was some evidence that the child was at A.'s house after the date of the deed, but it appeared doubtful whether the child ever lived with A. in the manner provided by the contract, and he soon after was residing with his father (B.), and the court was satisfied that A. and B., by agreement between themselves, abandoned the contract, and that the status of the child had not been altered by anything done by A. in pursuance of the contract. Upon a bill filed by the child, after the death of A.:—Held, that the contract, having been abandoned by the contracting parties, could not be enforced by the child. *Hill* v. *Gomme*, 5 Myl. & Cr. 250; 9 L. J., Ch. 54; 4 Jur. 165.

Whether this court would perform a contract by which a person, for a sum of money, deprives himself of the possibility of realising property which he can dispose of by will, and thus destroys an active motive for bettering his condition in life, quære. *Ib.*

Whether, if the contract had been so acted on by A. to alter the status of the child, the child could have enforced the contract, quære. *Ib.*

Conveyance of Lands not the Property of Grantor.]—A voluntary conveyance of lands, not the property of the grantor, established against him, as an agreement to convey lands of equal value. *Carey* v. *Stafford*, 3 Swanst. 427.

Where Deed Lost.]—Relief was given where a voluntary bond was lost. *Lightbone* v. *Weedon*, 1 Eq. Abr. 93.

Where Deed Destroyed by Settlor—Copy indirectly Gained.]—A. makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards, one secretly, and by fraud on behalf of the nephew, gets an attested copy of this settlement, and then the party who made the settlement burns it, and settles the premises on another nephew. The first nephew's bill to establish the copy of the first settlement is dismissed with costs; upon which the second nephew, claiming under his settlement, brings a bill to have the attested copy delivered up, and has a decree for it; because such copy has been indirectly gained. *Naldred* v. *Gilham*, 1 P. Wms. 577.

Where Deed Delivered to Trustee.]—If a voluntary deed is regularly executed, and delivered over to a trustee, and so put out of the control of the party, showing the design to divest the power of revocation, the party is bound, and the person intended to be benefited by that deed would have a right to come into this court against the trustee, to call upon him to secure the deed, and deposit it so as to be available for him. *Uniacke* v. *Giles*, 2 Moll. 267.

A voluntary deed, if perfect, will be executed after the death of the grantor, because, between the executor and the donee there is no preferable equity. *Id.* 265.

Burden of Proof.]—When a grantee, under a deed purporting to be a conveyance for valuable consideration, attempts to support the grant as a gift, the onus of proving that such a gift was intended and made is thrown upon the grantee, and clear evidence in support of the gift will be required. *Coultwas* v. *Swan*, 22 L. T. 539; 19 W. R. 485.

The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. *Coutts* v. *Acworth*, 38 L. J., Ch. 694; L. R. 8 Eq. 558; 21 L. T. 224; 17 W. R. 1121.

When a voluntary deed is impeached the onus of supporting it does not necessarily rest upon those who set it up. *Henry* v. *Armstrong*, 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472.

C., in 1855, mortgaged a house to the plaintiff in fee, handing over to him the deed of conveyance to himself, with the receipt of the vendors indorsed. In 1851 C. had made a voluntary conveyance of the house to trustees in trust for his wife and children, the consideration expressed being natural love and affection:—Held, that though evidence might be adduced to show that valuable consideration had been in fact given for the settlement, such evidence must be of a most conclusive kind, and that on the evidence adduced the mortgage must prevail. *Lery* v. *Creighton*, 22 W. R. 605.

III. RECTIFICATION, RESCISSION, REVOCATION, AND DISCHARGE.

A. RECTIFICATION OF ARTICLES AND SETTLEMENTS.

1. Mistake or Omission.

a. In Articles.

Intention followed.]—Articles, executed before a marriage, having stipulated that estates should be limited to the first and other sons of the marriage in tail, but, it being proved that the intention was to limit the estates to the first and other sons in tail male, the court, after the marriage had taken place, directed, in the settlement to be executed in pursuance of the articles, limitations to the first and other sons in tail male should be inserted. *Bedford* (*Duke*) v. *Abercorn* (*Marquis*), 1 Myl. & Cr. 312; 5 L. J., Ch. 230.

The court of chancery will not insert a hotchpot clause in executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause. *Lees* v. *Lees*, Ir. R. 5 Eq. 549.

Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words

of the articles was reformed, estate for life only being intended. *Randall* v. *Willis*, 5 Ves. 275; 5 R. R. 40.

Trust money in marriage articles in power of the court, and construed against the words for sake of the intent, by supplying the words, "if wife should die without issue." *Turgus* v. *Puget*, 2 Ves. Sen. 194.

A man articled on the marriage of his eldest son, to settle lands on the son for life, remainder to the wife for jointure, remainder to the first and other sons in tail, remainder to the right heirs of the son. The father brings a bill to be relieved against the articles, alleging that he was surprised, and intended that, upon failure of issue male of his eldest son, the remainder should have been limited to his younger son, charged with portions for the daughters of the marriage. Bill dismissed. *Seymour* v. *Fotherly*, 1 Vern. 320.

Wife's Property—First Life Interest decreed to Wife.]—Articles executed before the marriage of a widow, with seven children, gave the husband the first life interest in the settled property, the whole of which belonged to the lady. The husband acted as the wife's agent in the preparation of the articles:—Held, that the articles must be rectified so as to give the wife the first life interest. *Clark* v. *Girdwood*, 7 Ch. D. 9; 37 L. T. 614; 25 W. R. 575.

Estate Tail cut down.]—Marriage articles for settling lands varied by decreeing the estate to one for life, with remainder in tail to his issue instead of an estate tail to him. *Griffith* v. *Buckle*, 2 Vern. 13.

Election.]—Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage, the plaintiff having however taken a benefit under the will which he disputed:—Held, to have made his election, and decreed to give up part of the settlement estate in satisfaction. *Roberts* v. *Kingsly*, 1 Ves. Sen. 238.

b. In Settlements.

Principle—Intention Followed.]—A family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made. *Fane* v. *Fane*, L. R. 20 Eq. 698.

In a suit to rectify a settlement on the ground of mistake, the question for the court is, what was the intention of the parties at the time when the settlement was executed, and not what they would have done if, when they executed it, the result of what they did had been present to their minds. A deed of appointment, in favour of some of the objects of a power, rectified by the insertion of a hotchpot clause, the court being satisfied, upon the evidence, that the intention of the donee of the power was to produce equality, and that the clause had been omitted by mistake. *Wilkinson* v. *Nelson*, 7 Jur. (N.S.) 480; 9 W. R. 393.

In contemplation of a marriage between a lady, who was an orphan and a protestant, and a gentleman who was a roman catholic, a settlement was executed, to which the lady's uncle was a party, and the subjects of which were stock belonging to the lady, and two sums of money, one secured by the uncle's, and the other by the gentleman's bond, and both of them payable to the trustees of the settlement twelve months after the date of the bonds. The settlement, after declaring trusts in favour of the lady and gentleman and their children, provided, that until the marriage should be duly had and solemnised according to the forms of the church of England, or in case it should not be solemnised within twelve months next after the date of the settlement, the trustees should stand possessed of all the trust moneys, securities, and premises, and the securities for the same, in trust for the lady, her executors, &c., and should pay, assign, and transfer the same accordingly. The marriage never took place. After the uncle's death his bond was found amongst his papers with the words "Cancelled, the marriage never having taken place," written by him across the face of it. The court, though it did not consider the bond to be invalidated:—Held, that according to the true construction of the proviso, the lady was not entitled as the cestui que trust of the bond. *Mitford* v. *Reynolds*, 16 Sim. 130.

—— **Parol Evidence—Lapse of Time.**]—A court of equity will reform a settlement upon parol evidence alone, and after a long lapse of time, if on due deliberation it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R. Ir. 119; Ir. R. 11 Eq. 130.

By a post-nuptial settlement of 1841, after reciting that in consideration of 352*l.*, a share of residue to which E., the wife, had become entitled under a will taking effect a few days before the marriage, C., the husband, in order to provide for her after his death, and for their issue, had proposed to settle a freehold house and field upon the trusts therein mentioned, the freehold premises were conveyed to T. upon trust for C. for life, or until he should become bankrupt, or assign, or charge "the rents, issues, and annual produce of the trust estate moneys," &c., then upon trust for E. for life; "it being the true intent and the meaning of these presents, and the parties thereto, that the tenements, hereditaments, and premises" should, in the event of any such charge, &c., be for the separate maintenance of E. for life, then, "as to the rents, issues, and annual profits arising off the house and premises," for children, in the usual form, with an ultimate "trust to pay the rents, issues, and annual produce" to C.'s next of kin. The settlement provided, that on the appointment of any new trustee, "all the trust estate moneys and premises" should be assigned to him. T., who was also the trustee of the will, had paid part of the 352*l.* to C. before the execution of the deed, and the rest immediately after. The solicitor who prepared the settlement, on T.'s verbal instructions, had died in 1848, and there were no papers to show what the instructions were; but C., E. and T. all deposed that it had not been intended to settle any part of the 352*l.*, and their bill, filed in 1876, to reform the deed accordingly, was not opposed by the adult children:—Held, that the plaintiffs were entitled to a decree declaring that the word "moneys" had been introduced by mistake into the settlement, which should be construed and take effect as if that form had been omitted. *Ib.*

—— **Uncontradicted Evidence of Wife.**]—By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention :—Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely ; and declaration to that effect was ordered to be indorsed on the settlement. *Smith* v. *Iliffe*, 44 L. J., Ch. 755 ; L. R. 20 Eq. 666 ; 33 L. T. 200 ; 23 W. R. 851.

—— **Unsupported Evidence of Wife.**]—By a marriage settlement the property of the intended wife was settled upon the wife for life for her separate use without power of anticipation, and after her death as she should, notwithstanding coverture, by will or codicil appoint, and in default of appointment for her next of kin. After the death of the husband, and upon the unsupported testimony of the wife that it was only intended to protect the trust property during her coverture and not to deprive her of the control of it after the termination of the coverture :—Held, that the settlement ought to be rectified so that the property should be held in trust for the wife, her executors, administrators, and assigns, absolutely. *Cook* v. *Fearn*, 48 L. J., Ch. 63 ; 39 L. T. 348 ; 27 W. R. 212.

—— **Evidenced by Plan of Settlement.**]—By a marriage settlement certain lands were conveyed to A. (the intended husband), his heirs and assigns ; and in case A. should die, leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons, and the heirs male of his body, being always preferred to take place before the younger, with full liberty for A. to make such reasonable provision as he should think fit for such "younger child or children" ; and, in case A. should die leaving no son, and there should be one or more daughters, then to such daughter or daughters (if more than one) on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters ; and A., by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the lands with the sum of 1,500*l.* to be divided amongst the younger children of the marriage, in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise a portion of the 1,500*l.* :—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children as well daughters as sons, that the court would effect that intention, and support the appointment by transposing the clause creating the power, and that containing the limitations to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66.

—— **Deed going beyond Instructions.**]—By a marriage settlement an estate was limited to such uses as the husband and wife should appoint by deed, and in default of appointment to the uses therein mentioned, the husband and wife taking life estates, subject to which the wife had a general power of appointment by will. In 1825 the husband and wife appointed the estate to such uses as they should by deed appoint ; and in default of such appointment, to such uses as the wife alone should by deed or will appoint ; and in default of appointment, to the uses therein mentioned. In February, 1827, the wife made a will, devising the estate to her husband. In 1840 it was observed, that by mistake the life estates of the husband and wife had not been relimited by the deed of 1825, and the husband and wife directed their solicitor "to prepare such a deed as might be necessary and proper to correct the mistake." Upon these instructions he prepared a deed, which the husband and wife executed, with the sole object of remedying the omission of the life estates. By this deed the husband and wife exercised their joint power over the entire fee, and limited the estate to such uses as they should by deed appoint ; and in default of appointment, to and upon uses and trusts, during the lives of the husband and wife, similar to those in the settlement ; and after the decease of the survivor of the husband and wife, to such uses as the wife should by deed or will appoint ; and in default of appointment, to uses which for practical purposes were the same as the ulterior uses limited by the deed of 1840. The wife died in 1854. In a suit to establish the will, held, by Romilly, M.R., that it was revoked by the deed of 1840 :—Held, on appeal, that, assuming the deed of 1840 as it stood to be such as to revoke the will, there was an equity to have it rectified on the ground of mistake, as it went beyond the instructions and the intention of the parties, which were only to replace the life estates, and to do nothing more, and that the will must therefore be established. *Walker* v. *Armstrong*, 8 De G. M. & G. 531 ; 25 L. J., Ch. 738 ; 2 Jur. (N.S.) 959 ; 4 W. R. 770.

—— **In Favour of Wife against Husband's Assignees.**]—By a marriage settlement the father of the intended wife covenanted with the intended husband to pay to him, his executors, administrators, and assigns, during the life of the father, an annuity of 200*l.* The husband died insolvent, and his assignees claimed the annuity. The court, being satisfied that it was the intention of the parties that it should be paid as a provision for the wife and her children, ordered the settlement to be amended, and decreed that the assignees of the husband had no claim to any part of it. *Pearce* v. *Verbeke*, 2 Beav. 333 ; 9 L. J., Ch. 203 ; 4 Jur. 117.

—— **By Insertion of word "Heirs."**]—By a marriage settlement the wife's interest in real estate was granted and assigned to trustees, their executors, administrators, and assigns, upon the usual trusts in a settlement, with the omission of the word "heirs" in every case in which the fee simple was evidently intended to be passed :—Held, that the deed must be rectified by the insertion of the word "heirs" in order to effect the intention of the parties. *Bird, In re*, 3 Ch. D. 214.

—— **By Insertion of words "or Grandchildren."**]—A settlement directed the trustees,

immediately after the decease of the survivor of the husband and wife, to transfer a fund unto and amongst all and every the son and sons, daughter and daughters, of the husband and wife, and the children of such son and sons, daughter and daughters, in case any of them should be dead leaving issue, share and share alike; but the child or children of such of the said sons and daughters as should be then dead were to be entitled only to a parent's share; and in case there should be no child or children of the husband and wife living at the death of the survivor of them, then in trust to transfer the fund to the survivor, his or her executors, &c. There were three children of the marriage, but they all died before either of their parents; two of them left children, some of whom survived both their grandfather and grandmother:—Held, that the surviving grandchildren were entitled to the fund. *Green* v. *Bailey*, 14 Sim. 635; 9 Jur. 636.

—— **By striking out Erroneous Words.**]—Form of rectifying a settlement by striking out the erroneous words and endorsing the decree. *Stock* v. *Vining*, 25 Beav. 235.

—— **By striking out Words of Reference to Particular Marriage.**]—By a marriage settlement lands were limited to the use of the first son of the body of B. on the body of P. (his future wife) lawfully to be begotten, and the heirs male of the body of such son, with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of B. to be begotten severally and successively, one after another, as they and every of them should be in seniority of age and priority of birth, in tail male:—Held, that the eldest son of B. by his second marriage (there being no issue of his marriage with P.) was entitled to the lands as a tenant in tail in preference to the second son of such marriage. *Blake, In re*, 19 W. R. 765.

In 1848 estates were, in exercise of a power, appointed to the use of Jane W., in fee, and the same estates were, on the marriage of Jane W. with John Wright, vested in trustees, to sell, and invest the proceeds for the benefit of Mrs. Jane W., for life, for her separate use, with a power to her of appointment in favour of the children of the said intended marriage. John Wright died, leaving his widow and one child surviving. In 1856 Mrs. Jane W. intermarried with John Whitham, and subsequently filed a bill, praying that the settlement made on her former marriage might be rectified, on the ground that it was not framed in accordance with her intention. On the evidence, the court directed the settlement to be rectified by striking out the word "intended," and inserting the words "the said Jane W., by the said intended or any future husband." *Naylor* v. *Wright*, 3 Jur. (N.S.) 1090; 5 W. R. 770.

—— **As evidenced by Recital.**]—Settlement reformed, according to the intention declared in recital. *Payne* v. *Collier*, 1 Ves. 171.

Intention not Followed.]—Where a settlement shall be good and take effect, though not according to the intent of the parties. *Marshall* v. *Frank*, Pre. Ch. 480; Gilb. 143.

Evidence of Intention insufficient.]—Marriage settlement not altered in favour of the intention, the recital being too general, nothing dehors the words to do it by. If anything in the recital by which to correct it, it may be done. *Doran* v. *Ross*, 1 Ves. 57, 59.

By a marriage settlement, after the death of the husband and wife, the trustees were to pay, assign, and transfer the capital to the children of the wife equally, the shares to be paid at twenty-one. There was a subsequent proviso, that if there should be no such child living at the decease of the survivor of the parents, then the fund was to go over to S. C. There was only one child of the marriage:—Held, that though she had attained twenty-one, her interest was defeasible by her death before the survivor of her parents:—Held, also, that the settlement could not, on the evidence, be reformed. *Lloyd* v. *Cocker*, 19 Beav. 140; 24 L. J., Ch. 84; 1 Jur. (N.S.) 174.

Trust funds were limited, after the death of the husband and wife, to the children of the marriage, to be vested interests at their respective ages of twenty-five or day of marriage if daughters, which should first happen, with benefit of survivorship in the event of any dying under that age, or before marriage if daughters. The settlement contained powers of maintenance and advancement:—Held, that the language of the settlement being unambiguous, its legal effect could not be controlled, and that the limitations were void for remoteness; but leave was given to the children to adduce evidence that the settlement was not in accordance with the intention of the parties, with a view to its being rectified. *Morse, In re*, 21 Beav. 174; 25 L. J., Ch. 192; 2 Jur. (N.S.) 6; 4 W. R. 148.

Lands stood limited, subject to certain powers vested in the plaintiff, and to certain charges for his own benefit and for the jointure of his wife, and for portions for his younger children, to his use for life, with remainder to his sons successively in tail male, with remainder to trustees for 1,500 years, in trust, in the event of failure of his male issue, to raise 100,000*l.* for additional portions for his daughters. In contemplation of the marriage of his only son, the plaintiff and his son entered into an agreement for resettlement, whereby the son should disentail the reversion and limit the estates after the plaintiff's decease, and subject to his life interest and powers, and to the exercise thereof, and all subsisting charges, to such uses as he and his son should then appoint, the lands, in remainder, and subject as aforesaid, to the use of the son for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainder to a nephew of the plaintiff and certain other nephews successively for their lives, with remainders to their first and other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, and thereby the lands were appointed, after the plaintiff's death and subject to his life estate and to the powers thereto annexed, and of the jointure and any other charges upon the estates to which he might be entitled, to the use of his son for life, with remainder to his first and other sons successively in tail male, with remainder to his nephews successively, and remainder over. The plaintiff and his solicitor deposed that neither of them intended by the agreement or settlement to displace the terms of 1,500 years or the portions of 100,000*l.* thereby secured, except so far as was

necessary for the benefit of his son and issue, but it did not appear that any discussion took place on the subject, or that it was mentioned:—Held, not a case for reforming the resettlement. *Elwes* v. *Elwes*, 3 De G. F. & J. 667; 7 Jur. (N.S.) 747; 4 L. T. 500; 9 W. R. 820.

By a marriage settlement, after reciting that the lady was entitled to 10,000*l.* in possession, the sum was settled on herself, her intended husband, and the children of the marriage. There was also a covenant to settle all her after-acquired property. At the date of the settlement she was not entitled to any money in possession, but was entitled to a contingent interest in trust funds under the marriage settlement of her father and mother, and the 10,000*l.* was, in fact, advanced by the father out of his own moneys. After his death a bill was filed by his representatives to have it declared that his estate was entitled to be recouped the 10,000*l.* advanced by him on his daughter's marriage, to the extent of her portion in the trust funds:—Held, that the settlement did not show that the 10,000*l.* was meant to be an accelerated advance of the daughter's share in the trust funds. *Bradford (Earl)* v. *Romney (Earl)*, 31 L. J., Ch. 497; 8 Jur. (N.S.) 403; 6 L. T. 208; 10 W. R. 414.

Held, also, that the evidence failed to show that its provisions were at variance with the real intention of the parties, and therefore that the settlement could not be rectified. *Ib.*

Mistake—Substituted Charge—Fine proving Inoperative.]—Where, under a marriage settlement, a sum was directed to be raised, to which, under the limitations of the settlement, the plaintiff would be entitled, if not barred by a fine levied by the husband and wife (there being no issue), which was declared to be inoperative to that effect; and by a deed of covenant, a similar sum was charged upon the husband's estate:—Held, that he could not be relieved from such second charge upon the ground of mistake, although clearly intended to be substituted in lieu of the former. *Farr* v. *Sheriffe*, 4 Hare, 512; 15 L. J., Ch. 89; 10 Jur. 630.

—— **Not Mutual.**]—Where a marriage settlement is prepared pursuant to the intention of one of the parties, but under a mistake as to the other, it cannot be rectified. *Sells* v. *Sells*, 1 Dr. & Sm. 42; 29 L. J., Ch. 500; 8 W. R. 327.

Where a clause in a marriage settlement was framed in a form which did not carry out correctly the intention of the intended wife, and the whole clause was objected to by the intended husband, but the objection ultimately waived, and it appearing that the husband's attention had not been called to the variance between the form of the clause and the intention of the wife:—Held, that this was not a case of mutual error, and a bill for rectification was dismissed. *Thompson* v. *Whitmore*, 1 J. & H. 268; 3 L. T. 845; 9 W. R. 297.

—— **Explanation of Deed before Execution.**]—On clear evidence of mistake, a marriage settlement of a lady's fortune reformed, by striking out a proviso against anticipation of her separate estate, she having executed it on a representation that the most unlimited control, both over principal and interest, was secured to her, it having been agreed before the marriage that she should continue to possess the same power of disposition which she then had. *Torre* v. *Torre*, 1 Sm. & G. 815; 1 Eq. R. 364; 1 W. R. 490.

Real estate was settled on A. for life; remainder to B., his eldest son in tail. B., at A.'s request, joined with him in opening the entail to let in a charge. The estates were resettled, and several years afterwards B. discovered that his estate tail had been cut down to an estate for life. B. stated that he had joined in opening the entail on the understanding that, subject to the charge and to certain modifications in A.'s power of jointuring and charging portions, the estates should be settled precisely as they had previously been. A. stated that he had been under the same impression. On evidence that the persons who prepared the resettlement had explained the limitations to A. and B., a bill filed by B. to rectify the settlement was dismissed with costs. *Jenner* v. *Jenner*, 2 Giff. 232. Affirmed, 30 L. J., Ch. 201; 6 Jur. (N.S.) 1314; 3 L. T. 488; 9 W. R. 109.

By a marriage settlement made in 1858, property belonging to the lady was invested in trustees for the benefit of the wife and husband during their respective lives, and the children of the wife by the then intended or any future marriage, and in default of such children for the wife's nephews and nieces absolutely. The settlement contained no power of revocation, and gave the wife no power of appointment amongst her nephews and nieces, and no power to lease, to appoint new trustees, or to change investments. The husband died in 1865, leaving no issue. On a bill by the wife to set aside the settlement:—Held (on the ground that she had executed the deed in ignorance of its effect, which had not been sufficiently explained to her, and that the nephews and nieces were mere volunteers, and not within the consideration of the marriage), that the trusts of the deed must be declared void, and the trustees be ordered to retransfer to her the property comprised in the settlement. *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; 21 L. T. 449; 18 W. R. 83.

In a marriage settlement, the property of the wife was assigned on trust to pay the income to the wife for life for her separate use, and after her decease to pay an annuity of 200*l.* a year to the husband, remainder to the issue of the marriage, and in default of issue the trustees were directed to invest the trust money in land, to be held on similar trusts as were subsisting in respect of the family estate of the wife's family under the family settlement. There was no issue of the marriage, and the wife now claimed to have the settlement rectified, on the ground that her attention had not been called to the fact that under the settlement she had no power of disposing of the property in the event of there being no issue of the marriage:—Held, that the settlement must be rectified by inserting a general testamentary power of appointment by the wife during coverture, and a general power of appointment by deed or will on discoverture, in priority to the ultimate trusts. *Cordeaux* v. *Fullerton*, 41 L. T. 651; 28 W. R. 320.

Deed Executed under Protest.]—A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents and executed it under protest, and reserving his right to set it aside:—Held, that he could not,

after the marriage, sustain a suit to rectify the settlement. *Eaton* v. *Bennett*, 34 Beav. 196.

Mistake in Placing Terms for Portions.]—An elder daughter, where there is a son, is considered a younger child by a court of equity, and the court would rectify the mistake in the settlement; as it has done, where term for raising portions is placed after estate tail, which should have been before. *Heneage* v. *Hunloke*, 2 Atk. 457.

Where a mistake in placing a trust term is rectified. *Worsley* v. *Granville* (*Earl*), 2 Ves. Sen. 333.

In a marriage settlement a term for years for securing younger children's portions is, by mistake, made subsequent to the estate tail limited to the sons; this helped in equity. *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; 9 Mod. 56.

Omission of Provision for Bankruptcy of Husband.]—Marriage settlement of trader not securing the wife's fortune in the event of bankruptcy, the intention appearing to be so, amended accordingly. *Higginson* v. *Kelley*, 1 Ball & B. 252; 12 R. R. 28.

Marriage settlement not providing for a bond by husband to trustee for wife's fortune being provable in the event of his bankruptcy amended accordingly, such being the intention of the parties. *Verner, Ex parte*, 1 Ball & B. 260.

A marriage settlement gave the income of the trust funds to the husband, in the event of his surviving the wife, until death or bankruptcy. There was a maintenance clause only applicable after the death of the husband. The wife was dead, and the husband had become bankrupt. The settlement was ordered to be rectified by making the maintenance clause applicable upon the bankruptcy of the husband, upon the oath of the husband and of the solicitor who prepared the settlement, that such had been the intention of the parties at the time of the marriage. *Tomlinson* v. *Leigh*, 11 Jur. (N.S.) 962; 14 W. R. 121.

—— **For Settlement of After-acquired Property, and for Children of Future Marriage.**]—An order was, in 1855, on the application of the father as next friend, made, directing a trustee to pay certain dividends to the father for the maintenance and education of an infant daughter during her minority, or while unmarried. Previously to the marriage of the daughter, the draft of a proposed settlement, which contained a covenant by the intended husband to settle after-acquired property of the wife, but no provision as to the children by a future husband, was sent to the intended husband, and returned by him without any objection thereto. The marriage took place before the draft was ingrossed. A post-nuptial settlement, which contained no covenant to settle after-acquired property, and no provision for children of the wife by a future husband, was executed. Trustees subsequently paid funds of the wife, who was still a minor, into court. The husband and wife presented a petition for a transfer of the funds to them, and certain inquiries were directed. The chief clerk certified that the settlement ought to contain both provisions. The court directed only that the after-acquired property of the wife should be made subject to the trusts of the settlement. *Hoare, In re*, 9 Jur. (N.S.) 167; 1 N. R. 161; 7 L. T. 523; 11 W. R. 181.

—— **Against Anticipation.**]—Under a marriage settlement trust funds, in the events which had happened and by virtue of an appointment, stood limited upon trusts for A. for life, for her separate use without power of anticipation, remainder to B. absolutely. The trust funds had been paid into court in a suit instituted to carry out the trusts of the settlement. On B. attaining twenty-one, A. and B. executed a resettlement by which the trust funds were limited upon trusts for A. for life, remainder to B. absolutely. On a petition for payment out of the trust funds to the trustees of the resettlement, the court made the order subject to the insertion in the resettlement of a clause, similar to that contained in the original settlement, restraining A. from anticipating her life interest. *De Martana* v. *De Martana*, 33 L. T. 685; 24 W. R. 200.

On the settlement of a ward, no clause against anticipation was attached to her separate life estate. She incumbered her interest:—Held, that the settlement could not be rectified to the prejudice of her incumbrancers. *Blackie* v. *Clark*, 15 Beav. 595; 22 L. J., Ch. 377.

Ward of Court—Settlement immediately after attaining Twenty-one—No Provision for Children of Future Marriage.]—A female ward of court being entitled to funded property carried to her account in certain suits, in possession and reversion, a marriage is proposed, and certain proposals for a settlement taken in before the master, not on a reference: the master objects, as the intended husband is to settle nothing, and the ward's property is not to be settled so that children of a second marriage by her can take. The ward being on the eve of attaining twenty-one, the marriage is postponed, and a settlement according to the former proposals, with the addition of a provision that in the event of there being no children all the property settled and all after-acquired property shall go over absolutely to her brothers and sisters, is executed a few days after she attains twenty-one, and the marriage takes place. A few months after, a petition to transfer the funds to the trustees is presented, stating the settlement, and an order is taken by consent upon it without discussion. Thirty-one years elapse, and the husband dies, and there is no issue of the marriage. Eight years after she became a widow, a bill is filed by the lady, alleging that she had only then discovered the true nature of the settlement, and praying that it might be set aside or reformed, and such a settlement made as ought to have been made upon her marriage. It is contended for the plaintiff that, the settlement being executed so immediately after she was of age, she was still under the protection of the court; and that, as she distinctly swore that although the matter was discussed she knew nothing before the period alleged of its true nature, she was entitled to such a settlement as the court would have insisted upon at the time of the marriage, she being then under the influence of her mother, who managed the whole matter. The defendant's contention was, that lapse of time was a complete bar to the relief asked, even if the settlement was inequitable, which it was not, inasmuch as it was natural that the mother should wish to provide for her other children:—Held, that the settlement ought to be reformed so as to give the lady an absolute power in the events which had happened; with a reference to

chambers as to property otherwise arising. Costs by arrangement out of the fund. *Money* v. *Money*, 3 Drew. 256 ; 3 Eq. R. 996 ; 3 W. R. 425.

Interest of Children considered.] — Where children under marriage settlement have obtained a contingent advantage, the court will not, after the marriage, vary it to the prejudice of the issue. *O'Keefe* v. *Calthorpe*, 1 Atk. 17.

—— **As against Heir of Mother.**]—Settlement reformed in favour of the younger children against the heir of the mother claiming the reversion by a letter from her on the marriage of her daughter, stating the intention. *Barstow* v. *Kilvington*, 5 Ves. 593.

—— **As against Devisee of Father.**]—Settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion by his letter of instructions for drawing the settlement, but this equity did not prevail against creditors. *Jenkins* v. *Quinchant*, cited, 5 Ves. 596.

Misstatement—Amount of Incumbrance.] — Three estates belonging to A., two of them being subject to mortgages amounting to 2,400*l.*, and the third being subject to a mortgage for 3,000*l.*, were settled for valuable consideration upon A. for life, remainder to his wife for life, remainder as they should jointly appoint, "for the purpose of raising money, by way of mortgage or otherwise" ; and in default of appointment, and subject thereto, to a trustee for a term of years, to raise such a sum, not exceeding 600*l.*, as should be owing by A. in respect of two sums of 300*l.* each, with remainder to the use of the wife for life, with remainder to the husband and wife, in equal moieties. A. and his wife exercised the joint power for the purpose of raising 600*l.* and 400*l.* A. died insolvent :—Held, this was no mortgage of the wife's estate, and, consequently, that she was not entitled to have her moiety exonerated out of the estate of the husband. *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22 ; 33 L. J., Ch. 106 ; 9 Jur. (N.S.) 1258 ; 9 L. T. 1258 ; 12 W. R. 114. Affirming 32 Beav. 434.

The settlement was expressly made subject to the subsisting mortgage ; but it was stated to be 1,200*l.* instead of 1,400*l.* There was clear evidence of this being a mistake :—Held, that the parties claiming under A. were not estopped by the statements in the settlement, and that it was not necessary to institute formal proceedings to have the mistake rectified. *Ib.*

—— **Date of Will referred to.**] — Under a proviso in a settlement, to which A. and his eldest son B. were parties, a use which was limited to a younger son, P., and his issue, was made to shift to B. in the event of P. becoming entitled in possession to the manor of S. under certain limitations, which, in the settlement, were described as being contained in the will of A., bearing even date therewith. The will of A. contained the limitations mentioned in the settlement, but bore a later date, which was written upon an erasure not to be accounted for : —Held, that, inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could, in equity, be carried into execution, notwithstanding such variance. *Honywood* v. *Honywood*, 2 Y. & C. C. C. 471.

Misapprehension as to Validity of Marriage.] —In contemplation of marriage between A. and B., settlements were made of real estate belonging to B., the intended wife, and of personalty belonging to A., the intended husband, upon uses and trusts, which after the solemnisation of the marriage were to arise for the benefit of the husband and wife, and their issue ; the marriage ceremony was performed, and the parties lived together as husband and wife ; but after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement ; some time afterwards a new settlement in contemplation of marriage was made, including the same property as the former, but differing from the former in the interest given to the issue, as well as in other provisions ; the parties then intermarried, and there was issue of the marriage:—Held, that the first settlement being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement. *Robinson* v. *Dickenson*, 3 Russ. 399 ; 7 L. J. (O.S.) Ch. 70.

—— **As to Party Entitled.**]—A settlement of stock, which proceeded on a clear mistake as to the party in whom the property vested :—Held, not to affect the rights of the party really interested, no intention appearing on his part, although joining in the deed, to deal otherwise with the property than on the footing of the mistaken statement of the title contained in the recitals. *Ashurst* v. *Mill*, 12 Jur. 1035.

Misdescription of Beneficiaries.] — Property was settled on John Garner, Sambourn, and Elizabeth his wife and her children. There was a person named John Garner of Sambourn, whose wife was Hannah, but they were not related to the settlor. There was also a William Garner, of Beoley, whose wife was Elizabeth, and she was a niece of, and intimate with, the settlor : —Held, that the latter were intended. *Garner* v. *Garner*, 29 Beav. 114 ; 7 L. T. 182.

Property Omitted.]—Mrs. D., by her marriage settlement, reciting her title, as devisee, to certain freeholds and copyholds, and her intention to settle her freeholds and copyholds thereinafter described, conveyed and settled certain freeholds in K., and copyholds at B., which belonged to Mrs. D. under the will. Evidence of haste in the preparation of the settlement was offered, but the court held, that there was no evidence of intention to include the freeholds at B. *Chapman* v. *Chapman*, 1 Jur. 473, 688.

Property included by Mistake.]—The court being satisfied, upon the evidence, that a general description of property had been inserted inadvertently in a settlement, and not for the purpose of passing an estate, which the general description would in terms comprise, made a declaration that the general description had been inserted by mistake, so far as regarded the estate in question, and gave the parties liberty to

apply as they might be advised. *Exeter* (*Marquis*) v. *Exeter* (*Marchioness*), 3 Myl. & Cr. 321; 7 L. J., Ch. 240; 2 Jur. 535.

Words inserted by Mistake.]—A. being seised of estates in C., and having proposed to settle a certain part of them on his marriage, a settlement was made of all his estates in C., which were intended to be specified and described in the schedule thereunder written, "but which schedule is not intended to abridge or affect the generality of the description hereinbefore contained":—Held, from the proposal and other evidence, that the words quoted were inserted by mistake. *Walsh* v. *Trevanion*, 16 Sim. 178; 12 Jur. 344.

Husband having a power to make a jointure of any part of the estate not exceeding 400*l.* per annum, covenants on his marriage to settle lands of the yearly value of 400*l.* clear of taxes and reprises; he afterwards makes a settlement of lands, with a covenant, that if they should fall short of 400*l.* per annum, he would make up deficiency:—Held, that the settlement was intended as an execution of the power, and the making the jointure clear of taxes and reprises in the articles was a mistake. *Londonderry* (*Countess*) v. *Wayne*, 2 Eden, 170; Ambl. 424.

Representation before Settlement — Common Mistake.]—Bill by husband to have wife's property, part of which was invested in stock, made up money, on ground either of express contract or a representation, upon which the marriage took place, dismissed; the description by articles, though generally "the sum of 4,000*l.*," referring to that sum in settlement, and the representation under circumstances not amounting to warranty and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13; 7 R. R. 135.

Payments under Mistaken Construction.] — Construction of a clause in a marriage settlement. A court of equity will not direct payments made under a mistaken construction of a doubtful clause, in a settlement, to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 74.

Procedure.]—A settlement of a trust fund, whereby no legal estate was affected, reformed by a declaration in the decree without a reference, or the execution of any fresh instrument, in the form of such order. *Tebbitt* v. *Tebbitt*, 1 De G. & Sm. 506.

By marriage settlement lands of the husband were, by mistake, and contrary to the intention of the parties, settled upon the issue of the marriage. Form of decree to rectify the settlement, the contingent limitations to the unborn issue not being capable of destruction. *Hamil* v. *White*, 3 Jo. & Lat. 695.

No order will be made on petition to reform a settlement, though, by mistake, it included a fund not intended to be settled. Neither can any order be made in contravention of its provisions so long as the settlement is unreformed. *Malet, In re*, 31 L. J., Ch. 455; 8 Jur. (N.S.) 226; 10 W. R. 332.

Under the circumstances, a settlement could not be rectified in the suit as constituted. *Barron* v. *Barron*, 2 Jones, 226.

In a settlement made between persons severally entitled to interests under a will, the settlor, who took a life interest under the settlement, covenanted that if he became entitled to any property exceeding in value the sum of ——, he would assign the same to the trustees. He afterwards became entitled to a reversionary interest, and filed a bill to have the settlement rectified, or that it might be declared that the covenant was void. Stuart, V.-C., dismissed the bill, without costs:—Held, on appeal, that this decision was correct, as the court would not make a declaration of right beforehand, and that the covenant could not be considered insensible, as it must apply to capital, and not income. *Fyfe* v. *Arbuthnot*, 26 L. J., Ch. 646; 3 Jur. (N.S.) 651; 5 W. R. 793—L. C.

Costs.]—In a suit to rectify a settlement, there being no blame imputable to any parties, the costs are payable out of the fund. *Stock* v. *Vining*, 25 Beav. 235.

Mistake by Scrivener.]—No advantage to be taken of a scrivener's mistake in settlement. *Hunburn* v. *Curtis*, Fitzg. 118.

—— **Of Solicitor.**]—Parol evidence admitted to prove mistake of solicitor in settlement. *Rogers* v. *Earl*, Dick. 294.

A memorandum by a solicitor of verbal instructions will not be treated as a written instruction so as to prevent a decree for a rectification of a settlement made in accordance with the memorandum. *Henry* v. *Naghten*, 14 W. R. 814.

—— **Liability.**]—When a suit for the rectification of a marriage settlement has been rendered necessary by the neglect of the solicitor employed to prepare it, the court has no jurisdiction to make the solicitor pay the costs of the suit, when he has not been guilty of any fraud. *Clark* v. *Girdwood*, 7 Ch. D. 9; 37 L. T. 614; 25 W. R. 575.

The remedy against the solicitor in such a case is by action for damages. *Ib.*

A woman's fortune was settled on her marriage to her separate use, except a sum of 10,000*l.*, which had been settled on her marriage with a former husband, and which the woman understood to be still standing upon trust for her separate use. This was, however, a mistake, as the trusts of the former settlement did not extend to future covertures. Shortly after the marriage the parties separated, and were ultimately divorced on the ground of the husband's adultery:—Held, that whether the wife was or was not entitled to a rectification of the settlement, she was entitled in equity to a settlement; and the court settled the whole fund upon her, although she had other property sufficient for her support. The husband's conduct ought to be taken into account in considering the question of the wife's equity to a settlement. The omission in the settlement having arisen from the mistake of the lady's solicitor who prepared the deed, and who was also a trustee under it, the court refused to allow him his costs in the suit. *Barrow* v. *Barrow*, 19 Beav. 529. *S. C.*, on appeal, 3 Eq. R. 149; 24 L. J., Ch. 267; 3 W. R. 122.

Covenant to remedy Mistake not Voluntary.] —Feme seised of a copyhold on marriage of her

daughter to J., surrenders it to the use of J. and his intended wife, and the heirs of their bodies; remainder to J. in fee. The marriage takes effect, the husband signs a writing, whereby he owns that the limitation of the remainder in fee to him was a mistake, and that it was intended to be to his wife; and accordingly covenants to stand seised of the remainder in fee in trust for the wife in fee; this is not a mere voluntary covenant, and equity will compel the performance of it. *Randall* v. *Randall*, 2 P. Wms. 464.

2. Variance between Articles and Settlements.

Rule—Articles Followed.]—Where a settlement made before marriage purports to be in pursuance of the articles, but is not in conformity therewith, that is conclusive ground for correcting the settlement without further evidence, and though the articles and the settlement were both before the marriage, and the settlement does not purport to be made in pursuance of the articles, yet if it be clearly established that it was intended to be made in pursuance of the articles, and is not in conformity therewith, the court will rectify the mistake. *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; 25 L. J., Ch. 598; 2 Jur. (N.S.) 97; 4 W. R. 3. Affirming 20 Beav. 250.

Upon a treaty of marriage, the father of the intended wife said to the plaintiff, the intended husband, "I pledge you my word that after the death of my wife and myself, my daughter will have 10,000*l.* at the very least." Heads of articles, which were subsequently drawn up under the sanction of and approved by the father, and intended as instructions for a settlement, contained the following passage: "A covenant is to be drawn up by which Sir W. H. (the father) guarantees that his daughter shall, at the decease of both parents, have a property of not less than 10,000*l.*" In the settlement which was afterwards executed, before the marriage, there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband, who had survived his wife, against the executor of the father:—Held, that although the settlement, if it stood alone, could not have been rectified, yet that, having regard to the articles and representation made by the father, there was sufficient evidence of mistake to authorise the court to make the settlement conformable to the articles, and that the estate of the father was bound to make up the portion of his daughter to the stipulated sum. *Ib.*

Held, also, that the representation of the father, though not afterwards fulfilled, yet being of intention merely and not of fact, did not amount to such a misrepresentation as would entitle the husband to relief in equity on the ground of fraud. *Ib.*

Articles, and a settlement mentioned to be made in pursuance thereof, were both made before the marriage, but the settlement varied from the uses in the articles. Decreed to go according to the articles. *Honour* v. *Honour*, 2 Vern. 658; 1 P. Wms. 123.

The court will not rectify a settlement which varies the interest of an adult from what it appears to be under the articles, to his disadvantage, unless where it was clearly intended that the settlement should pursue the articles. *Parkyn* v. *Roberts*, Ambl. 315.

Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard* v. *Quinchant*, Ambl. 147.

Settlement set right according to articles. *Langley* v. *Furlong*, Dick. 315; *Neal* v. *Cust*, Dick. 513.

Settlement under articles from which it deviated set right; and what estate was damnified by tenant for life not upholding it, declared specialty debt, and to be answered out of his assets. *Ib.*

Articles discharged by Subsequent Articles imposing Condition.]—A sum of 2,000*l.* was by certain articles provided for the daughters of a marriage, without any restriction as to the time of payment. By subsequent articles between the father and his eldest son, the former security was discharged, and securities to the amount of 8,000*l.* substituted for it, part provided by the father and part by the son. The intent was declared to be, that if the three daughters respectively should marry with the consent of their father (or after his death, of their mother), they should receive each a certain portion of the said 8,000*l.* on the day of her marriage, with interest from that day; and in case any of them should marry without such consent, or if any of them should die before she was married as aforesaid, her share should go between the others or to the survivor; and such of them as should be unmarried at their father's death were to receive interest on their respective portions by way of maintenance. After the death of the father and mother, two of the daughters married and received their portions; the third having attained twenty-one years, though unmarried, was held entitled to have her portion raised. *Nugent* v. *Clare*, Wall. Lyn. 105.

Where Articles wrongly Recited.]—Articles, on marriage, to settle land on husband and wife for life; remainder to heirs male of body of wife by husband; remainder to heirs male of husband by other wife; remainder to heirs female by wife. A settlement is made before marriage, and said to be in pursuance of articles whereby lands are limited to husband for life, without waste, and with power of making leases; remainder to first, &c., sons of marriage in tail male; remainder to first, &c., sons in tail by other marriage; remainder to heirs of body of husband. There are issue two daughters. Husband suffers recovery and devises premises to his sister; daughters may compel a reconveyance to them. *West* v. *Erisey*, 1 Comyns, 412; 2 P. Wms. 349, *S. C.*, on appeal, 1 Bro. P. C. 225.

Where Agreement recited differing from Articles.]—A marriage settlement recited that upon the treaty for the intended marriage it was agreed, in order to make a suitable provision for the intended wife and the issue of the marriage, that the estate should be settled in manner thereinafter mentioned. There were ante-nuptial articles, under which, according to their true construction, portions were to be raised for a daughter or daughters, under the general designation of younger children. The settlement did not expressly refer to those articles, but there was evidence to show that there was no other agreement between the contracting parties. By the settlement, the estates were limited strictly

to the male issue of the marriage, subject to a term, the trusts of which were, "in case there should be issue of the intended marriage an eldest or only son, and also one or more other child or children," to raise a portion or portions for such child or children, of different amounts, according to their number, corresponding with the amounts and numbers of the younger children mentioned in the articles. There was issue of the marriage but one child, a daughter: —Held, that the trusts of the term should be reformed, so as to provide for her a portion of the amount stated in the articles for one younger child. *King* v. *King-Harman*, Ir. R. 7 Eq. 446.

Where Settlement never Executed.]—Plaintiffs file a bill to compel the execution of a settlement, which was prepared but never executed, by reason of the death of one of the parties. On the hearing it appeared that the settlement so prepared differed materially from the articles on which it was founded, to the prejudice of the plaintiffs. The court will direct a settlement according to the articles, notwithstanding the plaintiffs do not pray relief so beneficial to themselves. *Durant* v. *Durant*, 1 Cox, 58.

Construction.]—Where the articles and the indenture of settlement bear date on the same day, as in this case, they must be considered as one and the same act, and a different construction ought not to be put upon them. *Heneage* v. *Hunloke*, 2 Atk. 457.

Articles are considered in a court of equity as minutes only, which the settlement may explain more at large. *Blandford* v. *Marlborough*, 2 Atk. 545.

No difference between articles unexecuted in toto or in part; for the ground the court goes upon is, what is covenanted to be done is considered as done. *Ib.*

Where Articles before, Settlement after, Marriage.]—Settlement, after marriage, purporting to be pursuant to articles before, but differing, not supported. But, secus, if both before marriage, except where the settlement purports to be pursuant to such articles. *Legg* v. *Goldwire*, Cas. t. Talbot, 20.

—— **Contract Evidenced by Recital only not Enforced.**]—A post-nuptial settlement of money recited an ante-nuptial contract. By the settlement, those children who survived their parents alone took, but by the contract, as recited, all the children took vested interests at their birth. The recital being the only proof of the contract: —Held, that the court must act on the settlement. *Mignan* v. *Parry*, 31 Beav. 211; 31 L. J., Ch. 819; 8 Jur. (N.S.) 364; 7 L. T. 88; 10 W. R. 812.

—— **Variation by Agreement not Allowed.**]—A lady possessed of about 12,000*l.* consols, being engaged to be married, a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be no children and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement in execution of the articles, was prepared, but objected to by the husband, and as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that if there should be no child of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained no alternative limitation in the events of there being no child, and of the wife surviving the husband. The husband brought no property into settlement. In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:—Held, that the transfer of the fund to the trustees was not a reduction into possession by the husband. *Cogan* v. *Duffield*, 45 L. J., Ch. 307; 2 Ch. D. 44; 34 L. T. 593; 24 W. R. 905—C. A.

Held, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, she was entitled to the fund. *Ib.*

Held, also, that she was entitled to the arrears of income due at the death of the husband. *Ib.*

Post-nuptial Settlement Rectified in Accordance with Unexecuted Ante-nuptial Settlement.]—An order was, in 1855, on the application of the father as next friend, made, directing a trustee to pay certain dividends to the father for the maintenance and education of an infant daughter, during her minority, or while unmarried. Previously to the marriage of the daughter, the draft of a proposed settlement, which contained a covenant by the intended husband to settle after-acquired property of the wife, but no provision as to the children by a future husband, was sent to the intended husband, and returned by him without any objection thereto. The marriage took place before the draft was ingrossed. A post-nuptial settlement, which contained no covenant to settle after-acquired property, and no provision for children of the wife by a future husband, was executed. Trustees subsequently paid funds of the wife, who was still a minor, into court. The husband and wife presented a petition for the transfer of the funds to them, and certain inquiries were directed. The chief clerk certified that the settlement ought to contain both provisions. The court directed only that the after-acquired property of the wife should be made subject to the trusts of the settlement. *Hoare's Trusts, In re*, 9 Jur. (N.S.) 167; 1 N. R. 161; 7 L. T. 523; 11 W. R. 181.

Voluntary Agreement to Re-settle—Mistake in Limitation—Rights of Unborn Issue.]—A. being seised of an estate for life with remainder in tail to B. in several denominations of lands, entered into a voluntary agreement with B. to re-settle the lands, and that A. should be made tenant for life in one portion X. as of his former estate, with remainder in tail therein to B. The settle-

ment being prepared, supposed to embody this agreement, and executed, the lands of X. were thereby by mistake limited to B. for life only, with remainder to his heirs male in strict settlement. The mistake being some time afterwards discovered after the death of A., and before the birth of any issue of B., on a bill filed by B. to have the mistake corrected:—Held, that the court could not bind the rights of the unborn issue so as to divest them of any legal estates thereunder, or amend or correct the deed itself, but declare only the rights of the parties according to their original intention and contract. *Richards* v. *Fitzgerald*, 9 Ir. Eq. R. 486.

What amounts to a Contract — Proposal Approved by Court—Variation of Terms bonâ fide.]—On the proposed marriage of the infant daughter of one who was non compos mentis, a petition was presented to the lord chancellor, under the stat. 4 Geo. 4, c. 76, s. 17, for his consent, in order to obtain a licence. The petition was referred to the master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the lord chancellor, but shortly afterwards married, under the act 6 & 7 Will. 4, c. 85, without license. The settlement mentioned in the affidavit was not made, the parties having entered into articles for a different settlement:—Held, that the proposal laid before the master amounted to a contract, which, in the absence of any settlement properly substituted for it, the court would enforce. Semble, it was not incompetent to the parties before the marriage to vary bonâ fide the terms of the contract, notwithstanding it had been approved by the court. *Cook* v. *Fryer*, 1 Hare, 498; 11 L. J., Ch. 284; 6 Jur. 479.

3. Rectification of Voluntary Settlements.

Principles.]—In legal conveyances, if defective, the court will not assist against the heir, unless there is a meritorious consideration. *Wright* v. *Englefield*, Ambl. 474; 2 Eden, 239.

Voluntary conveyances seldom relieved in equity where defective in form at law. *Bonham* v. *Newcomb*, 2 Vent. 365.

Omission.]—Omission in a voluntary conveyance not supplied in equity. *Lee* v. *Henley*, 1 Vern. 37.

—— **Intention of Settlor.**]—A. B. being desirous of voluntarily settling property on the female descendants then in existence of C. D., by deed reciting this desire, and that certain persons therein named were the only descendants then in life of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons named; he afterwards discovered that there were other descendants in existence of C. D., who had been omitted, and to remedy the omission he appointed a part of the fund to an object of the power, upon his executing bonds, for the payment to the persons newly discovered of the amount when received:—Held, that the appointment was void, and that the court would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor. *Lee* v. *Fernie*, 1 Beav. 483.

Deed Executed in Ignorance of Legal Effect.]—The circumstances under which a voluntary settlement may be rectified, considered. *Lister* v. *Hodgson*, L. R. 4 Eq. 30; 15 W. R. 547.

Where a sum of money was, without valuable consideration, placed in the hands of a trustee, to be held upon certain trusts then declared; and it was agreed that the transaction should be ratified and completed by the execution of a deed, and a deed was afterwards prepared and executed, which was wholly inconsistent with the trusts declared by parol; the court ordered such deed to be delivered up and cancelled, and the money repaid to the settlor, who had executed the deed in ignorance of its legal effect. *Ib.*

Rights of Volunteer as against Settlor.]—A volunteer, under a settlement declaring the trusts of property placed in the hands of trustees, is entitled to file a bill to have an error rectified, even though the effect of the error should be to carry back the fund to the original settlor. *Thompson* v. *Whitmore*, 1 J. & H. 268; 3 L. T. 845; 9 W. R. 297.

The court will not rectify a voluntary deed, so as to carry out the alleged intentions of the parties, unless all the parties consent; if any object, the deed must wholly stand or wholly fall. *Broun* v. *Kennedy*, 33 Beav. 133; 33 L. J., Ch. 71; 9 Jur. (N.S.) 1163; 9 L. T. 302; 12 W. R. 224.

A voluntary deed cannot be reformed in equity, as against the grantor. *Ib.*

If a voluntary deed fails to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor. *Phillipson* v. *Kerry*, 32 Beav. 628.

Power of Revocation supplied.]—A father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and son executed a deed of conveyance to the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father and son had each a wife and a large family, and each declared that had he been aware of the effect of the deed he would not have executed it:—Held, that under the circumstances the deed must be rectified by adding a power of revocation, and with the plaintiff's consent it was directed that a new settlement, with all proper powers, should be made under the direction of the court. *Welman* v. *Welman*, 49 L. J., Ch. 736; 15 Ch. D. 570; 43 L. T. 145.

Held, also, that the settlement was voluntary as regarded all persons other than the plaintiffs. *Ib.*

4. Evidence and Onus of Proof.

Evidence must be clear as to Intention and Mistake.]—The court will not reform a settlement, on the ground of mistake, unless the evidence as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory. Whether the court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, quære. *Breadalbane* (*Marquis*) v. *Chandos* (*Marquis*), 2 Myl. & Cr. 711 ; 7 L. J., Ch. 28.

In order to enable the court of chancery to rectify a settlement, it must be proved that it was drawn in its existing form by a mistake common to all the parties to it. If the evidence be such as to make it doubtful whether this was so or not, the utmost that the court will do is to direct further inquiry. It is not enough that the deed is contrary to the clear intention of the settlor ; if any irrevocable changes of condition (as marriage) have taken place with reference to the deed, it must be shown that the mistake extended to them also. *Rooke* v. *Kensington* (*Lord*), 2 K. & J. 753 ; 25 L. J., Ch. 795 ; 2 Jur. (N.S.) 755 ; 4 W. R. 829.

Onus of Proof on Claimant.]—A post-nuptial settlement, after reciting ante-nuptial articles, and for the purpose of completing and making the same effectual, proceeded to declare the trusts of the premises, which were materially different from those contained in the articles themselves ; in giving a life estate to the father, and providing that only the children who survived the father and mother, or died in their lifetime leaving issue, should take vested interests, while by the articles the children took vested interests upon birth. There was no evidence of the contents of the articles, except so far as appeared by the recital in the settlement, which did not purport to be verbatim. Upon a bill filed after the death of the father and mother :—Held, that the onus lay upon those who claimed under the articles to show that the provisions were contrary to those of the post-nuptial settlement, and that the evidence afforded by the recital itself being insufficient for that purpose, the provisions of the deed must be adopted. *Mignan* v. *Parry*, 31 Beav. 211 ; 31 L. J., Ch. 819 ; 8 Jur. (N.S.) 634 ; 7 L. T. 88 ; 10 W. R. 812.

Onus shifted on to Defendant as Trustee.]—In a marriage settlement, the property of the wife was conveyed and assigned in trust for the wife for life for her separate use, remainder to the husband for his life, remainder to the children of the marriage, and in default of issue of the marriage to the brother of the wife and his children. After the marriage the husband and wife filed their bill, charging that the brother, who was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife in default of issue of the marriage, and praying that the settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it ; but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the ingrossment ; and the answer of the brother stated that the power having been noticed by him when the ingrossment was read over to him, he objected to it as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out : the court held that it was the duty of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point, and that relief might be given in the suit subject to the question, whether the wife knew, when she executed the settlement, that it did not contain that power. *Harbidge* v. *Wogan*, 5 Hare, 258 ; 15 L. J., Ch. 281 ; 10 Jur. 703.

—— **Where Re-settlement Varying Existing Limitations.**]—A. B., a tenant in tail subject to an existing life estate, borrowed money on mortgage, and the tenant for life joined in order to bar the entail, and he covenanted to pay the interest during his life. By the same deed, the equity of redemption was re-settled on A. B. for life, with remainder to his issue in tail, with limitations over. The court, ten years afterwards, set aside the re-settlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations. *Meadows* v. *Meadows*, 16 Beav. 401.

What Evidence Sufficient—Letters, Memorandum and Conversations—Draft Lost.]—Where a marriage settlement, made by the husband's father, was defective on the face of it, in omitting any limitation after the life estate of the husband and a jointure to the wife, whereby the reversion would descend to X., the elder brother of the husband, a correction of the settlement was refused as against a judgment creditor of X., though sought as soon as the omission was discovered, the evidence of the intended limitations consisting of a letter and memorandum from the lady's father, and conversations with the settlor after the date of the settlement, the draft being lost, and the solicitor who prepared it being unable to account for the omission. *Milner* v. *Milner*, 8 Ir. Eq. R. 488.

—— **Letters Accidentally Lost—Substance Established.**]—A pre-nuptial agreement to settle property on a wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and an inevitable accident, and if the existence and substance of the letters can be clearly established by the evidence. *Gilchrist* v. *Herbert*, 26 L. T. 381 ; 20 W. R. 348.

—— **Parol Evidence only.**]—A court of equity will reform a settlement upon parol evidence alone, after a long lapse of time, if on due deliberation it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R., Ir. 119.

By a post-nuptial settlement executed in 1841, a fund to which the wife became entitled after

the marriage, and payable prior to the date of the settlement, was assigned to a sole trustee in trust for the husband and wife for life, and, after their decease, in trust for the children of the marriage; the principal of the fund was, however, paid over to the husband by the trustee, under the impression that it was not included in the settlement. In a suit by the husband and wife and the trustee, the court refused to reform the deed by excluding the fund from its operation, on their uncorroborated parol evidence, there being nothing repugnant, inconsistent, or improbable on the face of the settlement itself, leading the court to believe that the words which it was sought to expunge had been erroneously introduced into the instrument. *S. C.*, Ir. R. 11 Eq. 130.

A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry, and its subdenominations, but the operative part of the deed purporting to convey by name, as a separate denomination, the lands of Killahan, which it was proved were reported a subdenomination of Ballyhenry:—Held, that there was not sufficient evidence of mistake to justify the court in striking Killahan out of the settlement. *Alexander* v. *Crosbie*, Ll. & G. t. Sugd. 145.

Semble, the court will perform a settlement where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach. *Ib.*, 150.

No written instructions were given for the preparation of the marriage settlement, and it was afterwards sought to rectify an alleged error in it. Upon the evidence of the husband and the solicitor who had prepared it, as to the intention of the parties to it, and the trustees of the settlement not opposing, on a bill filed by the sole child (an infant) of the marriage, and his father, as next friend:—Held, that the rectification might be made. *Tomlinson* v. *Leigh*, 11 Jur. (N.S.) 962; 13 L. T. 516; 14 W. R. 121.

—— **Parol Evidence Admitted to make out a Case.**]—Parol evidence is admissible to make out a case for the rectification of a settlement, but the jurisdiction in such cases is to be cautiously exercised. *Barrow* v. *Barrow*, 18 Beav. 529. Varied on appeal, 24 L. J., Ch. 267; 3 Eq. R. 149; 3 W. R. 122—L.JJ.

The erroneous belief of both the husband and wife, on their marriage, that a particular property already stood settled, is no ground for rectifying a settlement so as to make it include it. *Ib.*

Parol evidence admitted to show mistake in settlement; also, of loss of letter, and then evidence of contents. *Noble* v. *Noble*, 2 Moll. 403.

Parol evidence admitted to prove mistake by solicitor in settlement. *Rogers* v. *Earl*, Dick. 294.

The draft of an ante-nuptial settlement conferring considerable benefits on the husband in the property of the wife, to which it chiefly related, did not contain a covenant by the husband as to an annuity of 250*l.* (given to the wife if she survived the husband); but on the draft was endorsed a memorandum, in the handwriting of the husband, stating that the solicitor who prepared that draft had omitted to insert a clause, subjecting whatever property he (the husband) might die possessed of to a yearly rentcharge of 250*l.*, for the benefit of his intended wife, during her life, exclusive of such other advantage as she might be entitled to by the foregoing deed. On the death of the husband a bill was filed (by a party claiming under a mortgage of both estates, and of a date puisne to the settlement), praying that the covenant might be reformed in conformity with the memorandum. The widow, in answer, resisted the reformation, and denied that it ever was her understanding of the marriage contract, that the operation of the covenant was to be limited to such property only as the husband might die possessed of. The parol evidence of three trustees of the settlement was to the same effect: one of them deposed that to him, both at and after the marriage, the husband had stated his intention that the estates which he then possessed, or should thereafter acquire, should be subject to the annuity of the 250*l.*:—Held, that the bill should be dismissed without costs, and that a declaration should be inserted in a decree, that the annuity was well charged upon the estates of which the husband was seised both at and after marriage. *White* v. *Anderson*, 1 Ir. Ch. R. 419.

—— **Evidence of Interested Party Uncorroborated.**]—There is no absolute rule that in no case can a decree for the rectification of a settlement be made upon the uncorroborated evidence of an interested party; but it is the duty of the court to act upon such evidence with extreme caution. *Lovesy* v. *Smith*, 49 L. J., Ch. 809; 15 Ch. D. 655; 43 L. T. 240; 28 W. R. 979.

An intended husband told his intended wife that he wished every farthing of her property to be settled on her. She then expressed herself willing that he should have a life interest if he survived her, upon which he said he would have counsel employed. Nothing, however, was done until the evening before the marriage, when the intended husband, who was a retired solicitor, began to prepare the settlement of all the lady's property and a small portion of his own, and brought it to her at five o'clock on the morning of the wedding. From her evidence it appeared that he did not explain the settlement to her, nor was any other solicitor employed in her behalf. There were several mistakes in the deed, and it was evident that it had been hastily prepared. The husband having died, the wife for the first time discovered that the settlement gave a moiety of her property after her death to her husband absolutely. The wife then commenced an action against the trustees of the settlement and one of the several next of kin of the husband for the rectification of the settlement by omitting the words giving the moiety to the husband:—Held, that the court had power to decide the question between the parties then before the court. *Ib.*

Held, also, that it made no difference in the wife's right to the rectification of the settlement of her own property that she claimed the benefit of the settlement with regard to her husband's property; that under the circumstances the burden of proof that the settlement was good rested on those who maintained it; and that upon the evidence of the wife alone, it being supported by the probabilities of the case, the rectification asked for must be decreed. The order was suspended for a fortnight in order that the next of kin of the husband, other than the one who was party to the action, might have an opportunity of contesting the judgment. *Ib.*

By a marriage settlement the property of the

intended wife was settled upon the wife for life for her separate use without power of anticipation, and after death as she should, notwithstanding coverture, by will or codicil appoint, and in default of appointment for her next of kin. After the death of the husband, and upon the unsupported testimony of the wife that it was only intended to protect the trust property during her coverture, and not to deprive her of the control of it after the termination of the coverture:—Held, that the settlement ought to be rectified so that the property should be held in trust for the wife, her executors, administrators, and assigns absolutely. *Cook* v. *Fearn*, 48 L. J., Ch. 63; 39 L. T. 348; 27 W. R. 212.

By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention:—Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely; and declaration to that effect was ordered to be endorsed on the settlement. *Smith* v. *Iliffe*, 44 L. J., Ch. 755; L. R. 20 Eq. 666; 33 L. T. 200; 23 W. R. 851.

The court will order rectification of a deed on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. *Hanley* v. *Pearson*, 13 Ch. D. 545; 41 L. T. 673.

By a post-nuptial settlement real estate belonging to the wife was conveyed unto A. and his heirs "to the use of" A., his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use; and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns of the wife for ever; but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in Shelley's case, so as to give her, as was intended in the events that had happened, an absolute estate in fee:—Held, that a conveyance of the outstanding legal estate was unnecessary. *Ib.*

Form of order for rectification. *Ib.*

Smith v. *Iliffe* (supra) discussed. *Ib.*

The plaintiff's case was supported by an affidavit by herself alone:—Held, that the uncontradicted affidavit was sufficient, and ordered that the settlement be rectified so as to vest the legal estate in fee simple to the plaintiff. *Ib.*

5. On Divorce or Dissolution of Marriage.

Jurisdiction in Equity on Dissolution of Marriage.]—A court of equity has no jurisdiction to relieve a husband from the stipulations in his marriage settlement, upon a decree of dissolution of marriage being pronounced by the divorce court. *Evans* v. *Carrington*, 1 Johns. & H. 598; 29 L. J., Ch. 330; 6 Jur. (N.S.) 268; 1 L. T. 229; 8 W. R. 113.

Jurisdiction of Divorce Court—Adultery of Wife.]—In decreeing a dissolution of marriage, on the ground of the wife's adultery, the court has no power, under 20 & 21 Vict. c. 85, to alter a settlement made on the marriage. *Norris* v. *Norris and Cyles*. 1 Sw. & Tr. 174; 27 L. J., Mat. 72; 6 W. R. 640.

—— **None unless for Benefit of Children or Parents.**]—The court has no power to vary marriage settlements, unless it is for the benefit of the children of the marriage or of their parents. *Sykes* v. *Sykes and Smith*, 39 L. J., Mat. 52; L. R. 2 P. 163; 23 L. T. 239; 18 W. R. 984.

A petitioner's father having covenanted to pay the respondent, after the petitioner's death an annuity of 100*l.* during the joint lives of himself and the respondent, an order was made that after the petitioner's death the annuity should be applied for the benefit of the only child of the marriage; but the court held that it had no power to deprive the wife of the annuity in the event of her surviving the child. *Ib.*

—— **Power to Deprive Children of their Interests.**]—The court of divorce has no power to vary a marriage settlement so as to deprive the children of the marriage of all interest which they would take under the settlement. *Crisp* v. *Crisp*, 42 L. J., Mat. 13; L. R. 2 P. 426; 27 L. T. 428; 21 W. R. 79.

After a decree of dissolution the parties concurred in asking for an order under 22 & 23 Vict. c. 61, s. 5, which would extinguish the interest of an infant, the issue of the marriage, under a settlement, proposing in lieu that a sum of money should be invested in such a manner as would give the child an interest probably equal to that taken under the settlement. The court refused to make the order. *Ib.*

—— **Over Deeds Connected with Settlement.**]—All deeds whereby property is settled upon a woman in her character as wife, and to be paid to her while she continues a wife, come within the scope of 22 & 23 Vict. c. 61, s. 5, and the court has power to deal with them. *Worsley* v. *Worsley and Wignall*, 38 L. J., Mat. 43; L. R. 1 P. 648; 20 L. T. 546; 17 W. R. 743.

—— **Covenant to Pay Annuity.**]—The court has power to vary a post-nuptial settlement contained in a deed of separation by reducing the amount of an annuity which the husband has covenanted to pay. *Jump* v. *Jump*, 52 L. J., P. 71; 8 P. D. 159; 31 W. R. 956.

—— **Over Powers of Appointment.**]—The court of divorce made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced, on the ground of her adultery, to pay a moiety of the income of such property for the maintenance and education of the children. The court cannot vary a power of appointment vested in a guilty wife. *Seatle* v. *Seatle*, 4 Sw. & Tr. 230; 30 L. J., Mat. 216.

Under a post-nuptial settlement a power was given to the wife to appoint a life interest in the real and personal estate comprised in the settle-

ment in favour of any future husband. There was one child issue of the marriage, which was dissolved by reason of the wife's adultery:—Held, that the court had power, under 22 & 23 Vict. c. 61, s. 5, to deal with the power of appointment possessed by the wife, and to postpone the interests of the second husband to those of the child of the first marriage under the settlement. *Evered* v. *Evered and Graham*, 43 L. J., Mat. 86; 31 L. T. 101; 22 W. R. 845.

The court refused to carry out alterations in the settlement agreed upon between the parties, whose marriage had been dissolved, so as to extinguish the power of appointment given to the respondent by the settlement, or to affect the appointment of new trustees. *Davies* v. *Davies and M'Carthy*, 37 L. J., Mat. 17.

—— **Power of Appointment of New Trustees.**]—The judge ordinary has no power, under 22 & 23 Vict. c. 61, s. 5, to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage, the dissolution of which it has decreed. *Hope* v. *Hope*, 44 L. J., Mat. 31; L. R. 3 P. 226; 31 L. T. 592; 23 W. R. 110.

The parties had been divorced. Both husband and wife had brought funds into settlement. Upon a motion to confirm an arrangement, entered into by both parties, making a provision for the wife and giving the husband the sole power of appointing new trustees, the court refused to deprive the wife of her right to join in the appointment. *Ib.*

—— **Over Dividend Payable before Date of Order.**]—The court has no authority to alter the destination of dividends due and payable before the date of its order. *St. Paul* v. *St. Paul and Farquhar*, 39 L. J., Mat. 50; L. R. 2 P. 23; 23 L. T. 196; 18 W. R. 1007.

—— **Judicial Discretion.**]—The power of the court to make orders with reference to the application of settled property, after the dissolution of a marriage, is a discretionary power of the most absolute and unfettered kind, but to be exercised judicially with reference to all the circumstances of the case. The court has the power, and it is the duty of the court, to take into consideration the guilt of either party, and the court may, if it thinks fit, exclude the guilty party wholly or partially from the benefit of any provision. *Wigney* v. *Wigney*, 51 L. J., P. 60; 7 P. D. 177; 46 L. T. 441; 30 W. R. 722—C. A.

What Variations will be made—Generally.]—Under the will of her father a daughter had a life interest to her separate use in property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income or any part, should either voluntarily or involuntarily be aliened or incumbered, or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, and such annual income was to be applied for the benefit of her children, at the discretion of the trustees. On a decree dissolving the marriage, the court ordered a settlement to be made out of her life income derived under her father's will in favour of her husband and his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to pay to her in case the substituted trust came into operation by reason of such order. Such a possibility of income is not property in reversion within the meaning of the statutes. *Milne* v. *Milne and Fowler*, 40 L. J., Mat. 67; L. R. 2 P. 295; 25 L. T. 274; 19 W. R. 1118.

In a suit for dissolution of marriage by a wife, a decree absolute having been made, application was made to the court to vary the settlement executed on the marriage of the parties:—Held, that the object of the court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. *Maudslay* v. *Maudslay*, 47 L. J., P. 26; 2 P. D. 256; 38 L. T. 323.

It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except as far as is inevitable from their remaining in the custody of their mother. *Ib.*

The court, in altering marriage settlements, will take into consideration the fortune of the wife, the ability of the husband, and the conduct of the parties. *Chetwynd* v. *Chetwynd*, 35 L. J., Mat. 21; L. R. 1 P. 39; 11 Jur. (N.S.) 958; 13 L. T. 474; 14 W. R. 184. S. P., *Wigney* v. *Wigney*, supra.

—— **After Divorce at Suit of Husband.**]—The court will make no order respecting settled property after dissolution of marriage by reason of the wife's adultery, to deprive the husband of any benefit derived from the settlement. *Thompson* v. *Thompson and Barras*, 2 Sw. & Tr. 649; 32 L. J., Mat. 39; 9 Jur. (N.S.) 26; 7 L. T. 396; 11 W. R. 193.

Where a marriage was dissolved by reason of the adultery of the wife, the court ordered a certain proportion of the income derived from the property brought into settlement by her to be applied for the benefit of the husband and child, and in determining this proportion took into account the husband's income, and the wife's total income from the settled property, and from other sums directed by the will of her mother to be settled on like trusts. *March* v. *March and Palumbo*, 36 L. J., Mat. 28; L. R. 1 P. 440; 16 L. T. 366; 15 W. R. 799.

Where the court is moved to exercise its discretion under 22 & 23 Vict. c. 61, s. 5, the relative amounts contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. But as these elements are not capable of exact expression in figures, the result must be a general one, and vary with the details of each case. *Ib.*

The court has no power to order any part of the property of a guilty wife to be settled on her; but the court, by refusing to make any order with regard to a part, leaves it in her possession. *Bacon* v. *Bacon and Bacon*, 2 Sw. & Tr. 86; 29 L. J., Mat. 125; 2 L. T. 438; 8 W. R. 552.

In making arrangements with regard to a wife's property, the court will take into consideration the costs with which she will be burdened in defending a suit for a divorce, for which her husband is not strictly liable. *Ib.*

On a decree nisi for dissolution of marriage, on the ground of the adultery of the wife, who, on her marriage, had a fortune of 1,678*l.*, which

was not settled, but was received by the husband, the court ordered that he should settle 1,000*l.* upon trust; that the interest should be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing, the fund should be held in trust for the children of the marriage in equal shares, and that 1,000*l.* damages awarded against the co-respondent should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made. *Bent* v. *Bent and Footman*, 30 L. J., Mat. 175; 5 L. T. 139.

The wife brought 1,300*l.* a year into settlement. The husband settled nothing, but he covenanted to make an appointment in his wife's favour in respect of property in which he had a prospective interest. His own income was about 100*l.* a year, and there was one child of the marriage. Before the adultery which led to the dissolution of the marriage, the parties had executed a deed of separation, under which the wife had agreed to allow him 100*l.* a year out of the settled property. The court ordered a variation of the settlement, the husband to receive out of the settled property 300*l.* a year for his life, and 200*l.* a year for the maintenance of the child till of age, the 200*l.* a year to be paid to the child after attaining twenty-one, and the husband to be relieved from his covenant. *Benyon* v. *Benyon and O'Callaghan*, 45 L. J., P. 93; 1 P. D. 447; 24 W. R. 950.

By a post-nuptial settlement, executed in 1861, property belonging to the wife was assigned to trustees in trust, to pay the interest and annual proceeds to her for her separate use. Subsequently, in 1869, a deed of separation was entered into between the parties with the same trustees as those of the post-nuptial settlement, and by this deed the husband covenanted to pay his wife an annuity for her life. The marriage was dissolved in 1871, by reason of her adultery, and the husband afterwards applied to the court to vary the deed of separation, so as to relieve him from the payment of the annuity under the deed of separation. The court ordered that whenever any money should be payable to the wife under the deed of separation, the trustees should, out of the moneys in their hands payable to her under the post-nuptial settlement, pay and apply a sum equal in amount upon such and the same trusts as would be applicable thereto in case she were dead, and had died in the lifetime of the husband. *Bullock* v. *Bullock and Strong*, 41 L. J., Mat. 83; L. R. 2 P. 389; 27 L. T. 247.

On the marriage of the parties, the father of the wife brought into settlement 3,000*l.*, in which the first life-interest was given to her. Her conduct was bad, and after her marriage had been dissolved, she intermarried with the co-respondent, an officer in the army. The court ordered the total income derived from the fund in settlement to be applied, during her lifetime, to the maintenance of the three children of the marriage. *St. Paul* v. *St. Paul and Farquhar*, 39 L. J., Mat. 50; L. R. 2 P. 93; 23 L. T. 196; 18 W. R. 1007.

—— **Costs—Guilty Wife—Property acquired after Decree Nisi.**]—A wife, after a decree nisi of dissolution of marriage on the ground of adultery, became entitled to 500*l.*, the only property she possessed. The court refused to order that a part of this should be applied to the repayment of costs incurred by the husband, although she had been guilty of gross misconduct, and had increased the costs of the suit by an unfounded countercharge against the husband. *Carstairs* v. *Carstairs, Billson and Dickenson*, 3 Sw. & Tr. 538; 33 L. J., Mat. 170; 10 L. T. 696; 12 W. R. 1015.

—— **Payment of Income to Husband.**]—A sum of money, the wife's fortune, had been settled on marriage to the separate use of the wife for life. A decree of divorce having been pronounced against her at the suit of the husband, the judge ordinary made an order that the trustees of the settlement should stand possessed of the fund, in trust for the person who, under the settlement, would have been entitled were the wife dead. The fund being in court, the husband, as the person so next entitled, applied for an order for the payment of the income to him:—Held, that the court of divorce had jurisdiction, and the income was ordered to be paid to the husband. *Pratt* v. *Jenner*, *Jenner*, *Ex parte*, 35 L. J., Ch. 682; L. R. 1 Ch. 493; 12 Jur. (N.S.) 557; 15 L. T. 183; 14 W. R. 852.

—— **After Divorce at Suit of Wife.**]—In the settlement made on the marriage of the parties, power was given to the trustees, in the event of the husband (who took the first life interest in the property) becoming bankrupt, to apply, as they in their absolute and uncontrolled discretion might think fit, the income of the trust funds or any part, "for the maintenance and personal support of the husband and his then present or any future wife and child or children, and other issue, by his then present or any future wife, or any one or more of such objects to the exclusion of the others." The husband became bankrupt in 1866, and in April, 1872, the marriage was dissolved on the petition of the wife. The fund brought into settlement came from the husband's father, and yielded an income of 312*l.* per annum; and there were other funds out of which, under his father's will, the husband was entitled to an income of about 300*l.* a year. For some time before the dissolution of the marriage, and ever since, until March, 1877, the trustees paid to the wife, who had the custody of the five children, issue of the marriage, the net income of the settled property. In April, 1877, proceedings were commenced in the chancery division by the husband, on behalf of his infant son, for an administration of the trusts of the settlement, and the trustees thereupon declined to exercise their discretionary power under the settlement by payment of the income thereunder. The wife filed, in consequence, in June, 1877, a petition for a variation of the provisions of the settlement. The court made an order that the trustees, during her life and so long as she should remain unmarried, and the children of the marriage remain under age, pay to her the whole income of the settled property, and that as each of the children attained the age of twenty-one, a sum of 20*l.* a year be paid to such child during the life of the mother. *Marsh* v. *Marsh*, 39 L. T. 107; 26 W. R. 466. Affirmed, 47 L. J., P. 78.

Where a wife succeeds in her suit for dissolution of marriage against the husband, by reason of his adultery and cruelty, and he takes an interest in the income of the wife's money under settlement, the court will direct the application of such interest in favour of the mother or

the child. *Boynton* v. *Boynton*, 2 Sw. & Tr. 275; 30 L. J., Mat. 156; 4 L. T. 258; 9 W. R. 620.

By settlements before and after the marriage, 724*l.* consols, the property of the husband, and 700*l.*, and also some leaseholds, the property of the wife's father, were settled upon the wife for life, and after her death on the husband for life, and after the death of the survivor, upon the children of the marriage. The court, after a decree absolute for dissolution of marriage at the suit of the wife, made an order that the trustees of the settlements should deal with the proceeds of the property which came from the wife as if the husband were dead at the date of the decree absolute, but as to the 724*l.* settled by the husband, refused to alter the settlement. *Johnson* v. *Johnson*, 31 L. J., Mat. 29.

A settlement by a wife of her own property to her separate use after her marriage was, after a final decree dissolving the marriage, made on her petition, set aside, and the wife declared to be absolutely entitled. *Jessop* v. *Blake*, 8 Jur. (N.S.) 537; 6 L. T. 454; 10 W. R. 643.

Property was brought into a marriage settlement by the wife only, but a first life interest in three-eighths of it was given to the husband. She obtained a decree nisi for the dissolution of the marriage, but during the hearing of her suit, and before the decree nisi in it had in fact been pronounced, the respondent had given a charge on his life interest to his solicitors for the amount of the costs incurred in defending the suit:—Held, that as at the time when such charge had been so given by him it had been uncertain whether the decree nisi would have been granted against him, the court, in an application to vary the settlement by extinguishing his life interest under it, could not interfere with the mortgage so executed by him in favour of his solicitors. *Wigney* v. *Wigney*, 51 L. J., P. 84; 7 P. D. 228; 47 L. T. 129; 31 W. R. 140.

—— **Extinguishing Husband's Interests—Dum sola et casta clause not inserted.**]—A marriage having been dissolved on the petition of the wife, the court varied the settlements by extinguishing the husband's interest in the wife's fortune, and declined to make her enjoyment of the income of the settled property dependent on her living chaste and unmarried. *Gladstone* v. *Gladstone*, 45 L. J., P. 82; 1 P. D. 444; 35 L. T. 380; 24 W. R. 739.

—— **Injunction against Advancement to Children.**]—A divorced wife who had obtained an order for alimony, brought an action against her former husband and the trustees of a settlement under which he had a life interest with remainder to his children by a previous marriage, and moved in the action for a receiver and an injunction restraining him from consenting to any exercise of the power of advancement:—Held, that she was entitled to this relief, as the order for alimony constituted her a judgment creditor of the husband, and the rights of the children could not be regarded. *Oliver* v. *Lowther*, 42 L. T. 47; 28 W. R. 381.

—— **In Favour of Children.**]—On a decree of dissolution by reason of a wife's adultery, the court directed two-thirds of the bulk of property to which she was entitled under certain trusts to be settled on the children immediately, and the remaining third after her death or re-marriage. *Bacon* v. *Bacon and Bacon*, 2 Sw. & Tr. 86; 29 L. J., Mat. 125; 2 L. T. 438; 8 W. R. 552.

The court does not exhaust the power derived under 22 & 23 Vict. c. 61, s. 5, by making an order with reference to the application of the settled property either for the benefit of the children of the marriage or of their respective parents, as the case may be, but may make the order either for one or both, as shall seem fit. *March* v. *March and Palumbo*, 36 L. J., Mat. 65; L. R. 1 P. 440; 16 L. T. 366; 15 W. R. 799.

When an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody, and the fact that an order does not give such a direction is no ground of appeal, as the order would be so framed originally, if application for that purpose was made, when it was obtained. *Ib.*

A wife was entitled to the interest of 4,000*l.*, vested in trustees for her life, with a power of appointment amongst her children. In a suit for judicial separation on the ground of her adultery, the adultery having been proved, the court ordered that the trustees of the wife should pay over a moiety of her income to trustees named by the husband, to be applied by the latter to the maintenance and education of the children of the marriage. *Seatle* v. *Seatle*, 30 L. J., Mat. 216.

By a marriage settlement property was settled upon a husband for life, then upon the wife for life, then upon the children of the marriage. The marriage having been dissolved on the ground of the adultery of the wife, who continued to cohabit with the co-respondent, the court ordered that after the death of the husband the settled property should, in the event of the wife surviving the husband, be applied to the benefit of the children of the marriage, as if she were dead. *Pearce* v. *Pearce and French*, 30 L. J., Mat. 182.

The court will require full information of a husband's means when asked to vary the interest of the wife in her moneys in settlement in favour of children. *Webster* v. *Webster and Mitford*, 3 Sw. & Tr. 106; 32 L. J., Mat. 29; 9 Jur. (N.S.) 182; 7 L. T. 646; 11 W. R. 86.

Where a marriage had been dissolved by reason of the wife's adultery, and she was entitled to a life interest in about 2,900*l.* consols, her own moneys in settlement, and the husband had scarcely any income, the court ordered the trustees of the settlement to pay 20*l.* per annum out of the life income of the wife to the paternal grandfather of the only child of the marriage, a daughter, for her use and benefit. *Ib.*

Where a petitioner had entered into a covenant binding his estate with the payment of an annuity to the respondent, in the event of her surviving him, the court directed the annuity, when recovered, to be paid for the benefit of the children of the marriage. *Callwell* v. *Callwell and Kennedy*, 3 Sw. & Tr. 259.

On an application for an alteration of the settlements, the husband offered, if allowed to withdraw from settlement the moneys brought in by himself, to surrender his interest in favour of the child in the moneys settled by the wife, by reason of whose adultery the marriage was dissolved. The court refused the application, it not being satisfied that the proposed alteration would be for the benefit of the child. *Pocock* v. *Pocock and Barton*, 18 L. T. 338; 16 W. R. 712.

—— **Where there is no Issue.**]—Under 22 & 23 Vict. c. 61, s. 5, on a dissolution of marriage, the court has no power to deal with marriage settlements when there is no issue of the marriage living at the time the decree is pronounced. *Bell* v. *Bell and Anglesey (Earl)*, 1 Sw. & Tr. 565; 29 L. J., Mat. 159; 8 W. R. 178. S. P., *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; 2 L. T. 438; 8 W. R. 504; *Dempster* v. *Dempster*, 31 L. J., Mat. 113; *Bird* v. *Bird*, 35 L. J., Mat. 102; L. R. 1 P. 231; 14 L. T. 860; 14 W. R. 1023.

The court has no power to deal with marriage settlements under 22 & 23 Vict. c. 61, s. 5, where there has been issue of the marriage, unless a child is still living. *Corrance* v. *Corrance*, 37 L. J., Mat. 44; L. R. 1 P. 495; 18 L. T. 535; 16 W. R. 893.

The court has no power to deal with marriage settlements under 22 & 23 Vict. c. 61, s. 5, unless there is issue of the marriage living at the date of the order, although there may have been such issue living at the date of the decree of dissolution. *Graham* v. *Graham and Griffith*, L. R. 1 P. 711; 20 L. T. 500; 17 W. R. 628.

—— **41 Vict. c. 19, s. 3.**]—Under the powers given to the court by the above section, the court may vary marriage settlements where there are no children of the marriage. The court, under the circumstances of the case, declined to employ this later act retrospectively. *Yglesias* v. *Yglesias*, 4 P. D. 71; 40 L. T. 37; 27 W. R. 432.

An ante-nuptial settlement having been executed a decree nisi was afterwards obtained for dissolution of the marriage of the parties, and before the decree was made absolute the Matrimonial Causes Act, 1878, was passed, allowing the court, notwithstanding that there are no children of the marriage, to exercise the powers vested in it by 22 & 23 Vict. c. 61, s. 5:—Held, that the court had jurisdiction to vary the settlement though there was no issue of the marriage. *Ansdell* v. *Ansdell*, 49 L. J., P. 57; 5 P. D. 138; 43 L. T. 224; 28 W. R. 832.

—— **On Death of Petitioner.**]—A husband obtained a decree nisi for dissolution of marriage against his wife, and died before it could be made absolute. The petition prayed the court to deal with the post-nuptial marriage settlement; and the guardian of the minor children of the petitioner prayed to be allowed to intervene, for the purpose of making the decree nisi absolute, and of obtaining an order of the court in respect of the settlement:—Held, that the suit had abated by the death of the husband, and that no other party had any right to move in the matter. *Grant* v. *Grant*, 2 Sw. & Tr. 522; 31 L. J., Mat. 174; 6 L. T. 660.

The court will make an order varying the trusts of a marriage settlement on the petition of the guardian of the children of the marriage after the death of the petitioner. *Ling* v. *Ling and Croker*, 4 Sw. & Tr. 99; 34 L. J., Mat. 52; 13 L. T. 251.

A petitioner, the husband, died after a decree absolute had been made to dissolve his marriage with the respondent. He executed a will by which he excluded some of his children from participation in property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate. The court, whilst it extinguished the wife's life interest in her husband's property, refused to compel her, out of her separate income and estate, which was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children. *Smithe* v. *Smithe and Roupell*, L. R. 1 P. 587.

An executor of a deceased petitioner cannot, as such, petition for an alteration of the settlements. *Ib.*

The guardian of the minor children is the proper person to do so. *Ib.*

—— **Delay.**]—A marriage was dissolved on the wife's petition in April, 1872. The trustees under the settlement executed on the marriage paid to the wife the income to which she was entitled under the settlement until March, 1877, when, in consequence of proceedings instituted by the husband in the chancery division, they discontinued the payment. In the following June, the wife presented a petition, under 22 & 23 Vict. c. 61, s. 5, for a variation of the provisions of the settlement:—Held, that the wife had not been guilty of undue delay in presenting the petition. *Marsh* v. *Marsh*, 34 L. T. 107; 26 W. R. 466. Affirmed, 47 L. J., P. 78. See also *Benyon* v. *Benyon and O'Callaghan*, infra.

—— **After Remarriage of Wife.**]—In January a husband obtained a decree nisi for a divorce on the ground of his wife's adultery, which decree was made absolute on the 31st of July. In November he filed a petition for the variation of the marriage settlement, and in December the wife was married to the co-respondent in India, they being ignorant that any application had been made to the court:—Held, that the husband had not been guilty of undue delay, and that the remarriage of the wife did not, under the circumstances, preclude the court from ordering a variation of the settlement. *Benyon* v. *Benyon and O'Callaghan*, 45 L. J., P. 93; 1 P. D. 447; 24 W. R. 950.

—— **Respondent Abroad.**]—After a decree nisi for dissolution of marriage, the petitioner filed a petition for an order to vary a marriage settlement. Before the decree was made absolute, the respondent was served abroad with a copy of the petition, and with a notice that after the decree was made absolute the court would be moved to make the order as to the settled property. The respondent had not appeared at any stage of the proceedings:—Held, that the court had power to vary the marriage settlement in the absence of the respondent. *Lawrence* v. *Lawrence*, 3 Sw. & Tr. 207; 32 L. J., Mat. 124; 9 Jur. (N.S.) 1158; 9 L. T. 23.

—— **Judicial Separation.**]—In proceedings for a judicial separation only, the court has no power to alter settlements. *Gandy* v. *Gandy*, 51 L. J., P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673—C. A.

And see cases under HUSBAND AND WIFE.

B. RESCISSION BY COURT.

1. OF VOLUNTARY SETTLEMENTS.

Principles—Settlor in General not Relieved.]—A court of equity will not assist a vendor in defeating a prior voluntary settlement made by

himself. *Smith* v. *Garland*, 2 Mer. 123; 16 R. R. 154.

—— **Where Gift Completed.**]—A gift conclusively made to a volunteer, by means of a completed declaration of trust in his favour, is incapable of revocation by the donor. On the marriage of J. P. and B. L. P. certain sums of consols, the property of B. L. P., were settled in trust for J. P. for life, then for B. L. P. for life, then for the children of the marriage; and in default or failure of children, if J. P. should survive B. L. P., then, from his death and default or failure of children, as B. L. P. should by will appoint, or, in default of appointment, for her next of kin, under the Statute of Distributions; or, if B. L. P. should survive J. P., then, from his death and default or failure of children, for B. L. P. absolutely. No children were born of the marriage, and B. L. P. was past the age of childbearing:—Held, that notwithstanding the fact that the next of kin of B. L. P. were volunteers under the settlement, B. L. P. was not entitled to have the settled funds transferred to her, on her petition with the concurrence of her husband. *Paul* v. *Paul* (15 Ch. D. 580) not followed. *Paul* v. *Paul*, 51 L. J., Ch. 839; 20 Ch. D. 742; 47 L. T. 210; 30 W. R. 801—C. A.

—— **Effect of Delay.**]—A voluntary deed of gift cannot, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion. *Turner* v. *Collins*, 41 L. J., Ch. 558; L. R. 7 Ch. 329; 25 L. T. 779; 20 W. R. 305.

—— **Unsupported Allegations of Fraud.**]—A voluntary settlement which conveys real estate to a trustee for the settlor for life, with remainder to her nephew absolutely, will not be set aside upon unsupported allegations of fraud, undue influence, intimidation and coercion. *Toker* v. *Toker*, 31 Beav. 629; 9 Jur. (N.S.) 370. Affirmed, 3 De G. J. & S. 487; 32 L. J., Ch. 322; 8 L. T. 777.

The court refused to set aside a voluntary deed at the instance of the settlor, where it appeared that it was made solely at the instance of the settlor, and by the settlor's own solicitor, who fully explained the provisions and effect of the deed. *Ib.*

—— **Illegal Consideration not appearing on Face of Deed.**]—A court of equity will not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument. *Ayerst* v. *Jenkins*, 42 L. J., Ch. 690; L. R. 16 Eq. 275; 29 L. T. 126; 21 W. R. 878.

—— **Expectant Heir.**]—Bill by an expectant heir to set aside a post-nuptial settlement of a real estate in expectancy, to trustees for his wife for life, remainder to pay annually 500*l.* to the children, remainder to herself for life, made while he was indebted, and on the suggestion of his wife's mother. Dismissed without costs. *Shafto* v. *Adams*, 4 Giff. 492; 3 N. R. 363; 33 L. J., Ch. 287; 10 Jur. (N.S.) 121; 9 L. T. 676.

The principle upon which the court acts in discouraging mortgages, sales, and dealings with expectant heirs of reversionary interests, has no application to a settlement by an heir in favour of his wife and children. *Ib.*

—— **What Circumstances Considered.**]—Circumstances under which a voluntary deed will be set aside. *Henshall* v. *Fereday*, 29 L. T. 46; 21 W. R. 570—L.JJ.

—— **Deficiency of Wife's Portion.**]—Woman's portion falling short of husband's expectations, is not a reason for setting aside marriage agreement. *Marsh*, *Ex parte*, 1 Atk. 159.

—— **Costs in Uncontested Suit.**]—When a suit is instituted to set aside a voluntary settlement of real and personal estate, and the right to the relief asked is not contested, the court will order a re-conveyance of the property the subject of the settlement, and direct payment of the costs out of the property so settled. *Thompson* v. *Milligan*, 18 L. T. 809.

—— **Knowledge and Consent of Settlor—Independent Advice.**]—Where, in an action to obtain the cancellation or modification of a voluntary deed on the ground of undue influence and want of independent advice, the plaintiff admits that he had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the deed because he trusted his solicitor to look into those details on his behalf, he was as much bound as if he were himself a lawyer, and had drawn the deed with his own hand. *Lovell* v. *Wallis*, 50 L. T. 681.

The court will not set aside a voluntary settlement if the settlor understood and approved of its object, and it contains the usual clauses for carrying out that object; but if the settlement contains unusual clauses, it will be set aside unless it is clearly proved that the settlor understood the effect of and approved of the insertion of the unusual clauses. *Phillips* v. *Mullings*, 41 L. J., Ch. 211; L. R. 7 Ch. 244; 20 W. R. 129.

Where an action is brought by the settlor against the trustees to set aside a voluntary settlement, the court will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing; the only question being whether the settlor understood what he was doing, and its effect on his position with regard to the property. But, quære, whether this applies to cases in which there are persons claiming adversely to the settlor—Per Cotton, L.J. *Dutton* v. *Thompson*, 52 L. J., Ch. 661; 23 Ch. D. 278; 49 L. T. 109; 31 W. R. 596.

Where donor and donee were dead at the time of the institution of a suit, the court set aside a voluntary deed, on the ground that it was not fully explained to the donor. *Phillipson* v. *Kerry*, 11 W. R. 1034.

If a voluntary deed does not express the intentions of the parties, it cannot be rectified so as to carry out such intentions; but, if impeached, it must wholly stand or wholly fall. *Ib.*

A married woman living apart from her husband, by a voluntary deed appointed all her property to herself for life, with remainder to

the husband of her sister, irrevocably. She had the deed read over to her before execution, and it was pointed out to her that it was irrevocable. She never again saw the deed, and kept no copy of it, and subsequently executed a settlement and will inconsistent with it. The husband of her sister had notice of the settlement, but stood by and did not produce the deed till three months after her death :—Held, that the deed must be set aside, as it was not proved to be the well-considered act of hers. *Coutts* v. *Acworth*, 38 L. J., Ch. 694 ; L. R. 8 Eq. 558 ; 21 L. T. 224 ; 17 W. R. 1121.

A deed of settlement, whereby the settlor is delivered, bound hand and foot as to the property settled, into the power of his trustee, cannot be maintained in equity without the clearest proof that it was made at and with the request, consent, knowledge, or instance of the settlor ; and a solicitor who takes upon himself to prepare such a deed for execution by his client, without the clearest evidence of the concurrence of the latter, does so subject to all the consequences and liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client in preparing the settlement. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune, tied up the whole of his fortune and constituted himself sole trustee ; the court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore* v. *Prance*, 9 Hare, 299 ; 20 L. J., Ch. 468 ; 15 Jur. 1188.

Deed not containing whole Arrangement—Death of one Party.]—A voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death. *Hughes* v. *Seanor*, 18 W. R. 1122.

A mortgage effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld. *Ib.*

Conveyance under Erroneous Belief—Resulting Trust.]—A., having been deserted by his wife, and not having heard of her for ten years, married again ; afterwards, having discovered that she was alive, and believing himself liable to be convicted of bigamy, he executed a deed, purporting to convey his land to B. for valuable consideration. It was proved, by parol evidence, that the deed was executed on the understanding that B. would hold the land at A.'s disposal. No consideration was paid by B., and A. remained for four years in possession of the land, and partly paid off a mortgage upon it :—Held, that the transaction was not illegal, and that A. was entitled to a decree for a reconveyance of the land, the statute of frauds being excluded, both on the ground of fraud and of a resulting trust within s. 8. *Davies* v. *Otty*, 34 L. J., Ch. 252 ; 12 L. T. 789 ; 13 W. R. 484.

As against Purchaser from Donee.]—A voidable voluntary conveyance or gift cannot be set aside as against a purchaser from the donee, without repaying the price paid. *Aldborough* v. *Trye*, West, 221 ; 7 Cl. & F. 436.

—— **From Settlor.**]—In a suit for specific performance against a vendor and those claiming under a voluntary settlement made by him previously to the contract for sale, the court refused to declare that the settlement was void under 27 Eliz. c. 4. *Fletcher* v. *Ketteman*, 40 L. J., Ch. 624.

—— **Judgment Creditors of Settlor.**]—A court of equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486 ; 23 L. T. 636.

Where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor himself would not have possessed. *Ib.*

Order for Delivery up of Deed.]—Court will not order delivery up of voluntary instruments, which are revocable. *Bromley* v. *Holland*, 7 Ves. 28 ; 6 R. R. 58.

If a conveyance is made with a power of revocation, and afterwards is revoked, he to whom the inheritance belongs may compel the deed to be delivered up to him to be cancelled, because the deed of revocation may be lost, and then it is unreasonable the other deed should be standing out. *Anon.*, Gilb. Eq. R. 1.

2. Fraud on Marital Rights.

Other Fraudulent or Collusive Agreements respecting Marriage.]—*See* Husband and Wife.

Principle.]—Conveyance by a woman under any circumstances, and even the moment before marriage, good primâ facie : bad only if fraud, as where made pending the treaty without notice. A woman pending a treaty of marriage with A., settled all her property to her separate use with his approbation. A few days afterwards B., by a stratagem, induced her to marry him the day after she first thought of it. B. had no notice of the settlement. Settlement established, and deed of revocation obtained by duress set aside. *Strathmore* (*Countess*) v. *Bowes*, 1 Ves. 22 ; 1 R. R. 76. *See* 2 Bro. C. C. 354 ; 2 Cox, 28. Affirmed 6 Bro. P. C. 427.

As a conveyance made by the woman before marriage is primâ facie good, it is to be impeached only by the proof of fraud. In August, a widow having a second marriage in contemplation, settled her property on herself for life for her separate use, with remainder to the children of her first marriage ; and in October following she married. The settlement was prepared by her direction, without the privity or assent of "her then intended husband." In a suit to carry the settlement into execution, the second husband insisted on its being a fraud on his marital rights ; but it was not proved that in August he was "the then intended husband" :—Held, that the evidence was insufficient to impeach the deed. *England* v. *Downs*, 2 Beav. 522 ; 9 L. J., Ch. 313 ; 4 Jur. 526.

What Amounts to Fraud—Conveyance under no Obligation to Stranger.]—It seems agreed that if a woman, on the point of marriage, charge or convey her property to a mere stranger, for whom she was not even under a moral obligation to provide, such a conveyance will be considered as a fraud on the marital rights. *Lance* v. *Norman*, 2 Ch. Rep. 79; *Howard* v. *Hooker*, *id.* 81.

A widow, before her second marriage, made a settlement without the privity of her intended husband. Set aside as fraudulent, he having married her in confidence of having her estate. *Ib.*

—— Conveyance without Privity of Intended Husband.]—If a woman conveys her property before marriage without the privity of the intended husband, it is fraudulent, and will be set aside. *Ball* v. *Montgomery*, 2 Ves. 193; 4 Bro. C. C. 339; 2 R. R. 197.

Settlement made by a woman before her marriage, for her separate use, without the husband's privity, will not bind the husband. *Carleton* v. *Dorset* (*Earl*), 2 Vern. 17.

Secus in Case of Cohabitation before Marriage.]—Quære, to what extent the equity of a husband to set aside a settlement of the property of his wife, executed by her without his knowledge during the treaty of marriage, is taken away by the absence of any other settlement in favour of the wife or the poverty of the husband, or the reasonable nature or meritorious object of the impeached settlement, or the ignorance of the husband of the existence of the settled property. It is not necessary, in order to establish his title to this equity, that the husband should prove actual fraud or deception (for deception will be inferred), if after the commencement of the treaty of marriage the wife should have attempted to dispose of her property without the knowledge or concurrence of her intended husband. *Taylor* v. *Pugh*, 1 Hare, 608; 12 L. J. Ch. 73; 6 Jur. 890.

A settlement made by a woman without the knowledge of her intended husband pending a treaty for a marriage, held good on the ground that the husband, by his cohabitation with her previously to the marriage, had rendered retirement from the marriage on her part impossible. *Ib.*

Improvident Settlement by Widow before Remarriage.]—On the 16th May, 1846, a widow made an improvident settlement of a large portion of her property, and married on the 15th October following. The husband and wife filed a bill praying that the deed might be set aside as a fraud on the marital right. Semble, that the court would have given relief, notwithstanding the wife was a co-plaintiff, if an engagement to marry preceding the transaction, and a subsequent marriage without notice to the husband, were proved; and the court offered the plaintiff an issue to try the fact. *Griggs* v. *Staplee*, 2 De G. & Sm. 572; 13 Jur. 29.

A voluntary conveyance to a mother by a daughter six months after she had attained twenty-one, and seven days before the daughter's marriage, but unknown to the husband, was set aside, both on the ground of the maternal influence, and of the fraud on the husband's marital rights. *Chambers* v. *Crabbe*, 34 Beav. 457; 11 Jur. (N.S.) 277; 12 L. T. 46.

C. had, under her marriage settlement, a power of appointing property among her children, by deed or will; and a further power, if she survived her then husband and married again, of appointing one-half the property as she might think proper. C.'s then husband died, and she married again. She had three children by her former husband. One of those children, B., attained her majority, and soon afterwards received an offer of marriage from A., which offer was accepted. After the proposal for marriage, and about seven days before it took place, B. assigned all her interest under her mother's marriage settlement to her mother, who promised to leave her by will one-third of the settlement property. The effect of that assignment was well known to B.; but the circumstances which preceded it, and which accompanied the execution of it, were not made known to A. till after the marriage was completed:—Held, on a bill by A. and his wife, for a decree for the administration of the trusts of the marriage settlement of C., and delivery up and cancellation of the assignment by B., that A. was entitled to the relief he prayed. *Ib.*

Assignment in Consideration of Advances made for Education — False Recitals.]—A. B., trustee of a fund to which C. D. was entitled in reversion, makes advances to the father of C. D. for the purposes of her education as a singer. The day before her marriage, without the knowledge of her intended husband, C. D. assigns her interest to A. B. for a consideration expressed to have been paid (the amount of the advances to the father):—Held, that the deed could not be sustained. *Lewellin* v. *Cobbold*, 1 Sm. & G. 376; 17 Jur. 448; 1 W. R. 211.

The trustee of a fund, to which a young lady was entitled in remainder after the death of her mother, at the request of a needy father, advanced sums of money amounting to 460*l.*, to enable the father to educate her. Shortly after she came of age, being engaged to be married, she, by deed prepared by the father's solicitor, reciting a contract for sale at the price of 250*l.*, for which a receipt was indorsed, assigned the fund absolutely to the trustee, and married on the following day. The trustee was present at the wedding, but the husband was informed neither of the existence of the fund nor of the deed. On a bill by husband and wife:—Held, that the deed falsely representing the transaction to be an actual sale, must be set aside. *Ib.*

Held, also, that the falsehood of the recitals in the deed alone would have been sufficient to prevent the court from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the young lady's father to the trustee for money advanced for her education. *Ib.*

Voluntary Settlement made during Engagement.]—A settlement made by a woman pending an engagement and seven weeks before her marriage, without the knowledge of her intended husband, and in favour of persons for whom she was under no legal or moral tie to provide, was set aside as a fraud on the husband's marital right. *Downes* v. *Jennings*, 32 Beav. 290; 32 L. J., Ch. 643; 9 Jur. (N.S.) 1264; 8 L. T. 341; 11 W. R. 522.

A lady and gentleman were engaged to be married. Pending the engagement a separation took place, at the instance of the lady's friends,

but the engagement was not broken off. They afterwards married. The husband subsequently discovered that the wife had, about six weeks previously to the marriage, executed a settlement of her property, under which he took no benefit. Upon a bill by the husband, the settlement was set aside as a fraud upon his marital rights. *Ib.*

The delay of the husband to file a bill for two years and a half after his knowledge of the settlement, was not sufficient to disentitle him to relief, it not being shown that any prejudice had been created to the parties by the delay. *Ib.*

A wife was, before her marriage, entitled to a legacy of stock. About two months before the marriage and during the engagement which preceded it, she executed a voluntary settlement to which the intended husband was no party, and of which he had no information at the time, whereby the stock was transferred to trustees, to pay to her the dividends during her life, and after her death to hold the fund according to her appointment; and in default of her appointment for her next of kin, according to the Statute of Distributions. This instrument was prepared by the trustee of the will, and the stock was transferred by him into the names of the trustees of the settlement. No solicitor was employed. She died, leaving her husband surviving, who filed a bill to have the settlement set aside as a fraud upon his marital right:—Held, that looking to the circumstances under which the settlement was executed, so short a time before the marriage, yet without the intended husband's knowledge, and without proper legal advice, the settlement could not be supported. *Prideaux* v. *Lonsdale*, 1 De G. J. & S. 433; 2 N. R. 144; 9 Jur. (N.S.) 507; 8 L. T. 554; 11 W. R. 705. Affirming 32 L. J., Ch. 317.

Notice to Intended Husband.]—A woman ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money, and the existence of the settlement; ten years afterwards she died, and after her death he filed a bill to have the money paid to him:—Held, that the settlement was void as being a fraud on his marital right. *Goddard* v. *Snow*, 1 Russ. 485; 25 R. R. 111.

Where a husband, before his marriage, had sufficiently early notice that it was intended to settle the bulk of the intended wife's property, and nothing passed to justify a belief on the husband's part that, at the time of the marriage, no such settlement had been made:—Held, that the husband was not entitled to set aside a settlement which it appeared had been made before the marriage, although he was no party to it, and was not proved to have been actually cognisant of any settlement having been made. *Wrigley* v. *Swainson*, *Wrigley* v. *Wrigley*, 3 De G. & Sm. 458; 18 L. J., Ch. 396; 13 Jur. 800.

A lady pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister:—Held, that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud upon his marital right. Relief against a disposition of property by the intended wife, pending a treaty of marriage, can only be given when the husband has been kept in ignorance of the transaction; and, semble, that, in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided on the ground of fraud upon the marital right, the court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means. *St. George* v. *Wake*, 1 Myl. & K. 610; Coop. t. Brough. 129.

A settlement made by a woman of her personal property after her engagement to be married, set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property. *Prideaux* v. *Lonsdale*, 4 Giff. 159. See *S. C.*, on appeal, supra.

Neither she herself nor her husband was accurately informed of the nature and effect of the trusts of the settlement:—Held, that the doctrine of constructive notice of the contents of an instrument was not sufficient to bind the husband on the ground of acquiescence. *Ib.*

Notice to Husband after Marriage—Delay or Acquiescence.]—A woman a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to trustees upon a parol trust, as alleged by the trustees, for her separate use for life, and, after her death, for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock and containing a statement that the dividend were duly paid to the wife during the coverture. —Held, under the circumstances, that the husband was precluded from asserting his claim to the stock as having been transferred in fraud of his marital right. *Loader* v. *Clarke*, 2 Mac. & G. 382.

Note cancelled during Treaty for Marriage.] —Marriage settlement of personal property in general terms; "all money, debts, bills, bonds, notes, &c." :—Held, there is not inference of fraud from cancelling a note, the only instrument of that description, during the treaty, on a fair moral consideration, the marriage not taking place on representation of particulars, or on account of such personal property. *De Manneville* v. *Crompton*, 1 V. & B. 354; 12 R. R. 233.

Bond for valuable Consideration.]—Bond by a woman about to marry without her intended husband's knowledge, but for valuable consideration in respect of an antecedent debt:—Held, the husband could not be relieved against it. Concealment, however, of such security and debts not to be encouraged. *Blanchet* v. *Foster*, 2 Ves. Sen. 264.

Mortgage in Favour of Mother.]—Under the will of her father, Mrs. M'Wade was interested for life in the profits of a mine. A fortnight before her marriage she executed a mortgage of her interest to secure the payment to her mother, Mrs. Brodhurst, of a sum of money. Mrs.

M'Wade, with her children, was residing with her mother. This was a bill by the husband (a pauper) and his children (he being their next friend) seeking to have the mortgage (of which he alleged he knew nothing before marriage) set aside, or that an account should be taken of what, if anything, was due to Mrs. Brodhurst: —Held, that the bill must be dismissed so far as it regarded the mortgage, there being no evidence of fraud. *M'Wade* v. *Brodhurst*, 34 L. T. 924 —C. A. Affirming 24 W. R. 232.

Trust for separate Use—After-taken Husband.]—Quære, whether, notwithstanding the case of *Davies* v. *Thornycroft* (6 Sim. 420; 5 L. J. Ch. 140), a trust for the separate use of a single woman is valid against an after-taken husband. *Maber* v. *Hobbs*, 2 Y. & C. 317; 6 L. J., Ex. Eq. 12.

Action against Solicitor.]—Bill by husband against the solicitor of his wife as sole defendant alleging that the plaintiff and his wife were living separate; that the defendant had been before her marriage, and up to the present time, the wife's solicitor; that he had in that character prepared a deed, by which the wife fraudulently conveyed a sum of 300*l.* to trustees for her own benefit, in fraud of the plaintiff's marital right; and praying that the plaintiff might be declared entitled to the 300*l.*, and for discovery, and that the defendant might pay the costs. Demurrer for want of equity allowed. *Kelly* v. *Rogers*, 1 Jur. (N.S.) 514; 3 W. R. 442.

Whether such a bill will lie against the solicitor alone, quære. *Ib.*

Action by Husband's Representatives against Widow.]—A lady, being about to marry, placed, unknown to her intended husband, money in the hands of a third party, to hold in trust for her. The marriage was solemnised, and, during the coverture, the dividends were allowed to accumulate. On the death of her husband, the widow instituted a suit, and obtained a decree, against the legal personal representatives of the trustee, for the transfer and payment to her of the fund and accumulated dividends. Parties interested in the deceased husband's estate thereupon filed a bill against the widow and the legal personal representatives of the trustee, claiming to have the benefit of the decree, and a transfer and payment of the fund and dividends to them, on the ground that the so placing the money in the hands of a trustee was a fraud on the husband's marital right. To that bill the widow filed a demurrer for want of equity, and the court allowed the demurrer. *Grazebrook* v. *Percival*, 14 Jur. 1103.

Provision by Intended Wife for Children of Prior Marriage.]—A widow, before her marriage with her second husband, assigns over the greatest part of her estate to trustees, in trust for children by a former husband. Though this was without the consent of the second husband, yet it being to provide for her children by former husband, it is good. And husband suppressing the deed, decreed to pay 800*l.*, being the sum proved to be mentioned in the deed as the value of the estate. *Hunt* v. *Matthews*, 1 Vern. 408.

A widow, before her second marriage, without the privity of her intended husband, assigned a term in trust for herself and child:—Held, good; but a power reserved to dispose of the remainder of the term after the decease of herself and child, held void; for not being disposed of before marriage, it vested in the husband. *Blithe's case*, 2 Freem. 91.

A widow made provision for her children without the privity of her intended husband, who complained of fraud on the marriage treaty, but did not pretend he could make a settlement. His bill, therefore, to avoid the provision for his wife's former children, was dismissed. *King* v. *Cotton*, Mos. 261; 2 P. Wms. 357, 674, n.

Fraud by Intended Husband upon Wife and Wife's Father.]—The rule that a conveyance of the property of, or a security given by a woman during the treaty for, her marriage, without valuable consideration, and without notice to the intended husband, will be set aside as a fraud on his marital rights, rests upon the peculiar right which a husband has in his wife's property; and a wife has no similar equity to have a conveyance of the property of, or a security given by, the intended husband, set aside on that ground. *M'Keogh* v. *M'Keogh*, Ir. R. 4 Eq. 338; 18 W. R. 861.

But where, upon a marriage, the father of the husband agreed to give up to him a farm and stock, in consideration of the wife's fortune being paid to the father, it being then stated that the intended husband was not indebted to any extent; and a deed was drawn up and executed in pursuance of the agreement, and on the same day that the deed was executed, the intended husband gave his father a promissory note for 200*l.*:—Held, that the giving of this note, coupled with the statement that the son was not indebted to any extent, was a fraud upon the intended wife and her father, who gave the fortune. *Ib.*

C. REVOCATION.

1. IN GENERAL.

Appointment upon Trusts — Reappointment upon different Trusts.]—A single lady, having under a will a general power of appointment, to be exercised whether covert or sole, over a fund in the hands of trustees, executes an appointment upon certain trusts, and containing no power of revocation. Afterwards she executes a deed revoking the former one, and appointing the fund to trustees upon such trusts as she, whether covert or sole, should appoint. She then marries, and after the marriage she executes an appointment declaring the trusts upon which the trustees of the last preceding deed should hold the fund, being trusts for the benefit of herself, her husband, and children. The fund had remained all the while in the hands of the original trustees of the will:—Held, on a suit to establish the trusts of the last deed, that the first appointment was void as imperfect and voluntary, and the fund ordered to be transferred upon the trusts of the last deed. (*Sloane* v. *Cadogan*, Sugd. on Vendors, App. 9th edit., No. 26, commented on.) *Beatson* v. *Beatson*, 12 Sim. 281.

Revocation under Power—Deed Poll—Substituted Trusts.]—A father, by deed, settled certain leaseholds upon his son, D., absolutely, and a certain rentcharge and stock in the public funds upon D. for life, with remainder to his

children. The settlor afterwards by a deedpoll, which he had reserved to himself power to make, revoked all the uses, trusts, estates, &c., of the settlement, so far as the same related to his son, D., and declared that all estates, shares, right, interest, and benefit whatever given by the settlement to or in favour of the said D., should be, and remain to the use of trustees, their heirs, executors, and administrators in trust, during the joint lives of D., and his wife M., to pay the annual income to M. for her sole and separate use, and for the support of her children by D.; and if D. should die in the lifetime of M., in trust, to pay the same to her during her widowhood, for the support of herself and her said children, with a limitation over in favour of such children, in case of her death or second marriage. D. died in the lifetime of M., leaving several children by her:—Held, that the deedpoll was not to be considered merely as a revocation of D.'s life estate, but that the trusts of the second deed were to be substituted for the trusts declared by the first deed in favour of D.; consequently, that M. took an estate for life, or during her widowhood, in the rentcharge and stock, as well as in the leaseholds. *Angell* v. *Dawson*, 3 Y. & C. 308; 8 L. J., Ex. Eq. 50.

Resettlement by Agreement in consideration of Advance to Eldest Son.]—A., on marriage, settled lands to himself for life, remainder to wife for jointure, remainder to first, &c., sons in tail male, reserving power of charging with 3,000*l.* for younger children, on payment of debts, and covenanted to lay out 6,000*l.*, part of wife's portion, in lands to same uses: the 6,000*l.* is laid out. After eldest son came of age, it was agreed, in consideration of his advancing 3,000*l.* for purchase of commission in army, to make a new settlement more beneficial for younger children, by which lands were limited to former uses, but A. was empowered to charge 3,000*l.* for each of younger children, and covenant to lay out 6,000*l.* was released; court refused to set aside last settlement. *Kerry* (*Earl*) v. *Fitzmaurice* (*Lord*), 2 Bro. P. C. 384.

Alteration of Original Limitations.]—By a settlement in 1862 real estate then subject to a mortgage in fee was conveyed by B. to trustees, upon trust to permit R. to receive the rents for her separate use and upon further trusts for such persons and for such estates as R. should appoint. In 1868 B. and R., by a deed containing no recitals, mortgaged the property in fee (subject to the prior mortgage), the proviso for redemption reserving the right of reconveyance to R., "her heirs or assigns or as she or they shall direct:"—Held, that this proviso did not alter the limitations in the settlement so as to confer upon R. an absolute estate in fee simple. *Byron's Settlement, In re*, or *Reynolds, In re, Williams* v. *Mitchell*, [1891] 3 Ch. 474.

An estate was conveyed in 1826, by way of mortgage, to two persons, for a term of years, and, subject thereto, to such uses as A. B. and C. D. (father and son) should jointly appoint, and in default to the use of A. B. for life, with remainder to the use of C. D. in tail, with remainder to A. B. and C. D. in fee. In 1839 A. B. and C. D., and the mortgagees under the deeds of 1826, conveyed the estate to E. F. in fee, by way of mortgage, with a proviso for reconveyance to A. B. and C. D., and their heirs, if A. B. and C. D., or either of them, their or either of their heirs, should pay the money advanced. There were also contained a declaration, that, as between A. B. and C. D., the mortgage debt should be considered as a charge on the estate, and that A. B., during his life, should keep down the interest. C. D., the son, died in the lifetime of A. B., the father, leaving a son:—Held, that the limitations contained in the deed of 1826 were not altered by the deed of 1839, notwithstanding the form of the proviso for redemption therein contained. *Hipkin* v. *Wilson*, 19 L. J., Ch. 305; 14 Jur. 1126.

Real estate was settled on the husband for life; remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband; the husband and wife barred the wife's estate tail, and by that and other deeds it was settled to such uses as the husband should appoint. He appointed, by a deed of July, 1817, to such uses as "he and his wife should jointly appoint, and in default to himself for life, remainder to his wife for life, remainder to his son in fee." The husband and wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to the husband and wife, "their heirs or assigns, or to such other persons, &c., as they should direct," and by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the other deed of even date:—Held, that the deed of 1832 was intended to vary the limitation of the equity of redemption, and defeated the limitation of the deed of 1817. *Whitbread* v. *Smith*, 2 Eq. R. 377; 3 De G. M. & G. 727; 23 L. J., Ch. 611; 18 Jur. 475; 2 W. R. 177.

Settlement on Husband and Wife only—Revocation by Joint Deed poll.]—On marriage, a sum of 9,000*l.* was vested in trustees upon trust to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed-poll, whereby they appointed the money immediately to the husband; but the trustees declining to act without the directions of the court, this bill was filed; and upon personal examination of the wife, the court directed the trustees to pay the money to the husband, and to deliver up the settlement to be cancelled. *Macarmick* v. *Buller*, 1 Cox, 357.

Settlement adopted by Petitioner—Inconsistent Gift by Will.]—By a post-nuptial settlement in 1805, made between the husband and the father and mother of the wife, and executed by the wife, although she was not named as a party to it, the husband created a jointure for the wife, and the father and mother appointed certain sums to the wife, and the husband covenanted to assign these sums to trustees, in trust to accumulate during the joint lives of husband and wife, and after the death of either for the survivor for life, with power of appointment among the children, and in default of appointment, equally. The husband died in 1814, without having exercised the power of appointment. In 1815 the widow presented a petition to the lord chancellor, for maintenance for the eldest

son, and in this petition she referred to the settlement, as showing to what she and the younger children were entitled. She received her jointure, and the interest on the sums appointed during her life. She died in 1868, having executed a testamentary disposition in the Scotch form disposing of the sums appointed as her absolute property:—Held, that she must be held to have adopted the settlement, and that it bound the sums appointed. *Kingston* v. *Booth*, Ir. R. 4 Eq. 589.

Settlement in contemplation of Marriage—Revocation immediately before Marriage.]—Upon a marriage contemplated between A. and B., the lady's fortune, vested in C. her former guardian, was on the 14th March, after treaty and agreement with C., vested in trustees for the lady, "her executors and administrators and assigns," until the marriage, and afterwards for her, her husband and children. On the 27th March, and before the marriage, the husband and wife, without the intervention of C., revoked the settlement, and married the next day. A bill by the husband, claiming the fund unaffected by the trusts of the settlement, was dismissed with costs, the court holding that a revocation, under such circumstances, could not be maintained. *Page* v. *Horne*, 11 Beav. 227; 17 L. J., Ch. 200; 12 Jur. 340. And see *S. C.*, 9 Beav. 570.

—— **Marriage found void—Resettlement on Remarriage good.**]—In contemplation of marriage between A. and B., settlements were made of real estate belonging to B., the intended wife, and of personalty belonging to A., the intended husband, upon uses and trusts which, after the solemnisation of the marriage, were to arise for the benefit of the husband and wife, and their issue. The marriage ceremony was performed and the parties lived together as husband and wife; but after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement. Some time afterwards, a new settlement, in contemplation of marriage, was made, including the same property as the former, but different from the former in the interest given to the issue, as well as in other provisions. The parties then intermarried, and there was issue of the marriage:—Held, that the first settlement, being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement. *Robinson* v. *Dickenson*, 3 Russ. 399; 7 L. J. (O.S) Ch. 70.

—— **Marriage Abandoned—Subsequent Marriage to Different Person.**]—Settlement in contemplation of a marriage which never took effect. A feme sole in contemplation of marriage with A. B. settled a certain fund upon trust for herself until the solemnisation (if any) of her marriage; or in case no such marriage should be solemnised, and after the solemnisation (if any) of the same marriage, upon trust for herself and her children. The fund was transferred to the trustees, but the intended marriage did not take effect, and the woman married another person:—Held, on the construction of the settlement, that it applied to any marriage, and that she could not revoke the settlement previous to her marriage; and that the trustees had committed a breach of trust for which they were answerable. *M'Donell* v. *Hesilrige*, 16 Beav. 346; 22 L. J., Ch. 342; 16 Jur. 1148; 1 W. R. 71.

Post-nuptial Settlement falsely reciting Ante-nuptial Agreement.]—A post-nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of the trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children:—Held, both husband and wife desiring it, that this deed was a nullity; that as against the husband it was voluntary; and that it was not such a settlement as the court would enforce against the wife. The property was therefore treated as if it had never been settled. *Hogarth* v. *Phillips*, 4 Drew. 360; 28 L. J., Ch. 195; 4 Jur. (N.S.) 1093.

Revocation of Joint Appointment by Survivor only.]—Under a trust in a marriage settlement for the children of the marriage as the husband and wife shall by deed with or without power of revocation and new appointment jointly appoint, and in default of and subject to any such joint appointment as the survivor shall by deed with or without power of revocation and new appointment or by will appoint, a joint appointment expressed to be made subject to the power of revocation and new appointment mentioned in the settlement may be revoked by the survivor and a new appointment made. *Brudenell* v. *Elwes* (1 East, 442) and *Dixon* v. *Pyner* (55 L. J., Ch. 566) followed. *Harding, In re, Rogers* v. *Harding*, 63 L. J., Ch. 725; [1894] 3 Ch. 315; 7 R. 414; 71 L. T. 269; 42 W. R. 677—C. A.

Power of Revocation "they not having issue between them"—Son Dying in Lifetime of Mother.]—A proviso in a settlement, if the wife survive her husband, they not having issue between them, then she may revoke the settlement. Husband dies, leaving a son, who dies in the lifetime of his mother; she may revoke the settlement. *Holt* v. *Burley*, 2 Vern. 651; Pre. Ch. 293.

Implied Revocation of prior Will by Settlement.]—Settlement of personal estate upon a second marriage, upon trust to pay to such persons, &c., as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole, that it was to operate unless a subsequent instrument should be executed; a prior will, therefore, revoked. *Leigh* v. *Norbury*, 13 Ves. 340.

2. Revocation of Voluntary Settlements.

a. What Amounts to. In General.

Subsequent Voluntary Settlement.]—Where there are two voluntary conveyances of the same estate, the first shall prevail. *Goodwin* v. *Goodwin*, 1 Ch. Rep. 173.

In voluntary deeds and voluntary appointments, the first is to take place. *Chadwick* v. *Doleman*, 2 Vern. 530.

Of two conveyances of property, the first held to be for valuable consideration, the second voluntary; and even if both were voluntary, the first held to be good and irrevocable by a subsequent voluntary settlement. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

A. made a voluntary settlement of lands (subject to an annuity of 100*l.* to his youngest son), in trust for his eldest son and his heirs, which settlement did not contain any power of revocation. The eldest son being dead, the father made another settlement of the same lands, to the use of himself for life, remainder to his younger son for life, remainder to trustees to preserve, &c., remainder to first and other sons to youngest son in tail. The first deed came into the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first; both sons having been otherwise provided for, it was held, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first deed. *Clavering* v. *Clavering*, 7 Bro. P. C. 410; 2 Vern. 473; Pre. Ch. 235.

Where a father by a voluntary deed conveyed to trustees upon trust to allow him the rents and profits for life, then to the use of his son. He afterwards on the marriage of his son executed another deed, by which he gave up the rents and profits to the son, and after certain other limitations reserved the ultimate reversion to himself:—Held, that there being no evidence to show that settlor considered the former deed as still subsisting after the execution of the latter, the limitation in the latter did not prevail over the former, and that the reversion belonged to those claiming under the son and not to those claiming under the settlor. *Croker* v. *Martin*, 1 Dow (N.S.) 15; 1 Bligh (O.S.) 573; 30 R. R. 93.

Where Power of Revocation — Terms not Complied with.]—One makes a voluntary settlement, with power of revocation on tender of a guinea, and afterwards settles the same lands to different uses, but does not tender the guinea; whether this is a revocation, quære. *Arundell* v. *Philpot*, 2 Vern. 69.

Settlement of leasehold estates is not revoked by subsequent assignment by trustee to settlor entitled for life, or by the will of the latter; no intention to revoke appearing and the term of a power of revocation not being complied with. *Ellison* v. *Ellison*, 6 Ves. 656: 6 R. R. 19.

By his will, dated the 12th June, 1879, P., after appointing trustees and executors and making certain pecuniary bequests and devises of real estate, bequeathed to them all his personal estate upon certain trusts. The testator made four codicils not affecting the general bequest in the will. By an indenture of settlement, dated the 8th Jan., 1880, P. declared that a sum of money should be held by trustees upon trust that they should deal with the same in such manner as the settlor should by any writing or writings revocable or irrevocable "but not by his last will and testament, or any codicil thereto, unless he should expressly refer to the said trust fund and premises, order and direct, by such writing or writings, the trusts of the said indenture might be absolutely revoked, annulled, altered, varied, or otherwise dealt with at the free will and pleasure of the said P.":—Held, that the general bequest did not operate as an exercise of the power of revocation and new appointment contained in the settlement. *Charles* v. *Burke*, 60 L. T. 380.

Where no Power of Revocation—Subsequent Will.]—A voluntary deed executed in favour of children, without a power of revocation, is not revoked by a subsequent will. *Bolton* v. *Bolton*, 3 Swanst. 414.

Voluntary settlement, without a power of revocation, shall bind the party, and shall not be defeated by a subsequent will. *Villers* v. *Beaumont*, 1 Vern. 100.

A voluntary deed of settlement is not voidable by the settlor merely because it does not contain a power of revocation. *Henry* v. *Armstrong*, 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472.

A settlement, though voluntary, is not revocable. After a voluntary settlement, a man cannot devise the same estate, though for payment of his debts. *Bale* v. *Newton*, 1 Vern. 464.

A father makes a voluntary settlement to trustees and their heirs in trust to receive the profits, and to put them out for the increase of the fortunes of his daughters A. and B., and also executes a bond to the same trustees, to pay them 1,000*l.* at a certain day in trust for the said daughters, but kept both deed and bond by him till his death, and received the profits; and then by will, taking notice of the bond, gives legacies to A. and B. in satisfaction thereof, and the surplus of his separate estate to his said two daughters, and his four younger children: yet A. and B., electing to have the benefit of the settlement and bond, decreed for them, and an account of the profits from the date of the settlement, and the 1,000*l.* with interest from the time it was payable by the bond. *Barlow* v. *Heneage*, Pre. Ch. 211.

Subsequent Sale.]—Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—Held, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance, the deed of conveyance was not revocable, there being an ultimate trust for the benefit of wife and children. *Godfrey* v. *Poole*, 57 L. J., P. C. 78; 13 App. Cas. 497; 58 L. T. 685; 37 W. R. 357—P. C.

Subsequent Mortgage.]—A mortgage after a voluntary settlement, with a power of revocation and a will in confirmation of it, is a revocation pro tanto only. *Perkins* v. *Walker*, 1 Vern. 17.

Settlement with power of revocation, subsequent mortgage a revocation pro tanto only. *Thorne* v. *Thorne*, 1 Vern. 41.

A father, tenant for life, with remainders to his son, joined with the son in executing a post-nuptial settlement, by which the father and the son assigned the lands to a trustee in trust for the father for life, subject to an annuity for the son; and after the father's death in trust for the son, subject to a jointure (charged by the pre-existing deed), and charged with a sum for portions of the younger children of the father. The father and son afterwards joined in a mortgage which did not notice this settlement: it contained covenants for title, but not against incumbrances:—Held, that the settlement as re-

garded the provisions for the younger children was not voluntary or void as against the mortgagee, nor revocable by the father and son; and, even if it was revocable, was not revoked by the mortgage. *Bennett* v. *Bernard*, 10 Ir. Eq. R. 584.

Voluntary settlement by husband and wife, of wife's estate on themselves for life, remainder to J., grandson of the wife in tail, remainder as husband or wife should by will appoint: husband and wife mortgage the estate to a creditor of the husband by lease and release, without a fine: husband and wife being dead, and the grandson being dead without issue, quære, whether the mortgage was good against the heir of the wife. *Adney* v. *Field*, Ambl. 654.

Subsequent Issue of Voluntary Bonds.]—A. executed a voluntary settlement of personal property, upon trust after his death to pay thereout his debts, and also any legacies or sums of money, not exceeding in the whole 400*l.*, which the settlor by will or by any writing signed by him should direct, and subject thereto, upon trust for B. A., subsequently, and with intent to defeat the settlement, executed voluntary bonds for sums far exceeding 400*l.*:—Held, that the bonds constituted debts within the meaning of the settlement, and were payable, in the administration of assets, after simple contract debts for value. *Markwell* v. *Markwell*, 34 Beav. 12, 418; 34 L. J., Ch. 55; 10 Jur. (N.S.) 816; 10 L. T. 834; 12 W. R. 1095.

Letter to Trustees.]—A settlement made by a person going beyond sea, though voluntary, not to be controlled by a letter written by him afterwards to the trustees. *Clavell* v. *Littleton*, Pre. Ch. 305; Gilb. Eq. R. 37.

Voluntary Agreement to deliver up Deed.]—A. makes a voluntary settlement on B., who, after, agrees to deliver it up without consideration. This agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily. *Wentworth* v. *Deverginy*, Pre. Ch. 69.

Conveyance for Value.]—The appellant conveyed certain real estate to his wife by two voluntary settlements, without consideration. The wife died intestate, and the appellant obtained administration in his marital right. In a suit for administration by one of the next of kin of the wife, against him as administrator, praying that the real estate might be got in and sold, he pleaded that the voluntary settlement had been avoided by a subsequent sale and conveyance for value:—Held, that, if the sale was not a bonâ fide conveyance for value, it had no operation to defeat the prior settlement; and that if it was a conveyance for value, it was a breach of trust on the part of the administrator, and that he was liable in either case to account. *Harding* v. *Howell*, 60 L. T. 578—P. C.

Settlement made under Mistake as to Interest in Property—Settlor not Bound.]—A woman conceiving that she had an absolute interest in certain personal property, in which in fact, her children were jointly interested with her, made a voluntary settlement of it upon herself for life, with remainder to her children: the settlement not being binding upon the children, was held not to be binding upon herself. *Crockett* v. *Crockett*, 1 Hare, 451; 11 L. J., Ch. 279; 6 Jur. 531.

b. Retention or Cancellation of Deed by Settlor.

Principles.]—Party executing a voluntary deed, is not concluded by the legal ceremonies of formal execution. If he retains it in his custody he shows a plain intent not to divest himself of power over it, but to hold it just as revocable as a will; and whatever words he uses, that intent must determine its character. *Uniacke* v. *Giles*, 2 Moll. 268.

A voluntary deed, if perfect, will be executed after the death of the grantor, because, between the executor and the donee, there is no preferable equity. *Id.* 265.

If a voluntary deed is regularly executed, and delivered over to a trustee, and so put out of the control of the party, showing the design to divest the power of revocation, the party is bound, and the person intended to be benefited by that deed would have a right to come into this court against the trustee, to call upon him to secure the deed, and deposit it so as to be available for him. *Id.* 267.

A. executes a voluntary deed, assigning a chose in action to a trustee for her nephew, to take effect at her death, which she retains in possession. Her nephew, knowing of the disposition, borrows 400*l.* from her, and arranges with the trustee that so much is to be deducted from the sum assigned by the deed upon the death of A.: but there was no evidence that A. was privy to that arrangement. Upon a bill filed against the personal representative of A., who was the trustee in the deed, by the nephew, to set it up, A. having afterwards destroyed the instrument, and executed a new one, giving over the interest to another person, the wife of the trustee:—Held, that whether it contained a power of revocation or not, and however formally executed, the retention of the deed in the custody of the donor made it revocable, and the bill was dismissed, reversing a former decree in favour of the nephew, but without costs. An equity distinct from the general question might be raised as to the 400*l.* if it could have been shown that A. was privy to the arrangement touching the repayment of that sum. *Id.* 257.

Deed for Purpose never completed.]—A voluntary deed, never parted with, executed for purpose that has never been completed, is considered in equity as an imperfect instrument. *Cecil* v. *Butcher*, 2 J. & W. 573; 22 R. R. 213.

A voluntary conveyance, for the purposes of conferring a qualification under the Bedford Level Act, was executed by a father in favour of his son, and registered, but never communicated to the son, who died soon afterwards. The legal estate was outstanding in a mortgagee:—Held, that the father was entitled to have the property comprised in the deed conveyed to him. *Childers* v. *Childers*, 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 859. Reversing 3 Kay & J. 310.

Conveyance kept Secret—Subsequent Devise.]—W. made a secret conveyance of several estates to his daughter who was married, and had had a portion and was jointured. He kept possession of the estates, and of the deeds, and afterwards by will devised the estates:—Held, the

devise good, the conveyance being kept secret, and he continuing in the possession of the estate. There was no evidence that he made the conveyance to avoid being sheriff of London, by putting the legal interest out of himself, and thinking by that means he may swear to his want of qualification, but it appeared he did not take the oath, but paid the fine for not serving the office. *Birch* v. *Blagrave*, Ambl. 264.

A voluntary deed kept by a person and never cancelled, will not be set aside by a subsequent will. *Boughton* v. *Boughton*, 1 Atk. 625; 9 Mod. 212.

Subsequent Voluntary Deed.]—A person executing a voluntary settlement passes the estate out of himself, though he retained the deed in his own possession; and such settlement is not affected by a subsequent voluntary deed, delivered over to the party in whose favour it is made. The court, in the absence of special circumstances, will give effect to the first legal instrument in favour of the party claiming under it. *Roberts* v. *Williams*, 4 Hare, 130; 11 L. J., Ch. 65; 3 Jur. 1057.

Deed not disclosed until Death of Settlor.]—A voluntary deed, though retained by the grantor until his death, held valid. *Bonfield* v. *Hassel*, 32 Beav. 217.

A settlement whereby lands are assured to a trustee to the use of the settlor for life, and afterwards in trust for volunteers, and which is not communicated to the trustee until after the settlor's death, is valid, notwithstanding the disclaimer of the trustee. A power to appoint new trustees contained in the indenture is therefore exercisable. *Jones* v. *Jones*, 31 L. T. 535; 23 W. R. 1.

The testator, by a voluntary deed, covenanted with trustees that, in case A. and B., his two natural sons, or either of them, should survive him, his (the testator's) executors and administrators should, within twelve months after his death, pay to trustees named in the deed 60,000*l.* upon trust for such of them (A. and B.) as should attain twenty-one years, and be living at the time of his death, and if neither of them, having survived him, should attain twenty-one, then upon trust for him (the testator), his executors and administrators. The testator retained the deed in his own possession until his death, and did not communicate it either to the trustees or to A. and B. The testator by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his sons A. and B., and his legitimate children. After the death of the testator, the deed of covenant was found amongst his papers. A. survived the testator, and attained twenty-one:—Held, that although the deed of covenant was voluntary, it nevertheless created a trust for A., and that the refusal of the trustees to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator; and that deed was not of a testamentary nature, there being no power of revocation reserved to the covenants; that the retention of the deed in the possession of the covenantor, and the absence of communication respecting it to the trustees and the cestuis que trustent, did not affect its validity. *Fletcher* v. *Fletcher*, 4 Hare, 67; 14 L. J., Ch. 66; 8 Jur. 1040.

Deed Destroyed by Settlor—Subsequent Will.]—A voluntary deed in favour of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, established against legatees. *Sear* v. *Ashwell*, 3 Swanst. 411. n.

A. executed a deed, making a voluntary settlement of an equitable reversion, but gave no notice of it, and retained the deed. She afterwards destroyed the deed, and by will purported to dispose of the property comprised in the deed:—Held, that the equitable reversion was bound by deed. *Way's Trusts, In re*, 4 N. R. 453; 34 L. J., Ch. 49; 10 Jur. (N.S.) 1166; 11 L. T. 495; 13 W. R. 149—L.J.J.

—— **Subsequent Assignment on Different Trusts.**]—A., by voluntary deed, assigns property to B., in trust for A. for life, and then for C. and her children. Subsequently A. cancels that deed, and assuming to be absolute owner, assigned it to D., upon trust for B. absolutely. D. marries B., both of them joining in a deed, whereby that property, together with the property of D., was conveyed to trustees for D. and B. for life, remainder for their children, D. having no notice of the previous trust in favour of C. and her children:—Held, that the voluntary deed was not revocable, and that this was a breach of trust on the part of B., for which B. and her husband, D., were responsible, and that there should be a reconveyance of the property to new trustees for C. and her children. *Lanham* v. *Pirie*, 3 Jur. (N.S.) 704; 5 W. R. 540.

Deed Retained by Settlor got from him Wrongfully.]—If a parent make a voluntary conveyance in trust for his children, and keep it in his own power, or in the hands of his agent, and this is got from him, it ought not to bind him; but where a feme, having issue by her first husband, makes a suitable provision for them before her treaty for a second marriage, this is good, and not liable to be avoided by a second husband. *Cotton* v. *King*, 2 P. Wms. 358; Moseley, 259.

Deed Destroyed by Settlor—Copy indirectly obtained by Volunteer.]—A. makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards, one secretly, and by fraud on behalf of the nephew, gets an attested copy of this settlement, and then the party who made a settlement burns it, and settles the premises on another nephew. The first nephew's bill to establish the copy of the first settlement is dismissed with costs; upon which the second nephew claiming under his settlement, brings a bill to have the attested copy delivered up, and has a decree for it; because such copy has been indirectly gained. *Naldred* v. *Gilham*, 1 P. Wms. 577.

When Cancellation by Settlor allowable—Where no Power of Revocation Reserved.]—A voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor. *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

An appointment of an annuity to be paid out of an office if voluntary, is countermandable. *Young* v. *Cottle*, 1 P. Wms. 101.

If property be conveyed by a debtor in trust for the benefit of creditors, who are neither

parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor. Quære, whether a communication by the trustees to the creditors of the fact of such a trust will not defeat the power of revocation by the debtor. *Acton* v. *Woodgate*, 2 Myl. & K. 492 ; 3 L. J., Ch. 83.

—— **Settlements contemplating a Future Marriage.**]—A man unmarried cannot recall a voluntary trust deed, which he executes for the benefit of future children, nor can he relieve himself from a provision in the conveyance to trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. *Petre* v. *Espinasse*, 2 Myl. & K. 496.

A single woman, not immediately contemplating marriage, transfers a sum of stock, to which she was absolutely entitled, to trustees, upon trust to pay the dividends to her until she should marry ; and after her marriage, upon trust to pay the dividends to her separate use for her life, and after her decease to pay the same to her husband for his life, or until his bankruptcy, and after his decease or bankruptcy, in trust for the children of the settlor ; and if no child, for such person or persons as she should by deed or will appoint, and in default of appointment, upon trust for her next of kin. The settlement is irrevocable. *Bill* v. *Cureton*, 2 Myl. & K. 503 ; 4 L. J., Ch. 98.

c. Omission of Power of Revocation.

Principles.]—A settlement by an aunt on her nephew in fee of all her real estates, reserving a life estate only to herself, without any consideration except a covenant by the nephew to pay charges on the property after her death, and without any power of revocation, upheld, even as a voluntary settlement, it appearing that she had had the deed sufficiently explained to her before she executed it, that she sufficiently understood its nature and effect when she executed it, and that she intended when she executed it that it should operate and be effective according to its purport and tenor, and there being no ground for believing that she consented to execute or did execute it through or under any fraud or misrepresentation or undue influence, or by means or reason of any promise made to her, or in reliance on any promise. *Toker* v. *Toker*, 3 De G. J. & S. 487 ; 32 L. J., Ch. 322 ; 8 L. T. 777. Affirming 31 Beav. 629 ; 9 Jur. (N.S.) 370.

In such cases the evidence in support of the validity of the impeached deed must be clear and decisive. *Ib.*

The absence from a voluntary settlement of a power of revocation reserved to the settlor, is, in determining the validity of the impeached settlement, only a circumstance to be taken into account in connection with the other circumstances of the case. *Ib.*

The absence in the like case of advice given to the settlor as to the insertion of a power of revocation stands on the same footing. *Ib.*

In order to support a voluntary settlement, it must be shown that all the provisions are proper and usual ; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. *Phillips* v. *Mullings*, 41 L. J., Ch. 211 ; L. R. 7 Ch. 244 ; 20 W. R. 29.

No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential. *Ib.*

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by a solicitor, to execute a settlement by which he assigned a part of the money to trustees to invest and to pay him during his life the income on such part as they should think fit, and after his death on trust to hold the same for his wife and children, if any, and subsequent thereto for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice :—Held, that the deed could not be set aside by the settlor. *Ib.*

The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid ; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a certain power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property :—Held, that under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions. *Hall* v. *Hall*, 42 L. J., Ch. 444 ; L. R. 9 Ch. 430 ; 28 L. T. 383 ; 21 W. R. 373.

Where such Power would be Inconsistent with Object of Deed.]—In 1872, plaintiff, in order to protect his property, executed a voluntary post-nuptial settlement of all his real and personal estate, except a sum of cash under 1,000*l.*, in favour of his wife (for her separate use) and children. The settlement contained no power of revocation. In 1880, plaintiff brought an action against the trustees and his infant children, to set aside the deed on the ground of undue influence, misrepresentation, and ignorance of its effect :—Held, that the wife must be joined as a defendant. *Henry* v. *Armstrong*, 18 Ch. D. 668 ; 44 L. T. 918 ; 30 W. R. 472.

Held, also, that a burden of proof of a sufficient ground for setting the deed aside was on the plaintiff. *Ib.*

Held, also, that a power of revocation, even with the consent of the trustees, would have been inconsistent with the object of the deed, and that its absence was no ground for setting the deed aside. *Ib.*

Where Settlor not Sufficiently or Independently Advised.]—The absence of a power of revocation is a ground upon which a voluntary deed will be

set aside at the suit of a subsequent purchaser for value, though there be no trace of fraud or undue influence, if it appears that the propriety of reserving the power of revocation was not impressed upon the grantor. *Mountford* v. *Keene*, 24 L. T. 925; 19 W. R. 708.

An old man aged eighty executed a conveyance of freehold land in consideration of natural love and affection, to his son, to the use of himself for life, with remainder to his son in fee. The deed did not contain any power of revocation, and the propriety of inserting such a power had not been suggested to the grantor. Subsequently the grantor conveyed all his property to his daughter, who by the deed of conveyance covenanted to indemnify him against a mortgage debt, to which part of the property was subject. On a bill by the daughter to set aside the prior voluntary conveyance:—Held, that the deed must be set aside, as it contained no power of revocation, and as it was clear that the propriety of reserving such a power had not been suggested to the grantor; but without costs, as there was no evidence that the execution of the deed had been obtained by fraud. *Ib.*

A voluntary settlement was agreed to be made by a young lady, an orphan, some weeks before she attained twenty-one, upon the recommendation of the family solicitor, and was executed by her eight weeks after she attained twenty-one without any independent advice. Thereby she assigned to her stepfather and an uncle as trustees the whole of her fortune upon trusts for herself for life, with remainder to her children or testamentary appointees, and in case there were no children, then, in default of appointment, to her next of kin. A power raising 700*l.*, and paying it to the settlor, was reserved, but the settlement contained no power of revocation or of appointment by deed, and gave her no voice in the investments or in the appointment of new trustees:—Held, that although the solicitor and trustees acted really with the intention of benefiting the lady, the settlement must be set aside on the ground of imprudence. *Everitt* v. *Everitt*, 39 L. J., Ch. 777; L. R. 10 Eq. 405; 23 L. T. 136; 18 W. R. 1020.

An aged lady of weak intellect having made a voluntary settlement, containing no power of revocation, and without independent advice, under the impression that she was making a will, at the instance of some members of the family:—Held, that she was entitled to a decree to set aside the deed, and to have the stock transferred by her under its provisions, retransferred into her name. *Henshall* v. *Fereday*, 29 L. T. 46; 21 W. R. 570.

The solicitor who drew the deed read it over to her, but admitted that he had not expressly told her that it contained no power of revocation; he was ordered to pay his own costs. *Ib.*

Settlement made in extremis.]—A voluntary settlement, executed by the settlor when he was, or was supposed to be, in extremis, was set aside, on the ground that it did not reserve to him, as it ought to have done, a power of revocation. A settlement on his family by a person in extremis, and not containing a power of revocation, set aside, the court being of opinion that it was executed in expectation of his immediate death, but not with the intention that it should be operative in case of his recovery. *Forshaw* v. *Welsby*, 30 Beav. 243; 30 L. J., Ch. 331; 7 Jur. (N.S.) 299; 4 L. T. 170; 9 W. R. 225.

d. Duty and Liability of Solicitor.

Duty to Insert or Suggest Powers of Revocation.]—It is the duty of a solicitor, in preparing a settlement executed by a person in articulo mortis, to reserve a power of revocation; and where such a deed was executed without a power of revocation being reserved, the court ordered it to be cancelled. *Forshaw* v. *Welsby*, 30 Beav. 243; 30 L. J., Ch. 331; 7 Jur. (N.S.) 299; 4 L. T. 170; 9 W. R. 225.

The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed. *Coutts* v. *Acworth*, 38 L. J., Ch. 694; L. R. 8 Eq. 558; 21 L. T. 224; 17 W. R. 703.

A. made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative, who acted as his solicitor. The court considered that A. intended to reserve a power of revocation, but that the deed was in other respects unobjectionable. A. made his will, prepared by the solicitor, making a general devise, but not revoking the settlement. The court then held that it was the duty of the solicitor, when he prepared the will, specifically to have asked the testator whether he intended to revoke the deed; and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the court decided that, although the deed would have been operative if A. had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise obtained in the will. *Nanney* v. *Williams*, 22 Beav. 452.

Liability for Consequences of Deed being Set aside—Good Motive no Defence.]—A deed of settlement, whereby the settlor is delivered, bound hand and foot as to the property settled, into the power of his trustee, cannot be maintained in equity without the clearest proof that it was made at and with the request, consent, knowledge, or instance of the settlor; and a solicitor who takes upon himself to prepare such a deed for execution by his client, without the clearest evidence of the concurrence of the latter, does so subject to all the consequences and liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client in preparing the settlement. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune, tied up the whole of his property and constituted himself sole trustee; the court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore* v. *Prance*, 9 Hare, 299; 20 L. J., Ch. 468; 15 Jur. 1188.

—— **For Whole Costs of Suit.**]—A solicitor, acting both for donor and donee, prepared a will and several deeds containing no power of revocation, by which the donor reduced herself to absolute dependence upon the donee. The documents were afterwards set aside on the ground of undue influence, and the solicitor was ordered to pay not only his own costs, but the costs of the suit, if the estate of the donee should prove insufficient for that purpose. *Baker* v. *Loader*, 21 W. R. 167.

In the absence of fraud, the court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his mistake or carelessness. *Clark* v. *Girdwood*, 26 W. R. 90.

The client's remedy is by an action for damages. *Ib.*

—— **For own Costs.**]—An aged lady of weak intellect made a voluntary settlement, which was set aside as it contained no power of revocation. The solicitor who drew it admitted that he had not expressly told her of the absence of such a power:—Held, that he must pay his own costs. *Henshall* v. *Fereday*, 29 L. T. 46; 21 W. R. 570.

D. DISCHARGE.

Where Marriage does not Take Place.]—By an indenture, made in contemplation of the marriage of A. & B., certain leasehold property belonging to B., the intended wife, was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to B., which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and soon after the date of the indenture B. married C. In a suit instituted by C. and B. against the trustees, it was ordered that the leasehold property should be conveyed to C., and the stock transferred into his name. *Thomas* v. *Brennan*, 11 Jur. 95.

A feme sole, in contemplation of marriage with A. B., conveyed a certain fund to trustees, upon trust for herself, her executors, administrators, and assigns, until her marriage (if any) should be solemnised, or in case no such marriage should be solemnised; and from and after the solemnisation (if any) of the same marriage, upon trust for herself for her life, for her separate use, exclusive of the said A. B., or any other husband whom she might happen to marry; and after her death, upon certain trusts for her children. The fund was duly transferred to the trustees, but the intended marriage never took place, and the woman subsequently married another man. In the meantime the trustees, at her request, sold out and paid to her 200*l.*, part of the trust fund:—Held, that the settlement applied to her marriage with any husband, and not merely to the intended marriage with A. B., and that the trustees committed a breach of trust in selling out any part of the fund which had been transferred to them. *M'Donnell* v. *Hesilrige*, 16 Beav. 346; 22 L. J., Ch. 342; 16 Jur. 1148; 1 W. R. 71.

Death of Intended Wife's Father Before Marriage.]—Quære, how far marriage agreement discharged by death of intended wife's father before marriage, as to his estate. *Glengall (Earl)* v. *Barnard*, 1 Keen. 769; 6 L. J., Ch. 25. And see *S. C. nom. Thynne (Lady)* v. *Glengall (Earl)*, 2 H. L. Cas. 131; 12 Jur. 805.

Condition for Avoidance—Waiver by Agreement.]—Estates are settled on A. and B. on their marriage, in strict settlement; provided, that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void; the husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed; this is no avoidance of the settlement. *Mathews* v. *Jones*, 2 Anstr. 506.

—— **Re-conveyance Necessary upon Non-performance.**]—When a settlement is made void by non-performance of a condition, yet a re-conveyance held necessary. *Hunt* v. *Hunt*, Pre. Ch. 387.

Settlement of Annuity on Wife — Trust of Surplus for Children — Annuity Released by Wife—Children's Interest Discharged.]—Settlement, in contemplation of marriage, of an annuity, secured by bond to N. (the intended wife), together with arrears then due, upon trust for her separate use, the receipt of N., her appointees or assigns, to be good discharges for the annuity, and all arrears, and all future and growing payments; and after her decease, upon trust to pay the trust moneys, or such of them as should be unpaid or undisposed of at the time of her decease (in the events which happened), to her children, nominatim, with provisions for their maintenance, education, and advancement. Subsequently, the annuity being in arrear to an amount exceeding 3,000*l.*, N. and her trustee released the annuity and all arrears and future payments, and in consideration of such release the obligor conveyed hereditaments to trustees, upon trust to sell, and out of the proceeds to pay 3,000*l.* to N., her executors or administrators, and the surplus to himself, N. being a party to such conveyance:—Held, that upon N.'s death the 3,000*l.* passed to her husband, and was not impressed with any trust for the benefit of her children. *Calvert* v. *Johnston*, 3 K. & J. 556.

H. J. N.

SETTLEMENT OF PAUPERS.

See POOR LAW.

SETTLEMENT, FRAUDULENT AND VOID.

See BANKRUPTCY—FRAUD.

SETTLEMENT OF FAMILY AND OTHER DISPUTES.

See COMPROMISE—FRAUD.

SEVERANCE.

Of Excess in Appointment under Powers.]—*See* POWERS.

Of Excess under a Trust for Accumulation.]—*See* ACCUMULATION. *See also* ESTATE—PARTITION.

SEWERS AND DRAINS.

See LOCAL GOVERNMENT—METROPOLIS NUISANCE—WATER.

1. *In General*, 1085.
2. *Commissioners, Powers and Jurisdiction of*, 1087.
3. *Property in Sewers*, 1089.
4. *Compensation for Injuries*, 1090.
5. *Liability for Damage*, 1091.
6. *Obligation to Cleanse and Repair*, 1093.
7. *Presentments*, 1094.
8. *Rate.*
   a. In General, 1097.
   b. Making, 1098.
   c. Liability to, 1098.
   d. Distraining for, 1101.

1. IN GENERAL.

Restraining Proceedings.]—The court will grant an injunction to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under ss. 77 and 73 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133). *Hedley* v. *Bates*, 49 L. J., Ch. 170; 13 Ch. D. 498; 28 W. R. 365.

Jurisdiction of Justices.]—Quære, whether, under the Land Drainage Act, 1861, the justices of the peace have any jurisdiction to decide questions as to the validity of any notice served under ss. 72 and 73 of the act. *Ib.*

Semble, the only questions they are authorised to decide (s. 76) are (1) Whether the proposed drainage works will cause any injury to the land on which they are proposed to be constructed; and (2) Whether the injury (if any) can be fully compensated in money. *Ib.* And see *Ripon (Earl)* v. *Hobart*, 3 Myl. & K. 169; 3 L. J., Ch. 145.

Mortgage of Glebe—Foreclosure—Parties.]—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Wales Land Drainage and Inclosure Companies Act, and may charge his glebe land thereunder. To a foreclosure action under such a mortgage the patron of the living is not a necessary party. *Goodden* v. *Coles*, 59 L. T. 309; 26 W. R. 828.

Certificate of Inclosure Commissioners—Validity of Charge—Borrowing Powers.]—The D. company was by act of parliament empowered to borrow upon mortgage of the lands of the company sums not exceeding 25,000*l.* The company borrowed more. After this the L. company advanced to the D. company 6,405*l.*, and by an order the inclosure commissioners purported to charge the lands of the D. company with the repayment of that sum and interest:—Held, that the powers given by the L. company's act did not override the restriction on the borrowing powers of the D. company, and that the charge on the lands was invalid; and that a clause in the L. company's acts making the certificate of the inclosure commissioners conclusive evidence of the validity of a charge did not render the charge valid. *Wenlock (Baroness)* v. *River Dee Co.*, 57 L. J., Ch. 946; 38 Ch. D. 534; 59 L. T. 485—C. A.

—— **Land Drainage Charge—Priority.**]—The General Land Drainage Act, 1849, and the Lands Improvement Act, 1853, each contained a section which provided that, upon the certificate of the inclosure commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every existing or future charge. The company of 1853 executed improvements on land already subject to a charge in favour of the company of 1849:—Held, that the charge of 1849 was entitled to priority. *Pollock* v. *Lands Improvement Co.*, 57 L. J., Ch. 853; 37 Ch. D. 661; 58 L. T. 374; 36 W. R. 617.

Right of Owner.]—An owner of land has an unqualified right to drain it for agricultural purposes, to get rid of surface water, the supply of the water being casual and its flow following no regular course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water. *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J. Ex. 33.

Widening Drains—Trustees under Local Act.]—By a local act, trustees were appointed for the more effectual drainage, by means of a steam-engine, of a fen in Lincolnshire; and every engine, machine, building and work to be made by the trustees under the act, and all sewers, drains, watercourses, &c., and other works already made, or then existing or provided for the drainage of the fen, and the right to and property in them, should be vested in the trustees; a proviso that nothing in the act should extend to or affect any sewers, drains, watercourses, &c., already made, or existing, and then vested in commissioners appointed under a former enclosure and drainage act, called the Black Sluice Commissioners. It was further enacted that it should be lawful for the trustees, upon any land not vested in the Black Sluice Commissioners, to make and erect a steam-engine, with all proper machinery, and necessary works; and to make, maintain, repair, and improve the sluices, bridges, cuts, sewers, and other works, already or thereafter to be made in, upon, and through the fens:—Held, that the trustees had no power to widen a drain under the control of the Black Sluice Commissioners, to bring a sufficient supply of water to their steam-engine, thereby cutting away land vested in the commissioners; and that they had no power to make any reservoir on the land vested in the commissioners, although the making of the reservoir was necessary to the proper working of the engine, and none could be made without cutting into banks or drains vested in the commissioners. *Smith* v. *Bell*, 2 Railw. Cas. 877; 10 M. & W. 378.

Tenant Right—Reimbursement on Sale.]—Where A., B. and C., joint owners in fee of an

estate, of which C. was in the occupation as tenant, sold to a purchaser, under an agreement that "the tenant rights are to be ascertained by valuation in the usual manner, and paid for on completion of the purchase," they are entitled to recover from the purchaser, as one of such tenant rights, two-thirds of the sum expended by C. in drainage of the estate during his occupation. *Ward* v. *Moss*, 16 L. T. 91.

—— **Quâ Owner.**]—If the tenant had not been an owner, the purchaser would have been bound to pay for the whole drainage; but if all the three owners had been occupiers as well, the purchaser would not be liable for the cost of the drainage. *Ib.*

Representation that Estate was well Drained.]—It is no answer to the claim that at the time of the sale the estate was represented to the purchaser to be thoroughly well drained. The purchaser should have inquired by whom it was drained. *Ib.*

2. Commissioners, Powers and Jurisdiction of.

Over Navigable Streams.]—A commission of sewers extends only to navigable streams, unless within two miles of London. *Yeun* v. *Holland*, 2 W. Bl. 717. And see *Anon.*, 2 Chit. 137.

The commission has jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if the place over which the jurisdiction is exercised is benefited by it. *Dore* v. *Grey*, 2 Term Rep. 358; 1 R. R. 494.

New Romney Level—Metes and Bounds—Evidence of.]—A map, made under the authority of the commission in 1832, setting out the metes and bounds of the level, authenticated by the presentment of a jury, who made it part of their return to an inquisition under the same commission, and acquiesced in for nearly sixty years, is evidence of the local limits within which the commissioners of the level are entitled to exercise their jurisdiction of levying rates. *New Romney Corporation* v. *New Romney Commissioners*, 61 L. J., Q. B. 558; [1892] 1 Q. B. 840; 56 J. P. 756—C. A.

When Empowered to make a new Sewer.]—The commissioners, under an act, were empowered to make new sewers, but prohibited from making any new sewer to drain into a public river above a certain point:—Held, that they ought to be restrained from enlarging an old sewer running into the river above that point, so as to make it virtually a new sewer. *Holt* v. *Rochdale Corporation*, 39 L. J., Ch. 761; L. R. 10 Eq. 354; 23 L. T. 43; 18 W. R. 885.

By an act, it was enacted that it should be lawful for the directors of the B. company, and they were thereby authorised and required to make a common sewer, and also to alter and reconstruct any of the sewers at the mouths thereof, so that the sewers might be discharged considerably under the surface of the water in a new floating harbour; and also to make such other alterations and amendments in the sewers as should be necessary in consequence of the new floating harbour. The directors altered the sewers so as to discharge them considerably under the water in the floating harbour, but the sewerage there discharged was a nuisance:—Held, that, under the latter part of the clause, the directors were required to make a new sewer, if necessary, to remove the nuisance. *Rex* v. *Bristol Dock Co.*, 6 B. & C. 181; 9 D. & R. 309; 5 L. J. (o.s.) M. C. 51; 30 R. R. 280.

Making Sewers through Private Lands.]—Commissioners were empowered under a local act to make drains through private inclosed lands, after giving public notice. They were also, as such commissioners, by s. 3 of the Nuisances Removal Act, 1855, the local authority; and, as the local authority, were, by s. 22 of the same act, and by s. 67 of 5 & 6 Will. 4, c. 50, empowered to make drains through private enclosed lands adjoining a highway, for the purpose of removing an existing nuisance. A watercourse being a nuisance, and a new sewer being necessary to remove the nuisance, the commissioners, without giving notice, made a new sewer through inclosed land adjoining a highway:—Held, that the commissioners were entitled to act under either the local act or the general act, at their election; and that the making of the sewer was within their powers under the general act. *Derby (Earl)* v. *Bury Improvement Commissioners*, 38 L. J., Ex. 100; L. R. 4 Q. B. 222; 20 L. T. 927; 17 W. R. 772—Ex. Ch.

The Nuisances Removal Act, 1855, s. 22, construed with s. 67 of the Highway Act (5 & 6 Will. 4, c. 50), empowers the local authority, where a new sewer is necessary, to make the same in any direction they think fit through private inclosed lands adjoining a highway, although no sewer previously existed there. *Ib.*

Rights of.]—The commissioners are entitled to restrain a company by injunction until the hearing from interfering with a natural deposit of beach, forming a protection to the country from the inundations of a tidal navigable river, within the survey of the commissioners; notwithstanding a purchase by the company from the lord of the manor, of the spot. *Crossman* v. *Bristol & South Wales Union Ry.*, 1 H. & M. 531; 11 W. R. 981.

Semble, that "banks and walls, &c." by tidal and navigable rivers, as well as by the sea coast, are included in 3 & 4 Will. 4, c. 22. *Ib.*

—— **Taking Private Houses.**]—The commissioners, acting under 57 Geo. 3, c. xxix., cannot take compulsorily the whole of a house unless they have formally adjudged that possession of the whole is necessary for executing their powers. *Thomas* v. *Daw*, 36 L. J., Ch. 201; L. R. 2 Ch. 1; 15 L. T. 200; 15 W. R. 113.

Where, under 57 Geo. 3, c. xxix., notice had been served on the owners in fee of four houses requiring them to treat for the sale to the commissioners, the commissioners will not be allowed to summon a jury to assess the value of one of the houses separately. *Ecclesiastical Commissioners* v. *Sewers Commissioners*, 14 Ch. D. 305; 28 W. R. 824.

Enforcing Penalties for acting without Consent.]—A local act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees, under a penalty of 50*l.*:—Held, that a surveyor, who, after a sewer had been

commenced, directed it to be continued without the consent, incurred the penalty. *Woodward* v. *Cotton*, 1 C. M. & R. 44; 6 Car. & P. 489; 4 Tyrw. 689; 3 L. J., Ex. 300.

Appointment of—Default of Sewer Authority.]—A sewer authority having made default in providing the necessary sewers, the secretary of state, under 29 & 30 Vict. c. 90, s. 49, made an order, "I do order the authority to begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion." After the month, the sewer authority having done nothing, the secretary of state made a second order appointing B. "to perform the duty of the sewer authority in respect of sewerage as he shall be directed by me":—Held, that the two orders were justified by s. 49. *Reg.* v. *Cockerell*, 40 L. J., M. C. 153; L. R. 6 Q. B. 252; 19 W. R. 1133.

Jurisdiction of Court of Chancery.]—Injunction against the commissioners, reducing the height of water in a river, dissolved, there being a much shorter remedy by certiorari in the court of queen's bench, who interfere with great caution. *Kerrison* v. *Sparrow*, 19 Ves. 449.

The court of chancery has jurisdiction to entertain a bill at the suit of the commissioners of sewers appointed under 23 Hen. 8, c. 5, notwithstanding that such commissioners are a court of record. *Crossman* v. *Bristol and South Wales Union Ry.*, 1 H. & M. 531; 11 W. R. 981.

Bill to be relieved against order of commissioners of sewers. Demurrer overruled. *Box* v. *Allen*, Dick. 49.

Where commissioners, under an act, are proceeding to make sewers to the injury of property in a case not within the act, this court, unless expressly excluded, has jurisdiction to interfere, although by the act jurisdiction is given to the justices at sessions, whose judgment is not to be removed by a certiorari. *Birley* v. *Chorlton-upon-Medlock Constables*, 3 Beav. 499.

—— **Turning Water from Mills.**]—Turning water from mills may have help in chancery, but referred to commissioners of sewers. *Swain* v. *Rogers*, Cary, 26.

Costs—Security for.] — The security which may be taken by the inclosure commissioners from a landowner under 10 & 11 Vict. c. 38, s. 6, for the costs of an application for leave to execute work, under the act, is confined to the commissioners' costs; the costs of a person opposing the application successfully cannot be recovered under it. *Inclosure Commissioners, In re*, 33 L. J., Q. B. 171; 9 L. T. 732; 12 W. R. 383.

3. Property in Sewers.

Sewer, what is.]—A natural watercourse, for the greater part of its course, flowed through cultivated land, and was solely supplied by the drainage—natural and artificial—of those lands; it then passed through a town and received the drains of two or three inhabited houses:—Held, that this could not be considered as a sewer, within the Public Health Act, 1848, and did not vest in the local board of health. *Reg.* v. *Godmanchester Local Board*, 35 L. J., Q. B. 125; L. R. 1 Q. B. 328; 14 L. T. 104; 14 W. R. 375.

Vesting — Sea-wall.] — Commissioners of sewers cannot maintain an action against the commissioners of a harbour for breaking down a dam erected by the former, across a navigable river, as the authority to be exercised by them does not vest in them such a possessory interest as will enable them to maintain such action. *Newcastle (Duke)* v. *Clark*, 2 Moore, 666; 20 R. R. 583.

—— **Construction of Statute.**]—The 3 & 4 Will. 4, c. 22, s. 44, enacts, that "the property of and in all lands, tenements, hereditaments, buildings and erections, works and other things which shall have been or shall be purchased, obtained and erected, constructed or made, by or by order of, or which shall be within or under the view, cognizance or management of any commissioners of sewers, shall be and the same are hereby vested in the commissioners of sewers":—Held, that this section did not vest in the commissioners the property in all lands, under their "view, cognizance or management." *Stracey* v. *Nelson*, 12 M. & W. 533; 13 L. J., Ex. 97. And see *Crossman* v. *Bristol Ry.*, supra, col. 1088.

—— **Extent of.**]—The usual clause in local acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage. *Taylor* v. *Oldham Corporation*, 46 L. J., Ch. 105; 4 Ch. D. 395; 35 L. T. 696; 25 W. R. 178. And see *Pentney* v. *Lynn Paving Commissioners*, 12 L. T. 818; 13 W. R. 983.

Right of User—Landlord and Tenant.]—Lease by A. to B., reserving to A. power to enter upon the land, and to dig and make a covered sewer and watercourse through it, to convey away drainage from A.'s premises. A. made a sewer accordingly, and B. made a drain from his own premises, and carried it into the sewer:—Held, that A. was entitled to the exclusive use of the sewer, and that he could recover damages against B. for interfering with such use. *Lee* v. *Stevenson*, El. Bl. & El. 512; 27 L. J., Q. B. 263; 4 Jur. (N.S.) 950.

4. Compensation for Injuries.

Arbitration—Liability Disputed.]—By 11 & 12 Vict. c. 112, s. 69, full compensation shall be made to all persons sustaining any damage by the exercise of the powers of the act; and in case of dispute as to amount, the same shall be settled by arbitration:—Held, that the mode of proceeding given by s. 69 only applied where the amount of compensation, and not where the liability, was disputed. *Reg.* v. *Metropolitan Sewers Commissioners*, 1 El. & Bl. 694; 22 L. J., Q. B. 234; 17 Jur. 787; 1 W. R. 286.

—— **Amount Disputed.**]—B. claimed damage for making a sewer through his land. The board maintained that the land was not damaged, and that he was not entitled to any compensation:—Held, that the dispute was only as to the amount of the compensation, and was therefore to be settled by arbitration; and that arbitrators, if of opinion that there was no damage, might award that the amount of compensation was nothing. *Bradby and Southampton Local Board, In re*, 4 El. & Bl. 1014; 24 L. J., Q. B. 239; 3 C. L. R. 771; 1 Jur. (N.S.) 778; 3 W. R. 413.

In Metropolis.] — In 1854, the commis-

sioners of sewers under 11 & 12 Vict. c. 112, gave notice to A., the occupier of land under a lease by a tenant for life, that they were about to construct a new sewer across the same; and, in the early part of 1855, the work was done, no notice having been given to the owner of the fee. The 18 & 19 Vict. c. 120, passed after the work was to be done, came into operation on the 1st January, 1856. On the expiration of A.'s lease, in 1862, B., who had succeeded to the estate on the death of the tenant for life (in November, 1855), for the first time became aware of the existence of the sewer, which had depreciated the value of the property:—Held, that the liability of the commissioners to compensate B. for such damage was transferred to the metropolitan board of works by 18 & 19 Vict. c. 120. *Pettiward, In re*, 19 C. B. (N.S.) 489; 34 L. J., C. P. 301; 11 Jur. (N.S.) 932; 12 L. T. 764. And see *Holt* v. *Rochdale Corporation*, 39 L. J., Ch. 761; L. R. 10 Eq. 354; 23 L. T. 43; 18 W. R. 885.

Interruption of Drain.]—A statute incorporating a company provided that all disputes respecting compensation, works, matters, or things done or performed under the provisions of the statute, should be determined by arbitration:—Held, that the provision did not apply to a claim for compensation in respect of damages sustained by the interruption of a drain by the works of the company. *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. 57. And see *Eau Brink Drainage, In re*, 3 Sim. 435.

5. Liability for Damage.

Draining for Profit.]—A company who, for profit, undertakes to maintain a drain for carrying off water, is responsible for damage done to the occupier of adjoining land by the bursting of a bank after an unusual rainfall. *Harrison* v. *G. N. Ry.*, 3 H. & C. 231; 33 L. J., Ex. 266; 10 Jur. (N.S.) 992; 10 L. T. 621; 12 W. R. 1081.

A man is not entitled to the support of subterranean water except by special grant. *Ib.*

Covenant to Build.]—A deed of conveyance of land for building purposes contained a covenant by the grantee to build to secure the rent reserved:—Held, that the adjoining owner, who claimed under the same grantor, was, nevertheless, at liberty to drain his own land, although the result of his doing so was to cause a subsidence in the surface of the land of the first grantee. *Ib.*

Escape of Sewage—Adjoining Owners.]—The tenant and occupier of a house is liable for damage done on adjoining premises from the escape of sewage owing to the defective state, under his house, of a drain which receives the sewage from his own and adjoining houses, though he is ignorant of the existence of the drain and has not been guilty of negligence. *Humphrey* v. *Cousins*, 46 L. J., C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.

Pollution of Stream—Prescriptive Right.]—Where a man has a right to the use of an ancient stream flowing through his land, and sewage is precipitated into it as to prevent his using it, he may apply for an injunction to restrain the pollution before it becomes an undoubted nuisance; and it is not competent to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, 35 L. J., Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 308; 14 L. T. 154; 14 W. R. 562.

Primary Cause of Damage.]—By an act of parliament commissioners were the proprietors of a cut, protected by banks and a wall, and by their negligence the cut burst. The plaintiff was in occupation of a farm, which the water did not at first reach, but as the tides became higher, he, in order to keep the water from his land, closed a culvert. The proprietors of the lower ground, fearing this might damage their property, opened the culvert, and the plaintiff's farm became flooded:—Held, that, whether the proprietors of the lower ground were justified or not in opening the culvert, the primary cause of injury was the negligence of the commissioners, and they were therefore liable to the plaintiff. *Collins* v. *Middle Level Commissioners*, 38 L. J., C. P. 236; L. R. 4 C. P. 279; 20 L. T. 442; 17 W. R. 929.

Where Plaintiff elects to run Risk.]—Where commissioners of sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they heaped rubbish, and a cabman, in the exercise of his calling, attempted to lead his horse over the rubbish, and the horse was killed:—Held, that the plaintiff was not disentitled to recover, because he had at some hazard, brought his horse out of the stable, and that the case was properly left to the jury on the question, whether the plaintiff had persisted, contrary to express warning, in running upon an obvious danger. *Clayards* v. *Dethick*, 12 Q. B. 439.

Obligation to Fence.] — Commissioners of sewers used for the purpose of sewerage an ancient tidal-ditch, which ran along the side of a highway:—Held, that they were under no obligation to fence the sewer so as to protect persons frequenting the highway. *Cornwell* v. *Metropolitan Sewers Commissioners*, 10 Ex. 771; 3 C. L. R. 417.

Negligence—Proof.]—In order to render commissioners acting in the bonâ fide performance of a public duty liable to an action for an injury to an individual resulting from an act so done by them, it must appear that they have been guilty of negligence or want of skill in the conduct of it. *Grocers' Co.* v. *Downe*, 3 Scott, 356; 3 Bing. (N.C.) 34; 2 Hodges, 120; 5 L. J., C. P. 307.

Though Work Skilfully Done.]—Where bricklayers, employed by the commissioners to repair a public sewer, performed the work in such a manner as to occasion a damage to a neighbouring house:—Held, that they were liable to an action, although the work itself appeared to be performed in a skilful manner. *Jones* v. *Bird*, 1 D. & R. 497; 5 B. & Ald. 837; 24 R. R. 579. See *Drew* v. *New River Co.*, 6 Car. & P. 754.

For Acts of Persons Employed.]—By a local act, a duty was cast upon commissioners of making and maintaining a sluice and a cut; owing to the negligence of the persons employed by them the sluice and cut were not maintained, and a private individual sustained damage:—Held, that the commissioners were answerable

for the negligence. *Coe* v. *Wise*, 7 B. & S. 831; 35 L. J., Q. B. 262; L. R. 1 Q. B. 711; 14 L. T. 891; 14 W. R. 865—Ex. Ch.

Statutory Exemption.]—Contractors acting under the authority of the metropolitan commissioners of sewers, and bonâ fide acting for the purpose of executing the 11 & 12 Vict. c. 112, by negligence injured premises:—Held, that, under s. 128, they were exempted from all liability. *Ward* v. *Lee*, 7 El. & Bl. 426; 26 L. J., Q. B. 142; 3 Jur. (N.S.) 557; 5 W. R. 403.

—— **Who Entitled to.**]—By a local act commissioners were empowered to cause any "present or future sewers, ditches, drains, &c., to be opened, enlarged, altered or cleansed"; and it was enacted, that in case any action should be brought against any person for anything done in pursuance of the act, or in relation to the matters therein contained, the plaintiff should not recover in any such action, if tender of amends should have been made to him, or his attorney, by or on behalf of the defendant, before such action brought. The defendant, a commissioner, took plaintiff's land for the purpose of widening a drain without having given the plaintiff notice or obtained his consent. The defendant, before action, tendered 10*l.* as amends, which the plaintiff refused to accept; but no tender was pleaded, nor was the amount paid into court:—Held, first, that the defendant was entitled to the protection of the act. *Jones* v. *Gooday*, 9 M. & W. 736; 1 D. (N.S.) 914; 11 L. J., Ex. 297.

Held, secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into court. *Ib.*

6. Obligation to Cleanse and Repair.

Owner or Occupier.] — The cleansing and repairing of drains and sewers is primâ facie the duty of him who occupies the premises, and does not devolve upon the owner, merely as such. *Russell* v. *Shenton*, 3 Q. B. 449; 2 G. & D. 573; 6 Jur. 1083; 11 L. J., Q. B. 289.

If an owner of land on which is a house constructs on the other part of the land a sewer, and lets the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner, in such a faulty state, the house is injured, the owner is liable to his lessee. *Alston* v. *Grant*, 3 El. & Bl. 128; 2 C. L. R. 933; 23 L. J., Q. B. 163; 18 Jur. 332; 2 W. R. 161.

Dispute between Authorities—Proceedings—Mandamus.]—By s. 93 of 33 & 34 Vict. c. c.—it was enacted that any dispute which might arise between the sewers board and any local authority with respect to carrying into effect the provisions of the act or incidental thereto might, at the instance of either party, be referred to the judge of the Sussex county court, who should hear and determine such dispute, and whose decision should be final and conclusive. A dispute having arisen between the sewers board and one of the local authorities with respect to the mode of carrying out the provisions of the act:—Held, that the county court judge was bound to hear and determine the matter, and that a mandamus was the proper course to compel him to do so, and not a rule or order under 19 & 20 Vict. c. 108, s. 43—this being a special duty imposed upon him by statute. *Brighton Sewers Act, In re*, 9 Q. B. D. 723.

Execution of Works—Notice.]—Sect. 14 of 10 & 11 Vict. c. 38, provides that where, through the neglect of an occupier of land to maintain the banks, or to cleanse and scour the channels of existing drains, streams, or watercourses, bounding the lands of such occupier, injury is done to any other land, the occupier of such lands so injured may, after notice in writing, execute the necessary works for maintaining and repairing such banks, &c. The respondent's land having been injured through the neglect of the appellant to cleanse an underground drain running through his land:—Held, that the words "drain, stream, or watercourse" include an underground drain, and that proceedings were rightly taken under this act. *Bowes* v. *Watson*, 42 L. T. 27; 28 W. R. 394; 44 J. P. 364.

7. Presentments.

Validity—Precept to Sheriff.]—A jury summoned by the sheriff to make a presentment should come from the body of the county, and not from the district over which the commissioners have jurisdiction; and where the precept was to summon "men of your county, and resident within" the district over which the commissioners had jurisdiction, it was bad; and a presentment made by that jury, and all the subsequent proceedings founded on it, were declared to be void. *Birkett* v. *Crozier*, 3 Car. & P. 63; M. & M. 119.

—— **Summoning the Jury.**]—By 23 Hen. 8, c. 5, the jury, by whom a presentment is made to commissioners of sewers, ought to be summoned by the sheriff from the body of the county, in pursuance of a precept directed to him from the commissioners. *Rex* v. *Somerset Sewers Commissioners*, 7 East, 71; 3 Smith, 105.

A presentment made by a standing jury, constituted according to ancient usage, at the commencement of every new commission of sewers, from certain districts, composed of landowners there, which jurymen acted for life, and only the foreman of whom was summoned by the sheriff on the particular occasion, is void; and the want of jurisdiction of such presenting jury cannot be waived by traversing their presentment and going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. *Ib.* See also *Taylor* v. *Loft*, infra.

—— **Form of.**]—The presentment need not contain the name of every person benefited; if it finds "all Fore Street" to be benefited, that includes every one having a house there; and any one so having a house might traverse such presentment. *Warren* v. *Dix*, 3 Car. & P. 71.

The warrant of distress need not recite the presentment. *Ib.*

A defendant is not entitled to recover his treble damages under 23 Hen. 8, c. 5, s. 12, unless he claims them on the record. *Ib.*

—— **Construction.**] — The court of sewers directed a precept to the sheriff requiring him to summon jurors de corpore comitatûs to appear and make a presentment. The sheriff summoned a jury from the hundred of C. in the county; they made

a presentment and assessed a rate which the commissioners confirmed. No appeal was made against the presentment or assessment, and in 1823 a special law of sewers was enrolled containing the presentment, and all rates were made under such law. In 1840 a new commission of sewers issued, and at the first court holden under it, it was ordered that all laws, acts, deeds, constitutions and ordinances of sewers for the county, and which had not been repealed, altered or superseded, should be confirmed. In 1846, at a meeting of the commissioners a rate was made without any presentment of a jury. In 1847 and 1848 similar rates were made without any presentment of a jury:—Held, first, that the confirmation of the law of 1823, by the order of the new commissioners, rendered the original presentment operative and applicable to the rates, and consequently that they were valid. *Taylor* v. *Loft*, 8 Ex. 269.

Held, secondly, that it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of C. *Ib.*

Change of Owners during Continuance of Commission.]—A., having been presented by a jury, summoned under a commission of sewers, to be liable to repairs as owner of lands:—Held, that 3 & 4 Will. 4, c. 22, s. 13, did not authorise the commissioners, during the continuance of the same commission, to make an order for the repairs upon a person who had become owner since the presentment; and that such order was void. *Reg.* v. *Warton*, 2 B. & S. 719; 31 L. J., Q. B. 265; 9 Jur. (N.S.) 325.

—— **Order to Repair Sea-wall—Interest.**]—The presentment of a jury in 1861 found that the then owner of A.'s land was bound to repair a portion of the sea wall. In 1881—2 the commissioners made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level:—Held, that if the commissioners had made the orders under the powers of s. 33 of the Land Drainage Act, 1861, they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was an interested party. *Fobbing Commissioners* v. *Reg.*, 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721—H. L. (E.)

—— **Certiorari.**]—If a person against whom a presentment is made by a court of sewers obtains a certiorari to remove it into the queen's bench he must, before the allowance of the writ, enter into the recognisances required by 5 & 6 Will. 4, c. 33. *Reg.* v. *Baker*, 28 L. J., Q. B. 377; 7 W. R. 476.

When Award Ultra Vires.]—By an inclosure act, commissioners were required to set out or appoint "such fences, ditches, bridges, drains, sewers, cloughs, &c., within a township as they should think convenient." The act provided "that all such sewers and drains should be made, repaired, and kept in repair, in such manner as the other public sewers and drains within the township were by law to be repaired and kept in repair." The act also provided that all such private ways, &c., should be supported and repaired by the proprietors of lands within the township, in such manner as the commissioners should by their award appoint, and required the commissioners by their award to describe "all manner of sewers and drains," and all "private ways, cloughs, sewers, and drains," within the inclosed lands. The commissioners awarded two public sewers, and directed that they should be kept in repair and preserved of a certain width and depth by the owners and proprietors of the inclosed lands according to an acreage rate. Up to the time of the passing of the act, the owners and proprietors contributed to the repairs of one of these sewers, and they contributed to the repairs of the other eighty years after the act:—Held, that a presentment, that one of these sewers ought to be made of an increased gauge and repaired by the proprietors of the inclosed lands, according to an acreage rate, without disclosing any liability upon the part of these owners ratione tenuræ, or by reason of benefit, was illegal, as the act did not alter the law regulating the repairs of public sewers, and the award, if it purported to do so, was ultra vires. *Biglin* v. *Wylie*, 36 L. J., Q. B. 307.

Fines of Jurymen—By Local Commissioners.] A local act, enacting that all the lanes, &c., within a certain district (previously within the jurisdiction of the general commissioners of sewers), and the works, drains, sewers, &c., thereof, should be subject only to the control and jurisdiction of local commissioners thereby appointed, and not to the control or order of any commissioners of sewers, does not discharge the inhabitants of the district from their liability to serve on juries at the sessions of sewers; nor will the court discharge the estreats of fines imposed by the sessions on such inhabitants for refusing to attend. *Owst*, *Ex parte*, 9 Price, 117.

Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the court discharged the fine, it being admitted that it was not usual to re-swear the jury, except upon the issuing of a new commission. *Taylor*, *Ex parte*, 3 Y. & J. 91.

Not disputed.]—A jury presented that A. was benefited by the sewers; and he received a summons to show cause why he should not pay; he neglected to traverse the presentment, and a distress was levied for the amount of the rate:—Held, that the presentment, if duly made and not traversed, justified the commissioners in issuing the warrant of distress. *Warren* v. *Dix*, 3 Car. & P. 71.

Amending Traverse to.]—On a presentment to the commissioners, the party charged appeared on a proper day in a court of sewers, and tendered his traverse in writing. The clerk to the commissioners filed a demurrer on the ground of informality. The party charged applied for leave to amend his traverse, which the court refused, and gave judgment against him on the demurrer. On this a rate was made:—Semble, that the commissioners were wrong in admitting the demurrer to the traverse, or they should have given leave to amend. *Reg.* v. *Tower Hamlets Sewers Commissioners*, Dav. & M. 232; 5 Q. B. 375.

8. RATE.

a. In General.

Validity.]—A sewers rate laid under 11 & 12 Vict. c. 112, can be impeached only by appeal to the commissioners. *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, 7 El. & Bl. 964; 26 L. J., Q. B. 253; 3 Jur. (N.S.) 1216; 5 W. R. 711.

—— **Where no Presentment.**]—A parish consisting of two districts had immemorially been assessed to the repairs of a sea bank by one assessment, collected by one dykereeve. The commissioners without any presentment, appointed two dykereeves, one for each district, and made a rate on one district exclusively for the repairs of the sea bank:—Held, that the rate was void, and that the commissioners were liable for the taking of cattle under a distress warrant for arrears of such rate. *Wingate* v. *Waite*, 6 M. & W. 739; 9 L. J., Ex. 319; 4 Jur. 860.

An order of commissioners of sewers is void, unless it is founded on a presentment showing the existence of some public let, impediment, or annoyance. *Reg.* v. *Matthias*, 2 Jur. 13.

—— **By Majority of Assessors.**]—By a local act, the commissioners were authorised to assess and tax upon the whole district such sums as should be necessary, and to elect assessors to apportion such sums of money amongst the several parishes and townships. The commissioners having appointed three assessors to agree upon an apportionment, two out of the three agreed:—Held, that the making of the apportionment being a matter of public duty and trust, an apportionment by two, at a meeting of the three, was valid. *Rex* v. *Whitaker*, 9 B. & C. 648; 7 L. J. (O.S.) K. B. 332.

Retrospective Rate—Costs under Local Act—Rates.]—A local act for draining land, contained no prohibition against a retrospective rate. The commissioner borrowed money for the works directed by the act:—Held, that a rate made to pay off this debt was, under the act, valid. *Harrison* v. *Stickney*, 2 H. L. Cas. 108.

Inspection of Documents.]—Commissioners of sewers united two levels, which theretofore had separate drains and sewers, and had been separately rated for drainage, and then made a joint rate on the united levels. An occupier of property within one of the levels applied to the commissioners for an inspection of all commissioners' plans, rates, presentments, decrees, account-books, proceedings and minutes relating to the whole district. The commissioners gave inspection of all documents relating to the rates on the united level:—Held, that this was all he was entitled to. *Reg.* v. *Tower Hamlets Sewers Commissioners*, 3 G. & D. 92; 3 Q. B. 670; 11 L. J., Q. B. 231; 6 Jur. 1059.

Nature of.]—A sewers rate is not a parliamentary tax, not being imposed directly by act of parliament. *Palmer* v. *Earith*, 14 M. & W. 428; 14 L. J., Ex. 256.

Deduction of—How Calculated.]—A. demised land to B., upon a building lease, at the yearly rent of 60*l.*, clear of all rates and assessments, the sewers rate and land-tax only excepted, with the usual covenants for payment of rent. B. having, by building on the land, increased its ratable value to 800*l.* per annum:—Held, that he was only entitled to deduct the sewers rate and land-tax upon the original rent, and not in respect of the improved value. *Smith* v. *Humble*, 15 C. B. 321; 3 C. L. R. 225. And see *Armitstead* v. *Durham*, 11 Beav. 56; 13 Jur. 330.

b. Making.

For what Purposes—Law Expenses.]—Where commissioners, apprehending that a bill, if passed, would injure the land within their jurisdiction, instructed their clerk to oppose the progress of the bill:—Held, that it was within the jurisdiction of the commissioners under 3 & 4 Will. 4, c. 42, to employ their clerk to oppose the bill in parliament at the costs of the commission; that by s. 16 they were empowered to make a rate for paying their clerk the costs, charges and expenses incurred in opposing the bill. *Reg.* v. *Norfolk Sewers Commissioners*, 15 Q. B. 549; 15 Jur. 121.

—— **Past Expenses.**]—The commissioners may make a rate to defray the expenses of works already done. It is no valid objection to such a rate that it is made to defray previous law expenses of the commission, bonâ fide incurred by the commissioners in the discharge of their duty. Nor that the rate is in the alternative, to defray the expenses of works done or to be done; for the word "or" must be read "and." *Rex* v. *Tower Hamlets Sewers Commissioners*, 1 B. & Ad. 232; 9 L. J. (O.S.) M. C. 30.

Rate in Gross.]—A sewer rate assessed in gross on a township at large is bad. *Emerson* v. *Saltmarshe*, 7 A. & E. 266; 2 N. & P. 446; 6 L. J., K. B. 235.

The rate must be assessed on individuals. *Ib.*

Benefit to Property, how considered.]—The 11 & 12 Vict. c. 112, s. 76, has not altered the principle of rating to the sewers rate; and in assessing property under that statute the commissioners must consider whether any benefit is derived by the property from the sewers. *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, 7 El. & Bl. 964; 26 L. J., Q. B. 253; 3 Jur. (N.S.) 1216; 5 W. R. 711.

Where commissioners of sewers had effected a union of the sewers of one level with the sewers of another, which was not beneficial to the latter, though after the union it derived benefit from the sewers in the entire united level, a rate upon the whole of the united level, assessing the owners and occupiers in the latter in respect of their property benefited, is valid. *St. Katharine Dock Co.* v. *Higgs*, 10 Q. B. 641; 16 L. J., Q. B. 377; 11 Jur. 991—Ex. Ch.

And see *Rex* v. *Tower Hamlets Sewers Commissioners*, infra, col. 1099.

Repair of Wall.]—A rate for the repair of a wall is bad, unless the want of repair appears upon the proceedings to have been found by a jury. *Reg.* v. *Matthias*, 2 Jur. 13.

c. Liability to.

Persons Benefited—Who are.]—All persons whose property derives any advantage from the works of the commissioners, may be assessed in respect of that property. *Soady* v. *Wilson*, 4 N. & M. 777; 3 A. & E. 248; 1 H. & W. 256.

And property drained by sewers, and drains originally made and always repaired by persons independently of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed. *Ib.*

By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the sewers rate, as occupiers, who are de facto rated in respect of such premises to the poor rates of the parishes to which that act applies. *Ib.*

Different Levels.]—Where a district within one commission of sewers is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated. *Rex* v. *Tower Hamlets Sewers Commissioners*, 4 M. & Ry. 365; 9 B. & C. 517; 7 L. J. (O.S.) K. B. 131.

When Person cannot be Benefited.]—The commissioners of sewers cannot assess a person in respect of drains which communicate with other drains which fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he is not, nor is likely to be, benefited by the works done upon the sewer. *Masters* v. *Scroggs*, 3 M. & S. 447.

Necessity of Occupation.]—It is not sufficient, in order to justify an assessment to the rate, that the property should derive benefit from the drainage, but it is also necessary that there should be an occupier of the property assessed. *Neave* v. *Wrather*, 3 G. & D. 221; 3 Q. B. 984; 12 L. J., Q. B. 32; 7 Jur. 168. S. P., *Tracey* v. *Taylor*, 3 Q. B. 966; 3 G. & D. 14; 12 L. J., Q. B. 26; 7 Jur. 170.

Occupier—Who is.]—A clerk of the works of C. hospital dwelt in the hospital, in apartments in which he was permitted by the commissioners of woods and forests to dwell, in respect of his office, and which were separately rated for the sewers by an undisputed rate:—Held, that he was not an occupier of the land, or of any part of the building, except the apartments assigned to him. *Ib.*

The bridewell or house of correction for Westminster is a prison of our lady the Queen; a part of the bridewell was used for the purpose of keeping prisoners therein:—Held, first, that an assessment could not be made in respect of the part of the bridewell upon the governor, who resided in the governor's house, which was separately rated to the sewers rate. *Tracey* v. *Taylor*, supra.

Held, secondly, that that part was not liable to be assessed to the sewers rate. *Ib.*

Public Building.]—A tenement in the king's dockyard, deriving a benefit from the public sewers, and occupied by an officer of government, who pays no rent, is still liable to be rated. *Netherton* v. *Ward*, 3 B. & Ald. 21; 22 R. R. 284.

The apartments in Somerset House, appropriated to the commissioners for auditing public accounts, are ratable, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances. *Soady* v. *Wilson*, supra.

Proprietors of a Bridge.]—The proprietors of a suspension bridge over the Thames are ratable to the sewers rate, under 18 & 19 Vict. c. 120, in respect of the bridge itself and the approaches, though the bridge itself derived no direct benefit from sewers, to maintain which the rate was levied, but the approaches were drained by means of such sewers, notwithstanding that other and sufficient drainage was provided by the owners of the bridge. *Hammersmith Suspension Bridge Trustees* v. *Hammersmith Overseers*, 40 L. J., M. C. 79; L. R. 6 Q. B. 230; 24 L. T. 267; 19 W. R. 750.

New Street—What is.]—S., about 1866, built houses abutting on the Harrow Road, and about the same time the vestry constructed a sewer along the Harrow Road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to 1856. Before 1866 no sewer existed in the Harrow Road, which was a turnpike road until 1864, when the vestry took charge of it:—Held, that the Harrow Road was a new street within the meaning of 25 & 26 Vict. c. 102, s. 112; that s. 53 did not apply to new streets, as defined by 25 & 26 Vict. c. 102, s. 112, and that S. was therefore liable to be rated under s. 52. *Sawyer* v. *Paddington Vestry*, 40 L. J., M. C. 8; L. R. 6 Q. B. 164; 23 L. T. 662; 19 W. R. 96.

Land Covered with Water—Canals.]—By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with water . . . . shall pay to the sewers rate in respect of his property one-fourth part only of the rate in the pound payable in respect of houses and other property. A waterworks company was possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, and of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains, and service pipes:—Held, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one-fourth; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, ought to be assessed at the full value. *East London Waterworks Co.* v. *Leyton Sewer Authority*, 40 L. J., M. C. 190; L. R. 6 Q. B. 669; 20 W. R. 95.

Tithe Rent-Charge.]—Semble, that a commutation tithe rent-charge is not liable by law to contribute to a sewers rate. *Reg.* v. *Goodchild*, El. Bl. & El. 2; 27 L. J., M. C. 251; 4 Jur. (N.S.) 1050. But see *Reg.* v. *Sherford*, 8 B. & S. 596; 36 L. J., M. C. 113; L. R. 2 Q. B. 503; 16 L. T. 663; 15 W. R. 1035.

Agreement—Assessment by Sewers Commissioners.]—By a memorandum of agreement lands were demised to a tenant, subject to a condition that he should pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the sewers lands, the then present land tax only excepted:—Held, that an extraordinary assessment, made by commissioners for a work of permanent benefit to the land, was within the

agreement. *Waller* v. *Andrews*, 3 M. & W. 312; 1 H. & H. 87; 7 L. J., Ex. 67.

After Presentment.]—Under 3 & 4 Will. 4, c. 22, s. 13, no order in respect of repairs can be made upon a person who becomes owner of lands subsequently to the date of the commission, and who, consequently, has not been presented by a jury as the person liable thereto. *Reg.* v. *Warton*, 2 B. & S. 719; 31 L. J., Q. B. 265; 9 Jur. (N.S.) 325.

Decree of Commissioners not Conclusive.]—A decree by the commissioners is not conclusive against the party assessed who resides within the district over which they have jurisdiction; but such party may prove that he derived no profit from the sewer in respect of which the assessment was made. *Stafford* v. *Hamston*, 5 Moore, 608; 2 Br. & B. 691; 23 R. R. 543. See *Neave* v. *Wrather*, supra.

d. Distraining for.

When Allowed.]—An amercement on a township generally, and a distress on one of the parties liable, by commissioners of sewers, for neglect to repair, is good. *Ramsey* v. *Nornabell*, 3 P. & D. 253; 11 A. & E. 383.

Royal Palace.]—A distress cannot be levied for sewers rates within the precincts of a royal palace, occupied as the residence of the sovereign, such as Kensington Palace. *Att.-Gen.* v. *Donaldson*, 10 M. & W. 117; 11 L. J., Ex. 338.

Joint Warrant.]—A joint warrant to two persons to distrain for drainage rates may be well executed by one of them. *Lee* v. *Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271; 4 W. R. 554.

By Collector—General Authority.]—Where a collector for the commissioners of sewers receives from them a warrant directing him to distrain and afterwards sell the goods of A., he cannot, if he distrains the goods of A.'s tenant, justify the distress on the ground of his general authority of collector; whatever that general authority may be, it is taken away in the particular case by the warrant directing him to do a specific thing. *Sabourin* v. *Neale*, 2 H. & W. 103.

E. E. H. B.

SEXTON.

See ECCLESIASTICAL LAW.

SHARES.

Whether Real or Personal Estate.]—*See* CHARITY—COMPANY.

Gift of.]—*See* GIFT—WILL.

Issue of, Sale and Transfer.]—*See* COMPANY.

Contracts for Sale of—Performance of.]—*See* SPECIFIC PERFORMANCE.

SHELLEY'S CASE, RULE IN.

1. *General Principles*, 1102.
2. *Legal Limitations*, 1103.
3. *Equitable Limitations*, 1106.
4. *Estate of Ancestor.*
   a. Sufficiency of, 1110.
   b. Words Qualifying, 1111.
5. *Remainder to Heirs or Heirs of Body*, 1115.
6. *Remainder to Heir or Heir of Body.*
   a. In General, 1119.
   b. Words Qualifying, 1120.
7. *Remainder to Issue and Effect of Words Superadded to "Issue,"* 1122.
8. *Executory Trusts*, 1127.

1. GENERAL PRINCIPLES.

General Rule.]—When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; the word "heir" in such case is always taken to be a word of limitation, not of purchase. *Ambrose* v. *Hodgson*, 3 Bro. P. C. 416.

A devise to A. for life, and to the heirs of his body, so unites the two estates as to make the first taker tenant in tail. *Sheppard* v. *Gibbons*, 2 Atk. 444, 797.

Where there is an estate of freehold, limited to the ancestor, no subsequent limitation to his heirs or to the heirs of his body can make them purchasers. *Dubber* d. *Trollope* v. *Trollope*, Amb. 462.

Where plain words give an estate tail, they should not be controlled, but by a very plain indication. *Sayer* v. *Masterman*, Amb. 345.

In order that the rule may apply, the estate for life and the estate of inheritance in remainder must be either both legal or both equitable. *Silvester* d. *Law* v. *Wilson*, 2 Term Rep. 444; 1 R. R. 519. S. P., *Richardson* v. *Harrison*, 55 L. J., Q. B. 58; 16 Q. B. D. 85; 54 L. T. 456.

Deed and Will.]—The principles governing the application of the rule, are the same in the case of wills as in the case of deeds. *White and Hindle's Contract, In re*, 47 L. J., Ch. 85; 7 Ch. D. 201; 37 L. T. 574; 26 W. R. 124.

General Intent and Particular Intent.]—The supposed rule that in construing a will, the particular intent must give way to the general intent, is only to be applied in cases falling within the rule in *Shelley's case*. *Doe* d. *Gallini* v. *Gallini*, 5 B. & Ad. 621; 2 N. & M. 619; 3 L. J., K. B. 71.

How far, and in what cases, the particular intent in a will must give way to the general intent appearing upon the same instrument, when the two intents are inconsistent, quære. *S. C.*, 3 A. & E. 348; 4 N. & M. 893; 4 L. J., Ex. 337.

Two Instruments.]—Where by one instrument an equitable estate for life is vested in A., with a legal estate in remainder to the heirs of his body, and by another instrument a legal estate for life is vested in A., that legal estate for life so vested in A. will not coalesce with the legal remainder to the heirs of his body so as to defeat the rights of the remaindermen. *Collier* v. *M'Bean*, 34 Beav. 246; 34 L. J., Ch. 555; 11 Jur. (N.S.) 592;

12 L. T. 790; 13 W. R. 766. And on appeal, *see* infra.

Semble, the rule in *Shelley's case* applies only where the remainder is created by the same instrument which creates the particular estate. *Coape* v. *Arnold*, 4 De G. M. & G. 574; 24 L. J., Ch. 673; 1 Jur. (N.S.) 313; 3 W. R. 187.

A., on the marriage of his son B., settled lands to the use of B., for life, remainder to the wife for life, remainder to the heirs of their two brothers, remainder to B. in fee; B. and his wife, by deed and fine, mortgaged in fee, and subject to the mortgage the lands were settled to the use of B. for life, and after his and his wife's death to the heirs of her body by him begotten, remainder to his right heirs. The wife, after her husband's death, suffered a common recovery. Whether the estate of the wife for life, by the first settlement, and the limitation to the heirs of her body by the second, consolidated; and if it did, whether the estate of the wife was aliened, within the stat. of 11 Hen. 7, quære. *Clifton* v. *Jackson*, 2 Vern. 486.

An estate to A. for life in a deed, and a limitation of the same estate to the heirs of the body of A. in a will (though the estate by the deed is voluntary, and moved from the testator, and is recited in the will) do not unite so as to give A. an estate tail, but the heirs of his body take by purchase. *Doe* d. *Fonnereau* v. *Fonnereau*, Dougl. 470.

A will and schedule thereto are considered as one instrument. See *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698.

Absolute Interests in Personalty where Estate Tail in Realty.]—*See* WILL.

2. LEGAL LIMITATIONS.

Estate of Trustees.]—Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

A testator, in 1827, devised land to trustees and their heirs upon trust to stand seised of the land during the life of W. C., and until the testator's debts and legacies were paid upon trust to let the land, and to apply the rents in payment of his debts and legacies until they were all paid, and thenceforth to pay the rents to W. C. during his life; and after the death of W. C., and the payment of his debts and legacies, the testator devised the land to the heirs of the body of W. C. After the debts and legacies had been paid, the trustees conveyed the legal estate to W. C. for his life, it being assumed that they had only an estate pur autre vie. W. C. suffered a common recovery, and afterwards contracted to sell the estate. The Master of the Rolls held (supra), that the trustees did not take the whole fee, but only a fee determinable on the payment of the debts and legacies and the death of W. C.; that the estate for life of W. C. being an equitable estate, and the estate in remainder to the heirs of his body being a legal estate, the rule in *Shelley's case* did not apply, and that the title was bad. Per Knight-Bruce, L.J.: Semble, the trustees took the entire fee, and the title was good:—Held, by both their lordships, that as the view that the trustees did not take the entire fee had been acted on for many years, and the Master of the Rolls was of opinion that they did not, the title ought not to be forced on a purchaser. *Collier* v. *M'Bean*, 35 L. J., Ch. 144; L. R. 1 Ch. 81; 12 Jur. (N.S.) 1; 13 L. T. 484; 14 W. R. 156. And see *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252; 29 L. T. 868.

Lands were devised to trustees and their heirs, in trust to pay legacies and annuities, and then to pay the surplus of the rents and profits to A. during her life, for her separate use, or as she should direct; and after her death to stand seised to the use of the heirs of her body, with remainders over:—Held, that this was a use executed in the trustees and their heirs during the life of A., and that she had only a trust in the surplus rents and profits during her life, and that the subsequent limitation to the trustees to the use of the heirs of her body was a use executed in the persons entitled to take by virtue thereof; and therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, their different interests could not unite so as to create an estate tail by operation of law in the ancestor. *Say and Sele (Lord)* v. *Jones (Lady)*, 3 Bro. P. C. 113; 1 Eq. Cas. Abr. 383.

Devise to trustees to pay out of rents and profits, after deducting rates, taxes, and repairs, the residue to C. S. and his assigns, for life, and after his decease to the use of the heirs male of the body of C. S., and in default of such issue remainder over, not an estate tail in C. S., the uses not being executed in him. *Shapland* v. *Smith*, 1 Bro. C. C. 75. See observations on this case, in *Vancouver* v. *Bliss*, 11 Ves. 465; 8 R. R. 227.

A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed: the object of the trust terminating with that life; and a remainder following to the same trustees, upon the death of the tenant for life, for a term of years. A subsequent remainder therefore to the heirs of the body of the tenant for life held, a legal estate; uniting with the legal estate for life; and vesting an estate tail, according to the rule in *Shelley's case*; not an equitable estate, capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89; 8 R. R. 303. S. P., *Nash* v. *Coates*, 3 B. & Ad. 839; 1 L. J., K. B. 137; and *Toller* v. *Attwood*, 15 Q. B. 929; 20 L. J., Q. B. 40.

Implied Estate Tail.]—G., who died in 1837, devised certain freehold hereditaments to W. B. for life, and if he should die without having a son, over. W. B. entered into possession of the property and died in 1882, leaving a son, W. E. B., who entered into possession of the property and contracted to sell it. The purchaser having objected to the title, a summons was taken out under the Vendor and Purchaser Act:—Held, that there was an implied gift to the son of W. B., and this implied gift following on the gift to W. B. for life, was equivalent to a word of limitation, and therefore by the rule in *Shelley's case*, gave W. B. an estate in tail male, and as this had not been barred W. E. B. was entitled to the property for an estate in tail male. *Bird and Barnard, In re*, 59 L. T. 166.

A. devised lands, subject to annuities and other charges, to his executors and the survivor of them, and the heirs of such survivor, upon trust to preserve contingent remainders during the lives of the devisees for life; then to the use of

W. during his life, and the heirs of his body lawfully begotten :—Held, that W. took an estate tail in the lands. *Welply* v. *Raycroft*, 15 W. R. 213.

Real and personal estate was devised to a feme covert for her life, for her independent use and benefit, with remainder to her husband for life, with "remainder to the heirs of her body in tail, with remainders over"; and then followed a declaration in the will that "all the aforesaid limitations were intended by the testator to be in strict settlement" :—Held, in accordance with the certificate of the court of C. P., that, subject to her husband's life estate, the wife took an estate tail in the realty and an absolute interest in the personalty. *Douglas* v. *Congreve*, 1 Beav. 59 ; 8 L. J., Ch. 53 ; 3 Jur. 120. And see *S. C.*, 4 Bing. (N.C.) 1 ; 5 Scott, 223 ; 7 L. J., C. P. 43 ; 1 Keen, 410 ; 6 L. J., Ch. 51.

Equitable Estate for Life.] — Devise (after 1837) of copyholds and freeholds to trustees to hold unto them and their heirs on trust to pay unto or permit A. to receive the rents during his life, and after his death to the use of the heirs of his body, with a gift over in case he died without leaving issue :—Held, that A. took an equitable estate for life with a legal remainder to the heirs of his body in both the freeholds and copyholds. *Baker* v. *Parson*, 42 L. J., Ch. 228.

The statute of uses not applying to copyholds, on a devise of freeholds and copyholds together, the legal estate in the copyholds attracts that in the freeholds and makes it vest in the first devisee. *Ib.*

Copyholds are, however, to the same extent as freeholds, subject to the rule that the legal estate in the trustee shall be construed to be the smallest estate necessary for the execution of the trust. *Ib.*

Devise to trustees and their heirs during the life of A. B., in trust to lay out the rents in government securities, until A. B. should attain twenty-one, and after that to suffer her to take the profits during her life, not subject to the debts or control of her husband, her receipt to be a sufficient discharge ; and after her decease, to her heirs. Upon a suit for specific performance of an agreement for the purchase of part of the estates, the question was, whether A. B. took the legal, or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case*. The lord chief baron would not compel the defendant to accept the title. *Playford* v. *Hoare*, 3 Y. & J. 175.

The court will order rectification of a deed on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. *Hanley* v. *Pearson*, 13 Ch. D. 545 ; 41 L. T. 673.

By a post-nuptial settlement, real estate belonging to the wife was conveyed unto A. and his heirs "to the use of" A., his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use ; and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife ; but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in *Shelley's case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee :—Held, that a conveyance of the outstanding legal estate was unnecessary. *Ib.*

3. Equitable Limitations.

Tenant for Life with Power to Appoint—Ultimate Limitation to her Right Heirs.]—By a will made in 1833, a testatrix devised a freehold messuage unto trustees, their heirs and assigns, upon trust for her daughter during her life, and after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, "and in default of such appointment," in trust for the daughter's right heirs. The testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements of any husband with whom she might intermarry, and that the trustees might reimburse themselves. The testatrix authorised the trustees, their heirs or assigns, also to sell the messuage, with the consent of her daughter, "or other the persons or person who shall be beneficially interested under the trusts." The daughter, after her mother's death, granted the messuage to the defendants in fee simple, and died without having been married. The plaintiff, her heir-at-law, having brought an action to recover the messuage :—Held, that the messuage was devised to the trustees in fee simple at law ; that the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder and not an executory devise ; that both the estate for life devised to the daughter and the remainder to her right heirs were equitable estates, and consequently coalesced pursuant to the rule in *Shelley's case* (1 Co. Rep. 93 b.) ; that the daughter could make a valid disposition of the fee simple, and that the defendants were entitled to the messuage. *Cunliffe* v. *Brancker* (3 Ch. D. 393), *Hart's Estate, In re* (W. N. 1883, p. 164), distinguished by Cotton, L.J. *Richardson* v. *Harrison*, 55 L. J., Q. B. 58 ; 16 Q. B. D. 85 ; 54 L. T. 456—C. A.

Equitable Estate with Executory Gift over.] —A testator gave real and personal estate to his daughter A., and two other persons, upon trust, to permit A. to receive the rents and interests for life, for her separate use, and after her decease in trust to convey to her heirs, executors, &c. ; but, in case A. should marry, and have no children, then the property to belong to D. ; or in case of his decease before A., then to his children :—Held, that A. took an absolute equitable estate, with an executory gift over, to D. and his children, and D. having died in the lifetime of A., leaving no children, held, that A. was absolutely entitled to the property. *Jackson* v. *Noble*, 2 Keen, 590 ; 7 L. J., Ch. 133 ; 2 Jur. 251.

Equitable Estate Tail.] — A testator devised an estate to trustees, in case he should leave only one child (an event which happened), "to permit and suffer" such child to receive the rents and profits for her natural life, and declared that immediately after his death the trustee should stand seised and possessed of the hereditaments unto and to the use of the

heirs of the body of such child, and the hereditaments were to be legally conveyed and assured unto such heirs of his child in equal shares as they should severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever, the rents and profits in the meantime to be paid and applied by the trustees for the maintenance and education of such heirs of the child in such manner as the trustees should direct:—Held, that, notwithstanding the use of the words "to permit and suffer," the legal estate remained throughout in the trustees; that the rule in *Shelley's case* applied; and that the will created an estate tail in the testator's daughter. Decision in *Montgomery* v. *Montgomery* (infra, col. 1124) criticised by Lord Macnaghten. *Van Grutten* v. *Foxwell*, 66 L. J., Q. B. 745; [1897] A. C. 658; 77 L. T. 170—H. L. (E.)

A limitation that will create an entail at law, will have the same effect upon an equitable estate; therefore a devise in fee to pay debts, and then to the use of A. in trust for B. for life, and after his decease in trust for the heirs male of his body, is an entail in B. *Brydges* v. *Brydges*, 3 Ves. 120.

A testator gave real estate to trustees upon trust for his grandson for life, and directed the trustees, until he should attain twenty-five, to receive the rents, and after certain deductions, to pay them in their discretion to the separate use of the testator's daughter and her children; and upon his grandson attaining twenty-five to put him into possession of the property, and any surplus rents, and immediately after his demise he gave the same property to the heirs of the body of his grandson lawfully issuing, and for default of such issue over in somewhat similar terms to the other children of his daughter, with an ultimate limitation to his (the testator's) father's right heirs:—Held, that he took an equitable estate tail. *Denman* v. *Jones*, 16 L. T. 787.

Equitable Contingent Remainder.] — A testatrix devised real estate (of which the legal estate was outstanding) to trustees during the life of A., upon trust to pay her the rent due, with an ultimate remainder, if B. should die in the lifetime of A., to the heirs of A. A. and B. were both living:—Held, that, as A.'s life estate and the remainder to heirs were both equitable, the two estates united according to the rule in *Shelley's case;* and A. took an equitable contingent remainder in fee. *White and Hindle's Contract, In re*, 47 L. J., Ch. 85; 7 Ch. D. 201; 37 L. T. 574; 26 W. R. 124.

Equitable Fee Simple.] — Land was conveyed to a trustee, his heirs and assigns, to certain uses; and after the determination of those uses, to the use of the trustee, his heirs and assigns, upon trust to receive the rents and profits and pay them to A., a married woman, for her separate use, and after the determination of that estate, to stand seised of the said land to such uses and upon such trusts as A. should by will appoint, and in default of appointment, to the use of the heirs and assigns of A.:—Held, that (though the construction might be otherwise on a will) the trustee took the legal estate in fee, and that A. took an equitable estate for life, with an equitable remainder to her heirs and assigns, which two estates united, according to the rule in *Shelley's case*, and gave her the equitable estate in fee. *Cooper* v. *Kynock*, 41 L. J., Ch. 296; L. R. 7 Ch. 398; 26 L. T. 566; 20 W. R. 503.

A general devise to trustees and their heirs primâ facie gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate they take. *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252; 29 L. T. 868.

A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate. *Ib.*

A testator, by will, dated in 1827, devised his estate to trustees and their heirs upon trust to stand seised of the same during the life of C., and until the whole of the testator's debts and the legacies were paid, upon trust to set and let the same and apply the rents and yearly profits and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts and legacies until they were paid, and from thenceforth to pay the rents to C. during his life; and after his death, and payment of the debts and legacies and expenses, the testator devised the estate to the heirs of the body of C., and for default of such issue, to his own right heirs. In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to C. for his life. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W. In 1861 C., the father, and W., his mortgagee, filed a bill for a conveyance of the fee against the heir of the surviving trustee and the son (C.'s heir apparent). The son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing the plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff. The father had since died. This suit was instituted in 1873 by the son against the mortgagee:—Held, that the trustees took a legal fee under the will, that the rule in *Shelley's case* therefore applied, and that the son acquired a good equitable fee by the recovery. *Ib.*

Held, also, that if they had only taken a life estate, their conveyance of it to the father enabled him to suffer a recovery and bar the contingent remainders at law and in equity, and was no breach of trust. *Ib.*

Held, further, that the son having chosen to answer in the former suit, was bound by the decree. *Ib.*

The decision on the same will in *Collier* v. *M'Bean* (supra, col. 1102), that the trustees took a fee determinable when the debts were paid, disapproved of. *Ib.*

Testator devised copyholds to his trustees and executors and their heirs, subject to the payment of his debts, in trust for his two daughters for life in equal moieties, remainder to the right heirs of the survivor of them:—Held, that such remainder coalesced with the life estate of the survivor, both being equitable interests, the determinable fee simple taken by the trustees not being merely commensurate with the duration of the life of the surviving cestui que trust. *Creaton* v. *Creaton*, 26 L. J., Ch. 266; 2 Jur. (N.S.) 1223; 5 W. R. 123.

A testator, by will, subsequently to 7 Will. 4 & 1 Vict. c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estate to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. for his

natural life; and after the death of J., in trust for the right heirs of him, J. :—Held, that, by reason of the direction to pay debts, the trustees took the legal estate in fee, and therefore, inasmuch as the estate for life and the estate in remainder were both equitable estates, the rule in *Shelley's case* applied, and J. took an equitable estate in fee. *Spence* v. *Spence*, 12 C. B. (N.S.) 199; 31 L. J., C. P. 189; 6 L. T. 538; 10 W. R. 605.

A testator gave his real and personal estate to his wife and three other persons, and their heirs, executors, &c., upon trust for his wife to receive the rents for life; and after her decease, upon trust to pay and divide the rents among his children as they attained twenty-one, and after their decease, to pay the principal of their respective shares unto their legal representatives, their executors, administrators, and assigns. He gave power to the trustees to sell, with power of maintenance out of the rents, and advancements out of the principal of their shares; and in case any of his freehold estates should not be sold by his trustees, then, after the decease of his children, he devised the same unto their respective heirs and assigns, as tenants in common. And he directed that the receipts and conveyance of his trustees to any purchasers of any part of his estate and effects should be good discharges and assurances: — Held, that the trustees took the legal fee, and that the children were entitled to equitable estates for life, with equitable remainders to their heirs, which, united, gave them equitable estates in fee. *Reynell* v. *Reynell*, 10 Beav. 21.

By a marriage settlement a sum of money, part of the fortune of the intended wife, was vested in trustees upon trust to call in the same, and, with the consent in writing of the intended husband and wife, or the survivor of them, to invest the sum in the purchase of real estate in such part of Ireland as the husband and wife should approve of, and it was declared that such lands, and, until the purchase, such sum of money, should be held upon trust, out of the income, to make up any deficiency in the wife's jointure, and, subject thereto, and to certain portions for younger children, in trust for the husband for life, and, after his death, to the use of or in trust for the issue of the marriage in strict settlement, with ultimate remainder to the right heirs of the husband; and it was provided, that in case the intended husband, who was a minor at the date of the marriage, should refuse to ratify it upon attaining full age, he should forfeit all interest in the money:—Held, that there was a constructive conversion of this sum into real estate; and that the limitation to the right heirs of the husband coalesced with the life interest previously given to him, and enabled him to dispose of the fund absolutely upon failure of issue of the marriage. *Batteste* v. *Maunsell*, Ir. R. 10 Eq. 97. Affirmed, Ir. R. 10 Eq. 314.

On a devise of lands to be purchased with the proceeds of estates sold by the testator, upon trust to pay the rents and profits to testator's daughter for life, and afterwards as she should appoint, and for default of appointment to the right heirs of his daughter, he also directed that, as to such part of the proceeds as should not be laid out in lands, his trustees should pay her the dividends for her life, and after her decease to such persons as she should by will appoint, and in default thereof to transfer and assign to her executors, &c. :—Held, that as the effect of the limitation of the proceeds, if uninvested, was to give it to the daughter absolutely, the intention was to be inferred the same whether it continued in the shape of money or was invested in land: the words of limitation, therefore, in the latter case, to the daughter's right heirs, were to be considered not as words of purchase but as of a limitation, and gave her a fee, and that she might by fine extinguish this power and make a good title to the lands purchased. *Webb* v. *Shaftesbury (Earl)*, 2 Myl. & K. 599.

Devise to trustees and their heirs to pay debts; then to the use of B. for life, without impeachment of waste; remainder to trustees for life of B., to preserve, &c.; remainder to use of the heirs of his body; remainder to testator's own right heirs. This is a trust in equity, and not a use executed; and an estate for life only in B., with contingent remainders to his issue successively. *Bagshaw* v. *Spencer*, 1 Ves. Sen. 142; 2 Atk. 245, 570, 577.

4. Estate of Ancestor.

a. Sufficiency of.

Estate Tail or Contingent Remainder.] —A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed: the object of the trust terminating with that life; and a remainder following to the same trustees, upon the death of the tenant for life, for a term of years. A subsequent remainder therefore to the heirs of the body of the tenant for life held, a legal estate: uniting with the legal estate for life; and vesting an estate tail, according to the rule in *Shelley's case;* not an equitable estate, capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89; 8 R. R. 303. S. P., *Doe* d. *James* v. *Hallett*, 1 M. & S. 124. And see *Pybus* v. *Mitford*, 1 Vent. 372.

G. A., after devising part of his estate to his wife for life or during widowhood, and after devising another part to trustees for a term, to raise money for the payment of debts, &c., devised the said estates, and all the rest of his estates (subject to certain mortgages), to A. B., his eldest son, for the term of ninety-nine years, in case he should so long live; and subject thereto, to trustees during the life of his son, in trust only to support contingent remainders; and from and after the determination of the said estates, unto the heirs of the body of his said son; and for want of such issue, then over to his second son, with like limitations. G. A. by a codicil, after confirming his will, devised all his freehold and copyhold estates unto four trustees, in trust to convey unto the trustees of his marriage settlement so much of the said estates as, together with the provision in the said settlement, would make up 1,200*l.* a year as a jointure for his wife, and in trust for the payment of debts. After executing a disentailing deed, A. C. devised the estates to H. A.:—Held, that the rule in *Shelley's case* did not apply; that the devise to the heirs of the body of A. B. was a contingent remainder, which was not destroyed by the disentailing deed of 1836; and that the plaintiff, as the heir of G. C., the daughter of A. B., was entitled as equitable tenant in tail. *Coape* v. *Arnold*, 2 Sm. & Giff. 311; 18 Jur. 506; 2 W. R. 482. Affirmed on other grounds, 4 De G. M. & G. 574; 24 L. J., Ch. 673; 1 Jur. (N.S.) 313; 3 W. R. 187.

Devise to A., B. and C. for their lives, and after their decease unto the next lawful heir of A. for ever :—Held, that A. took an estate in fee simple under the rule in *Shelley's case*. *Fuller* v. *Chamier*, 35 L. J., Ch. 772 ; L. R. 2 Eq. 682 ; 12 Jur. (N.S.) 642 ; 14 W. R. 913.

b. Words Qualifying.

Limitation to Trustees to preserve Contingent Remainders.]—In devise to C. for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of C. :—Held, that C. took only an estate for life, and that heirs of the body were to be construed words of purchase. *Colson* v. *Colson*, 2 Atk. 246 ; 2 Eq. Cas. Abr. 318 ; 2 Str. 1125.

Devise in trust to permit A. B. to enjoy estate during his life, and after his decease his first and other sons and daughters then living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing, and for default of such issue in trust to testator's own right heirs :—Held, on death of A. B., his eldest son entitled to estate as tenant in tail, and not a mere life estate, and then to next child of A. B. in succession. *Green* v. *Staples*, 5 Madd. 85.

Devise to G. and heirs of his body, the males having the preference, and succeeding according to their birth, and the trustees to preserve contingent remainders during the life of G. :—Held, that G. took an estate tail. *Sayer* v. *Masterman*, Amb. 344.

A. devises lands to her sister B. for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of B., remainder to her other sister C. for life, with remainders to trustees to preserve, &c., remainder to the heirs of the body of C., remainders over ; B. died in testatrix's lifetime ; C. suffered a recovery, and then contracted to sell estate. On a bill by C., against purchaser, it was held, that B. would have taken an estate tail in the premises if she had survived the testatrix ; and that, having left an only daughter, C. could make no title, and therefore bill was dismissed. *Hodgson* v. *Ambrose*, 3 Bro. P. C. 416 ; Dougl. 337. S. P., *Measure* v. *Gee*, 5 B. & Ald. 910.

Without Impeachment of Waste.]—A. devised 10,000*l.* to trustees in trust, to be laid out in lands, and to be settled on B. for life without waste, remainder to trustees and their heirs for the life of B., to support contingent remainders, with a power to B. to make a jointure ; remainder to the heirs of the body of B., remainders over ; and by the same will devised lands to B., to the same uses, and died leaving C. executor ; B. sued C., the executor, for the deeds relating to the lands that were in his hands, and to have the money laid out in lands and settled : B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory, and in the power of the court, B. was to be but tenant for life, with remainder to his first, &c., son. *Papillon* v. *Voice*, 2 P. Wms. 471 ; 2 W. Kelyng, 27.

Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste ; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

Devise to the use of the devisor's second son A. for life, without impeachment of waste, and after his decease to the heirs of his body, to take as tenants in common, and not as joint tenants ; and in case of his decease without issue, to the devisor's eldest son B., his heirs, &c. ; and in case both sons should die before twenty-one, over :—Held, an estate tail in the land, and absolute interest in personalty bequeathed with it. *Bennett* v. *Tankerville (Earl)*, 19 Ves. 170.

Whether an estate settled to A. for life, with remainder to the heirs of his body for life, gives A. an estate for life or an estate tail, quære. *Slade* v. *Pattison*, 5 L. J., Ch. 51.

Cy-près.]—A testator declared his will to be that his property be inherited by his nephews, C. and T., and the sons of his late brother A., during their lives, and after the decease of C. and T., that the eldest son of C. and the eldest son of T. inherit the property during their lives, and so on, the eldest son of each of the two families to inherit the same for ever ; and that each two of the succeeding inheritors should inherit the property free from incumbrances :—Held, that C. and T. took estates for their lives, with remainders to their eldest sons respectively for their lives, with remainders to C. and T. in tail male. *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93 ; 16 W. R. 290. See *S. C.* in court below, 14 L. T. 282.

Power of Making Leases.]—One devises his lands for payment of his debts, and then to A. for life, with power to make leases, &c., remainder to the heirs male of the body of A. ; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery : secus, in case of marriage articles, to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bale* v. *Coleman*, 1 P. Wms. 142 ; 2 Vern. 670.

—— **To Appoint unto Heirs of Body.**]—Devise to W., a natural son of the testator's sister, for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, &c., shall appoint, and, for want of such appointment, to the heirs of the body of W., share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue to the heirs of the devisor :—Held, that an estate tail vested in W. by this devise. *Jesson* v. *Wright*, 2 Bligh, 1 ; 21 R. R. 1—H. L. (E.) S. P., *Doe* d. *Atkinson* v. *Featherstone*, 1 B. & Ad. 944 ; 9 L. J. (o.s.) K. B. 163. And see *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823 ; *Colclough* v. *Colclough*, Ir. R. 4 Eq. 263 ; *Van Grutten* v. *Foxwell*, supra, col. 1106.

Restrictions on Alienation.]—Devise to W. for life ; remainder to trustees during the life of W. ; remainder to the heirs of the body of W., was held an estate for life, there being words of restriction that W. shall not sell for any longer than his own life, and the estate being devised to that intent :—But held, in error, to be an estate tail. *Perrin* v. *Blake*, 1 W. Bl. 672 ; 4 Burr. 2579 ; 1 Dougl. 329, n.

Devise to his wife for life, remainder to

trustees, &c., remainder to his daughter for life, remainder to trustees, &c., remainder to the heirs of her body, and for want of such issue, remainder over in fee; it being his will and meaning, that after the decease of his wife, his daughter should have only an estate for life, and that after the decease of his wife and daughter the premises should go to and vest in the heirs of the body of his daughter; and for want of such issue, should go over in fee, and that his daughter should not have any power to defeat his intent:—Held, that the daughter, notwithstanding, took an estate tail. *Roe* d. *Thong* v. *Bedford*, 4 M. & S. 362; 16 R. R. 487. And see *Thong* v. *Bedford*, 1 Bro. C. C. 313.

A. devised his real estates to his son and his heirs, but without power of selling them, and he willed that they should, "at his death," go to his lawful issue absolutely, and if his son should not have any lawful issue him surviving, then over:—Held, that the son took an estate tail. *Marshall* v. *Grime*, 28 Beav. 375; 29 L. J., Ch. 592; 6 Jur. (N.S.) 390; 8 W. R. 385.

A father gave his fee simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any gift in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors: by a codicil reciting the death of J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, Ir. R. 7 Eq. 68.

Held, secondly, that under the codicil the eldest son R. took an estate tail in B. *Ib.*

Estate in Quasi-Tail.]—A testator devised to B. in trust for testator's eldest son A., also one-fourth of the issues and profits of the estate of C., also the testator's interest in the house in which he resided in K. Street, to hold as tenant for life, remainder to his heirs lawfully begotten, "A. to be considered as strict tenant for life of all the above-stated property." He also devised "to B., in trust for my son, H. M., one-fourth of the issues and profits of the estate of C., as tenant for life, and to his heirs lawfully begotten;" as also "my interest in the two houses in K. Street, let to H. J. and R. C.; also the two houses in D. Street, Dublin, all as tenant for life." In default of issue of the children there was a gift over. The houses in K. Street were held under a lease for lives renewable for ever, which was afterwards converted into a fee farm grant:—Held, that H. M. took an estate, in quasi-tail, in the two houses in K. Street. *Macnamara* v. *Dillon*, 11 L. R. Ir. 29.

A devise to the heirs male of J. S. in a will and afterwards in a schedule annexed, this estate being recited to be given to J. S., shows the intent of the testator to give him an estate for life, which the law will enjoin to the estate given to his heirs male, and construe him to be tenant in tail. *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698.

For Life and no Longer.]—Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he shall have lawfully to be begotten; and for default of such issue to W. and his heirs for ever:—Held, that on construction of whole will, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180. Affirming 1 Burr. 38; 2 Ves. Sen. 225; 3 Atk. 736.

Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision and regarding the expressions as words of purchase:—Held, accordingly, that in a devise to W. F. and his heirs male according to their seniority, on their respectively attaining twenty-one, the elder son surviving of W. F., and the heirs male of his body being preferred to the second or younger son; and in case of the failure of issue male in W. F. surviving him, or dying without lawful issue male attaining twenty-one, then over an estate tail was devised to W. F. *Fetherston* v. *Fetherston*, 3 Cl. & F. 67—H. L. (Ir.) *S. C.*, nom. *Jack* v. *Fetherston*, 9 Bligh (N.S.) 257.

Gift of Real and Personal Property.]—A gift of freehold and leasehold estates to A. for life, then to trustees to preserve contingent remainders, then to the sons of A. successively in tail, then to the daughters of A. as tenants in common, with an ultimate remainder to the "right heirs of A. for ever," on the failure of the contingent remainders in tail:—Held, to confer on A. an absolute disposable interest in the leasehold property as well as the freehold. *Comfort* v. *Brown*, 48 L. J., Ch. 318; 10 Ch. D. 146; 27 W. R. 226.

Devise to A. for life, remainder to trustees to preserve contingent remainders; remainder to the heirs of his body, with remainders over for life, and in tail male, declaring that the respective devises to A., &c., "and to their respective heirs male," were on condition of taking the testator's name. Codicil giving an after-purchased leasehold for years, for such estate, and in such manner and form as the real estates were devised by the will, and subject to the like limitations, &c. A. took an estate tail in the freeholds, and the absolute interest in the leasehold. *Brouncker* v. *Bagot*, 19 Ves. 574; 1 Mer. 271.

Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her

daughter to receive the rents and interest for life, for her separate use; and after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but in case her daughter should die without leaving lawful issue at the time of her decease, she gave the house and stock over:—Held, that the daughter took the property absolutely. *Verulam (Earl)* v. *Bathurst*, 13 Sim. 374; 12 L. J., Ch. 359. S. P., *Garth* v. *Baldwin*, 2 Ves. Sen. 646; *Theebridge* v. *Kilburne*, 2 Ves. Sen. 233.

A testator gave leasehold estate to trustees, on trust for his son Benjamin, to take the rents until he should attain twenty-one, remainder on trust to support contingent remainders; and subject thereto on trust for such son for life, remainder for the heirs male of such son; remainder to the second and other sons of Benjamin, and the heirs male of their bodies; with remainder over of a like nature in favour of other children of the testator and their sons:—Held, that this would have been an estate tail in the son of Benjamin, and, being personalty, he would have taken an absolute estate. *Williams* v. *Lewis*, 6 H. L. Cas. 1013; 28 L. J., Ch. 505; 5 Jur. (N.S.) 323; 7 W. R. 349. Affirming *S. C.*, nom. *Lewis* v. *Hopkins*, 3 Drew. 668; 5 W. R. 17, 243.

Devise and bequest to A. and the heirs of his body, with limitations over in case of no such heirs:—Held, an estate in tail in real estates, and an absolute interest in personal, the limitations over being void; but if expressed, if he leaves no such heirs, it would be good as confined to the time of the death, and not after an indefinite failure of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

Residuary trust by will to apply the rents and profits for and during his life, and afterwards for the heirs of his body, if any, and in default of such issue over, is an estate tail in the real estate, and the absolute interest in the personal. *Elton* v. *Eason*, 19 Ves. 73; 12 R. R. 142.

5. Remainder to Heirs or Heirs of Body.

Words Qualifying.]—A devise to A. for life, and after his decease, to the heirs male of the body of A., and the heirs male of the body of every such heir male, severally and successively as they should be in priority of birth, &c.; remainder over, whether this be a tenancy in common in tail, or for life only. *Legate* v. *Sewell*, 1 P. Wms. 87; 2 Vern. 551; 1 Eq. Cas. Abr. 394, pl. 7.

A testator devised real estates to A., a married woman, for life, with remainder to her husband for life, with remainder to the use of the heirs of the body of A. in tail, with remainder to B. for life, with remainder to the heirs of his body in tail; and he declared, that all the aforesaid limitations were intended by him to be in strict settlement:—Held, that, subject to the contingent life interest of the husband, the wife took an estate tail. *Douglas* v. *Congreve*, 1 Beav. 59; 8 L. J., Ch. 53; 3 Jur. 120. And see *S. C.* at law, 4 Bing. (N.C.) 11; 5 Scott, 223; 7 L. J., C. P. 43. And see *S. C.*, 1 Keen, 418; 6 L. J., Ch. 51.

A testatrix devised real estate to her daughter A. for life, remainder to the heirs of the body of A. lawfully begotten or to be begotten, they to take the freehold and inheritance as tenants in common, and not as joint tenants; and in default of such heirs of the body of A., to the right heirs of the testatrix:—Held, that A. took an estate tail. *Anderson* v. *Anderson*, 30 Beav. 209; 7 Jur. (N.S.) 1067; 4 L. T. 198; 9 W. R. 492.

Testator being seised in fee of gavelkind lands, devised all his real estate to his nephew T. C. for his natural life, with remainder to trustees to preserve contingent remainders, with remainder to all and every the heirs of the body of T. C., as well female as male, as tenants in common and not as joint tenants, and for default of such issue to trustees for a term of 500 years, upon trust after the decease of T. C., in case he should die without issue, to raise a sum of money for maintenance of his niece, and after the determination of the term he devised the same to his nephews T. C. and C. C., for their respective lives, as tenants in common and not as joint tenants, and after their respective deceases, to all and every the heirs of the respective bodies of T. C. and C. C., as well female as male, lawfully begotten or to be begotten, such heirs to take as tenants in common, and not as joint tenants, and in default of such issue to his own right heirs:—Held, that T. C. took an estate tail. *Doe* d. *Bagnall* v. *Harvey*, 4 B. & C. 610; 7 D. & R. 78; 4 L. J. (O.S.) K. B. 18.

Devise to A. for life, remainder to the heirs of the body of A. and his, her, and their heirs and assigns for ever as tenants in common:—Held, an estate tail in A. *Mills* v. *Seward* or *Howard*, 1 J. & H. 733; 7 Jur. (N.S.) 654.

A devise by will to A. for life, remainder to A.'s children and their heirs, as tenants in common. Devise by codicil of after-purchased estates to A. for life, remainder to the heirs of his body lawfully begotten for ever, equally, share and share alike, sons or daughters, but if A. should die without heirs or heir, then over:—Held, that A. took an estate tail in the property devised by the codicil. *Grimson* v. *Downing*, 4 Drew. 125; 5 W. R. 767.

Devise of freehold and leasehold to A. for life, and after his death to the heirs of his body, and their heirs, executors, &c.:—Held, this gave A. an estate tail in the freehold, and an absolute interest in the leasehold. *Kinch* v. *Ward*, 2 Sim. & S. 409; 4 L. J. (O.S.) Ch. 28.

By a marriage settlement estates were limited to the wife and the husband for their lives, with remainder to the heirs of the body of the husband on the body of the wife and their heirs; and if more children than one, equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs:—Held, that the husband did not take an estate in tail special, but for life only, and that the children took by purchase as tenants in common in fee in remainder. *North* v. *Martin*, 6 Sim. 266.

Devise to T. for life, remainder to trustees to preserve, &c., remainder to the heirs male of T. and their heirs; provided if T. should die without issue male living at his death, then over:—Held, T. took an estate tail. *Wright* v. *Pearson*, Amb. 356; 1 Eden, 119.

Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an estate tail. *Alpass* v. *Watkins*, 4 Term Rep. 516. S. P., *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

L. devises to M., eldest son of his nephew, R. M., and the first heirs male of his body, and the heirs male of his body, and in default of such

issue to the second son of the said R. M., and the heirs male of his body and their issue, remainder over, &c. These words, "the second son of the said R. M.," do not mean the second son of the devisee, but John, the second son of the testator's nephew R. M. *Minshull* v. *Minshull*, 1 Atk. 411.

Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, &c.; and in case both sons should die before twenty-one, over:—Held, an estate tail in the land, and an absolute interest in personalty bequeathed with it. *Bennett* v. *Tunkerville (Earl)*, 19 Ves. 170.

A testator devised all his real estate to his executors for the purposes thereinafter stated; and after empowering them to continue his business, he gave the profits and the interest of the moneys arising from the sale, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gave her the rents and profits of all his real estates during her life; and at her decease he gave to her heirs all his estates real and personal as tenants in common; if his daughter had but one child, such child was to possess the whole; but if she should die without issue, then at her decease he gave certain legacies. He ordered his real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event might turn out; and he gave over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents until they are sold. The daughter died without having had issue:—Held, the daughter took an estate tail in the freeholds; that the real and personal estate being given over together, she took the personal estate absolutely. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

Devise to F. G. and his assigns for his life, and immediately after his decease, unto the heirs of his body, in such shares as F. G. should by will or deed appoint, and in default of such heirs of his body, then immediately after his decease, over to J. G.:—Held, that F. G. took an estate tail by implication. *Doe* d. *Cole* v. *Goldsmith*, 7 Taunt. 208; 2 Marshall, 517; 17 R. R. 487.

Words of Purchase—Children.]—The words "heirs of the body," though words of limitation, may, by explanatory context, be reduced to words of purchase, but the inference to be drawn from such context must be clear. *Gummoe* v. *Howes*, 23 Beav. 184; 26 L. J., Ch. 323; 3 Jur. (N.S.) 176; 5 W. R. 219.

A devise and bequest of residuary real and personal estate to A. and B. in equal shares for their natural lives; but in case of the death of either without issue, her share to go to the survivor; but if either should die leaving issue, the share of her so dying to be paid to her children in equal proportions, if more than one; and if but one, then to such only child; and after the death of both A. and B., the residuary estate to be paid to "the heirs of the body" of A. and B., share and share alike, or to the survivor or survivors of them, if more than one; and if but one, then to such only child:—Held, from the general context of the will, that "heirs of the body" must be construed to mean "children." *Ib.*

—— **Sons.**]—Devise to A. for life, and after his death to the heirs male of his body for their lives in succession, according to their respective seniorities, "or in such parts and proportions, manner and form, amongst them as A., their father, shall by deed or will, duly executed and attested, direct, limit, or appoint":—Held, that "heirs male of his body," used in this connection, meant "sons," and therefore A. took an estate for life only. Per Cockburn, C.J., and Wightman, J. Affirming (6 C. B. (N.S.) 748; 29 L. J., C. P. 180; 6 Jur. (N.S.) 536), but per Martin, B., and Channell, B., that A. took an estate tail. *Jordan* v. *Adams*, 9 C. B. (N.S.) 483; 30 L. J., C. P. 161; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 593.

Devise to the testator's wife; after her decease to the heirs of her body, share and share alike, and in default of issue to be lawfully begotten by him, to be at her own disposal. He died and left six children by his wife:—Held, that the wife took an estate for life only, and that each of the six children took a fee simple in remainder expectant on the determination of the mother's life estate in one-sixth part as tenant in common. *Gretton* v. *Haward*, 1 Mer. 448; 6 Taunt. 94.

Under a devise to trustees upon trust to permit A. to receive the rents for his life, and after his decease upon trust to permit his first son and the heirs of his body "to receive the rents for their respective lives, severally and successively in tail male," and in default of such issue over, A. takes an estate in tail male, and not merely a life estate. *Hugo* v. *Williams*, 41 L. J., Ch. 661; L. R. 14 Eq. 224; 26 L. T. 901.

Devise to A. for life, and to her heirs, the issue of her body, for ever for their lives, and in case A. has no son, then to her eldest daughter, followed by a proviso containing a devise over if A. left no issue, or they should become extinct, creates an estate tail in A. *Reece* v. *Steel*, 2 Sim. 233; 6 L. J. (O.S.) Ch. 120; 29 R. R. 88.

"Issue."]—E. by his will, made in 1872, devised all "right, title, and interest" in the lands of G. to his daughter M., for her "life and to her lawful issue; and in the event of her leaving none," he devised his "said property" to F., if living at the time of his death; and if not, then to F.'s "eldest son lawfully begotten"; and in the event of F. "dying without leaving a son lawfully begotten," then he devised the "said property" to the second son of S., "late of India, if he has a second son; and if not to his eldest son and to his heir." He also directed that whoever possessed his property should take the name of E., and that in the event of his "not leaving lawful issue," she might charge the "property" to a specified amount:—Held, that M. took an estate tail. *Sandes* v. *Cooke*, 21 L. R. Ir. 445—C. A. And see *Voller* v. *Carter*, 4 El. & Bl. 173; 24 L. J., Q. B. 56; 1 Jur. (N.S.) 278; 3 W. R. 22.

Devise to A. for life, remainder to B. for life, remainder to the right heirs of A., and A. dies in the testator's lifetime; his right heirs shall never take. *Goodright* v. *Wright*, 1 P. Wms. 400; 1 Str. 25; 2 Eq. Cas. Abr. 359, pl. 13.

Devise of lands to A., and the heirs male of his body. A. dies in the life of the testator, leaving issue. The devise is void, and the issue cannot take. *Hutton* v. *Simpson*, 2 Vern. 722; Pre. Ch. 439; Gilb. Eq. R. 120, 165.

A., on the marriage of his son, covenanted to purchase lands, and settle them to the use of his son for life, remainder to the heirs male of the body of the son. The son died, leaving issue a son, who brought a bill against the executor of A. for the performance of the covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Cann* v. *Cann*, 1 Vern. 480.

Contingent Remainder to Heirs.]—A devise of real estate to A. for life, remainder to the children of A. in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty-one and without issue; and if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, a devise to the heirs and assigns of A., although A. had no child at the date of the will or at the death of the testator:—Held, that the gift to the heirs of A. was a contingent remainder. *Crofts* v. *Middleton*, 2 K. & J. 194; 1 Jur. (N.S.) 1133. See *S. C.*, 8 De G. M. & G. 192; 25 L. J., Ch. 513; 2 Jur. (N.S.) 528; 4 W. R. 439.

6. Remainder to Heir or Heir of Body.

a. In General.

Devise.]—A devise to A. for life, and to the heir of his body, so unites the two estates as to make the first taker tenant in tail. *Sheppard* v. *Gibbons*, 2 Atk. 444.

A house, together with the furniture thereof, was limited to a feme, and such heir of her body as should be living at her death, and in default of such, remainder over. The feme had an estate tail in the house, and the absolute property in the furniture. *Richard* v. *Bergavenny*, 2 Vern. 324.

Devise to A. for life, remainder to the heir of his body (though in the singular number) is an estate tail. *Ib.*

Devise of land to W. for life, remainder to his first son for life, remainder to the right heirs male of his body, remainder to the second, &c., sons of W., and the heirs male of their bodies, remainder to T. for life, and after to his first heir male of his body, and for want of such, over:—Held, T. took an estate in tail male. *Dubber* d. *Trollope* v. *Trollope*, Amb. 453.

A devise to a man for life, and if he died without heir male, remainder over, makes an estate tail. The words, "for want of such issue," make an estate tail by implication. *Ib.*, 465.

"Heir," or "heir male of the body," in the singular number, words of limitation, not of purchase, unless words of limitation superadded, or the context shows that those words are not used in their technical sense, as the word "issue," or "without impeachment of waste"; a limitation to trustees to preserve contingent remainders; or a direction so to frame the limitation, that the first taker shall not have the power of barring the entail. *Blackburn* v. *Stables*, 2 V. & B. 367, 371; 13 R. R. 120.

Devise to A., B. and C. for their lives, and after their decease unto the next lawful heir of A. for ever:—Held, that A. took an estate in fee simple, under the rule in *Shelley's case*. *Fuller* v. *Chamier*, 35 L. J., Ch. 772; L. R. 2 Eq. 682; 12 Jur. (N.S.) 642; 14 W. R. 913. And see *Parry and Daggs, In re*, 55 L. J., Ch. 237; 31 Ch. D. 131; 54 L. T. 229; 34 W. R. 353—C. A.

In order that the exception to that rule, established by *Archer's case* (1 Co. Rep. 66, b.), may apply, the intention that the heir should take as purchaser must be clearly shown by words of limitation added to the word "heir." *Ib.*

A testator devised freehold premises to his son J. "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever," subject to certain charges. The will provided that if J. should die without leaving any son of his body lawfully begotten, then the hereditaments were to go to the testator's son R. in fee simple, subject nevertheless to the charges above referred to, and to the payment of 300*l.* to the daughters of J. who should be living at his decease:—Held, that the will gave J. an estate for life, with a contingent remainder in fee to the person, if any, who at J.'s death should answer the description of heir male of his body, with a limitation over to R. in fee if there should be no such heir male. *Chamberlayne* v. *Chamberlayne*, 6 El. & Bl. 625; 25 L. J., Q. B. 357.

b. Words Qualifying.

In General.]—Subsequent words of limitation affect not the legal operation of the preceding words of limitation, unless the word "heir" is used in the singular number, or an express estate for life limited to the first taker. *Minshull* v. *Minshull*, 1 Atk. 413. And see *Richard* v. *Bergavenny* (*Lady*), 2 Vern. 324; *Bony* v. *Taylor*, 2 Roll. Abr. 253, pl. 3.

Devise of real estate to trustees upon trust for the testator's son W. for life, and after his decease to the heir male of his body begotten of an European woman, and the heirs of such heir male; and in case his son should die without leaving such heir male of his body, the trustees to pay the rents equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body upon trust for the heir male of the body of A. and the heirs of such heirs male. W. and M. both died without issue, and A., having a son, suffered a recovery of the devised estate, and resettled it to new uses, under which a remote interest was limited to the surviving trustee, and died leaving her son surviving, who filed his bill against the surviving trustee of the will for a conveyance of the legal estate. Decree made against the trustee with costs: the court holding that, under the devise, A. took a life estate only, with remainder to her son in fee. *Willis* v. *Hiscox*, 4 Myl. & Cr. 197; 4 Jur. 738.

Conveyance.]—By a deed of conveyance lands were limited to the use of E. and his assigns during his life without impeachment of waste, with an ultimate limitation of the use of "such person or persons as at the decease of the said E. shall be his heir or heirs at law, and of the heirs and assigns of such person or persons":—Held, that the rule in *Shelley's case* did not apply, and that E. took, not an estate in fee simple, but merely a life estate, with a contingent remainder in fee to the person or persons who at his death answered the description of his heir or co-heirs at

law. *Evans* v. *Evans*, 61 L. J., Ch. 456; [1892] 2 Ch. 173; 67 L. T. 152; 40 W. R. 465—C. A.

Devise to Sons for Life.]—A testator devised certain land to his sons successively for life, beginning with the youngest "and so on from son to son till it arrives to the oldest son, then the said copyhold estate to be for ever enjoyed by the oldest surviving heir of my oldest surviving son then living for their life or lives, for ever":—Held, that upon the true construction of the will, the intention of the testator was to give a life estate to the "heir"; that the word "heir" was not to be regarded as a word of limitation, and, therefore, that the rule in Shelley's case (1 Co. Rep. 93 b.) did not apply and that the testator's oldest surviving son took only a life interest. *Pedder* v. *Hunt*, 56 L. J., Q. B. 212; 18 Q. B. D. 565; 56 L. T. 687; 35 W. R. 371—C. A.

A devise of real estates upon trust to and for the use of W. for life, with remainder to the use of the heir male of his body lawfully begotten, according to their respective seniorities and priority of birth, in tail, with remainder to his daughters, as tenants in common in tail, with remainder over, with an ultimate remainder in case W. should die without leaving any such issue as aforesaid, and there should be only one of the testatrix's daughters then surviving, to such only daughter, her heirs and assigns for ever, was:—Held, to create an estate tail. *Johnson* v. *Rutherford*, 3 L. T. 649.

Testator directed 20,000*l.* which he had in the 3 per cents. to be firmly fixed there, to remain during the life of his wife for her to receive the interest, and after her death to be in the same manner firmly fixed on the infant W. C., "to be so secured that he may only receive the interest during his life, and after his decease to the heir male of his body, and so on in succession to the heir at law, male or female"; with a direction that the principal sum was never to be broken into, but the interest only to be received; "his intent being that there should always be the interest to support the name of Cobb as a private gentleman." Though the intention be manifest to give only a life interest to W. C., yet, there being nothing to show that the word "heir male" was not used in a strict technical sense:—Held, that W. C. took the absolute interest, the words being such as would create an estate tail of freehold property; secus, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere designatio personæ:—Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which in the case of land would not prevent the creation of an estate tail. *Britton* v. *Twining*, 3 Mer. 176; 17 R. R. 53. And see *Harvey* v. *Towell*, 7 Hare, 231; 17 L. J., Ch. 217; 12 Jur. 241.

A testator gave his residuary real and personal estate to a trustee, upon trust for J., for life, and after his decease, for the heir or heiress at law of J., his or her heirs and assigns for ever:—Held, that J. took an equitable estate for life only, with a remainder in fee to the person who at his death was his heir. *Greaves* v. *Simpson*, 33 L. J., Ch. 641; 10 Jur. (N.S.) 609; 10 L. T. 448; 12 W. R. 773.

Marriage Settlement.]—A deed is construed more strictly than a will, according to the legal import of the words. Therefore in a marriage settlement, after life estates to the husband and wife, a remainder to the heir male of her body by him to be begotten, and to his heirs, and for want of such to the daughters, and if there should be no issue of the marriage to the right heirs of the husband:—Held, a contingent remainder in fee in such person as should be heir male of the wife at her death. *Bayley* v. *Morris*, 4 Ves. 788.

Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor. When the deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters, and also several sons of the marriage, survived him:—Held, that under the limitation to the "heir female," the daughters took a life estate in the lands as purchasers. *Chambers* v. *Taylor*, 2 Myl. & Cr. 376; 6 L. J., Ch. 193.

By settlement 500*l.* was assigned to trustees in trust to lay the same out in land with the consent of the wife, and to pay the rents to her for her life for her separate use, remainder to the husband for life, and after the death of the survivor in trust to convey the same as the wife should by deed or will appoint; and, in default of appointment, in trust for her right heir for ever, proviso that until such purchase should be made, the trustees should invest the money in the public funds with the consent of the wife, and pay the dividends to her for life for her separate use, and after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid and to pay or transfer the principal sum of 500*l.*, or the stock in which the same should be invested, to such persons as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. The 500*l.* was never paid to trustees, but remained in the hands of the husband at the death of the wife. She having made no appointment, the 500*l.* vested in her heir at law, subject to the life interest of the husband, but the heir took it as money, and, therefore, at her death this interest passed to his personal representatives. *Russell* v. *Smythies*, 1 Cox, 215.

7. Remainder to Issue and Effect of Words Superadded to "Issue."

Child or Children—Dying without Issue.]—A will made in 1820 contained the following clause:—"I give and devise unto my eldest son, Thomas, all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents, and the performance of the covenants mentioned in the said indentures of lease), during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue, my will is that it may go unto my other son, William, during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue, my will is that

it may go to my daughter, Mary, and to her heirs and assigns for ever." The will then gave legacies to the second son and the daughters, with provisions for the daughters, to be paid in the first instance by Thomas, but to be paid in part or in whole to him in certain events by his successor in the estate. Thomas died without issue:—Held, by Earl Cairns and Lords Blackburn and Fitzgerald, that reading the whole will together, Thomas took an estate tail in the realty. Contra, by the Earl of Selborne, L.C., and Lord Bramwell, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers. *Bowen* v. *Lewis*, 54 L. J., Q. B. 55; 9 App. Cas. 890; 52 L. T. 189—H. L. (E.)

Issue — Implication from the Context.]—Where an estate is given for life, and the remainder to the "issue" is accompanied by words of distribution, and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life, and that whether the estate is given in fee to the issue by the usual technical words "heirs of the body," or by implication. *Bradley* v. *Cartwright*, 36 L. J., C. P. 218; L. R. 2 C. P. 511; 16 L. T. 587; 15 W. R. 922.

By a will made in 1806, the testator devised lands to his son S. B. for life, with remainder to trustees to preserve contingent uses; and after the decease of S. B., "to the use of all and every the issue, child, or children of the body of S. B., lawfully to be begotten, in such shares and proportions, manner and form," as S. B. by deed or will should limit or appoint; and "in default of such issue," to the use of the other sons of the testator in fee:—Held, that S. B. had power to appoint to his children in fee, and that, therefore, in default of appointment, they took an estate in fee, and consequently S. B. was entitled to an estate for life only, and not to an estate tail. *Ib.* S. P., *Hockley* v. *Mawbey*, 1 Ves. 143; 3 Bro. C. C. 82; 1 R. R. 93; *Ryan* v. *Cowley*, Ll. & G. t. Sugd. 7; *Macnamara* v. *Whitworth* (*Lord*), G. Cooper, 241.

Issue with Words of Limitation superadded.]—A testator by his will, dated 1860, disposed of all his real estate, subject to an interest therein to his wife for life, in favour of his six nephews, "and all my right, title, and interest to and in the same and every part thereof, to be equally divided amongst my six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns." Held that the words in question created an estate tail in the six nephews; that the addition of a limitation to the heirs general of the issue would not prevent the words "issue" from operating to give an estate tail as a word of limitation; that the words "equally divided" made the estate divisible into six shares, and there were no words to sub-divide those shares and consequently that the subsequent words "heirs, executors, administrators, and assigns," must be rejected. *Williams* v. *Williams*, 51 L. T. 779; 33 W. R. 118.

The owner of land devised it to his eldest son L. "for life, and after his decease to his lawful issue and their heirs for ever, if any," and "if he shall die without leaving any children born in wedlock," then to the testator's son E. and his heirs:—Held, that the devise gave a life estate only to L., and not an estate tail. *Morgan* v. *Thomas*, 51 L. J., Q. B. 556; 9 Q. B. D. 643; 47 L. T. 281; 31 W. R. 106.

Bequest to A. (a feme covert) of an annuity of 600*l.* per annum "for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs"; with a request that K. and C. would act as trustees for A., so that the annuity might be secured for her sole use and benefit:—Held, that A. took an estate for life only in the annuity, with remainder to the issue. *Wynch's Trust, In re*, 5 De G. M. & G. 188; 23 L. J., Ch. 930; 18 Jur. 659.

Lord Thurlow's decision in *Knight* v. *Ellis* (2 Bro. C. C. 569) is good law and has never been overruled; but Lord Langdale's decision in *Att.-Gen.* v. *Bright* (2 Keen, 57; 5 L. J., Ch. 325), is inconsistent with it. *Ib.*

Assuming that this annuity was to be considered in its nature real estate, A. would not have taken an estate tail, for there could not have been a union of her life estate with an estate in remainder, according to the rule in *Shelley's Case*, A.'s life estate being equitable, and the remainder legal.—Per Turner, L.J. *Ib.*

A testator devised his residuary real estate to his son A. and his heirs: but his will was, that his son should not have power to sell the estates devised to him. Upon the death of his son, the estates to go to his lawful issue absolutely; but if he should not leave any lawful issue him surviving, then he willed that the estates should go and be absolutely held by his, the testator's nephew, his heirs and assigns for ever:—Held, that A. took an estate tail general in the estates. *Marshall* v. *Grime*, 28 Beav. 375; 29 L. J., Ch. 592; 6 Jur. (N.S.) 390; 8 W. R. 385.

Devise to A., and his issue, remainder to B. and his issue, remainder to the heirs of A. A. dies without issue in the life of the testator. B. dies in the life of the testator, leaving issue, who is also the heir of A. The issue shall not take an estate tail as issue of B., nor the remainder in fee as heir of A. *Goodright* v. *Wright*, 1 P. Wms. 397; 1 Str. 25; 2 Eq. Cas. Abr. 359, pl. 13.

Devise of real and leasehold estates to A. for life, and after his death to the male issue of his body in equal shares, the leasehold estate being the bulk of the property:—Held, that A. took an estate tail in the freeholds, and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 J. & H. 235.

Lands were devised in trust for A. for life, remainder in trust for her issue male, and their issue male, in such manner as A. should appoint, and in default of such issue male then in trust for B. for life, remainder in trust for such of his issue male and their issue as he should appoint; and in default of such issue, then over:—Held, that B. took an estate tail. *Irwin* v. *Cuff*, Hayes, 30.

Devise to B. during the life of herself and her husband, and after their deceases, to the lawful issue of B.'s body for ever:—Held, that B. took an estate tail. *Griffiths* v. *Evan*, 5 Beav. 241; 11 L. J., Ch. 219.

A testator devised all his "part of the lands of A., being lately part of the estate of J. K." purchased by him under a decree of the court of chancery to his son, W. M., "during his natural life and no longer, unless it shall so appear that my said son shall survive his present wife and marry a second or other wife, by whom he shall have lawful issue, and then and in that

case" he devised his "said part of such lands upon the death of my said son leaving issue male of such second or other marriage, to such issue male share and share alike, and for want of issue male, to the issue female of such second or other marriage, share and share alike; and in case it shall so happen that my said son shall die without leaving any such issue of such second or other marriage," he devised the lands to his grandsons:—Held, that W. M. took for life, with remainder to the issue of a second or other marriage in fee as tenants in common, and that the grandsons were to take only on the contingency of the devise to the issue not taking effect. *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; 8 Ir. Eq. R. 740.

But see *Van Grutten* v. *Foxwell*, supra, col. 1106.

The rule in *Shelley's Case*, as applicable to wills, considered and explained, and the cases on the construction of "issue" and "heirs" in testamentary gifts reviewed. *Ib.*

Where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" has been used by the testator as meaning "heirs of the body." *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823.

When the word "issue" is so employed, it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning. *Ib.*

Devise in 1817 of a freehold estate for lives, renewable for ever, "to my son W. during his life, and after his death to his lawful issue in such manner, shares, and proportions as he by deed or will shall appoint, and for want of such appointment then to his issue equally if more than one, and if only one child to said child, and on failure of issue of W." to J. Another estate, consisting of fee simple lands, was devised in the same terms to another son J., and on failure of issue of J. it was to go to W. J. and W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:—Held, that each of the first devisees took an estate tail by implication. *Ib.*

The remainders were contingent, and therefore the recovery suffered operated as a bar to them, whether the first devisee did or did not take an estate tail. *Ib.*

A testatrix devised her real estates to trustees in trust as to the rents and profits thereof for all and every the children then or thereafter to be born of her niece, M. C., who should be living at the testatrix's decease, during their lives, in equal shares, and for the survivors or survivor of them for life, &c., and after the decease of the survivor "in trust for all the lawful issue male and female of such of the children of my niece now or hereafter to be born, as shall be living at my decease, in equal shares and proportions as tenants in common, and not as joint tenants, and the heirs of the body and respective heirs of the body of all and every the issue of the said children, and on the death and failure of heirs of the body of any one or more of the issue of the said children," &c., in trust for the survivors, &c. At the testatrix's death her niece had two daughters, one of whom was married and had issue five children:—Held, that the daughters of the niece took estates for life only, with remainder to their issue as purchasers. *Parker* v. *Clarke*, 3 Sm. & G. 161; 1 Jur. (N.S.) 605; 3 W. R. 471. Affirmed, 6 De G. M. & G. 104; 2 Jur. (N.S.) 335. And see *Colclough* v. *Colclough*, Ir. R. 4 Eq. 263.

In wills of real estate "issue," unless there be something to show a contrary intention, means "heirs of the body," and includes all descendants to all time. *Woodhouse* v. *Herrick*, 1 K. & J. 352; 3 Eq. R. 817; 24 L. J., Ch. 649; 3 W. R. 303.

Devise in 1806 of lands to F. and M., his wife, for their joint lives, and the life of the survivor; remainder to all their children "already or hereafter to be born, for their joint lives, and the life of the survivor," but all the sons to take testator's name and arms; remainder to trustees to preserve contingent remainders, but nevertheless upon trust to permit the children to receive the rents during their lives, and after their several deceases "unto and equally between all their issue male and female," and for want of such issue over:—Held, first, that the name and arms clause was not a condition precedent; secondly, that "already or hereafter to be born," like "born or to be born," denoted children living at the testator's death; thirdly, that such children took as tenants in common in tail, with cross-remainders between them in tail, notwithstanding the limitation to the issue was in terms to them as tenants in common, and the limitation over was "in default of such issue," and not of issue absolutely. *Ib.*

King v. *Burchell* (Amb. 379; 4 Term Rep. 296, n.; 1 Eden, 424) remarked on, and *Montgomery* v. *Montgomery* (supra) explained. *Ib.*

A testator in 1789 devised real estate to his wife and granddaughter, during their natural lives, and in case his wife should marry again, he gave the whole of the real estate to her during her life; and if his granddaughter should die leaving issue, then the testator gave unto her issue, after the death of his wife and sister, all his freehold and copyhold lands, to be distributed between them, share and share alike, as three gentlemen, learned in the law, or the major part of them, should affix the same; but in case his granddaughter should die leaving no issue, and after the death of his wife, the testator gave the same over. The testator's widow married again, and the granddaughter survived her and the sister of the testator:—Held, that the granddaughter took an estate tail. *Kavanagh* v. *Morland*, Kay, 16; 2 Eq. R. 771; 23 L. J., Ch. 41; 18 Jur. 185; 2 W. R. 8.

Devise to A. for life, and after his decease unto all and every the issue of the body of the said A., share and share alike as tenants in common, and the heirs of such issue:—Held, that A. took an estate for life only. *Greenwood* v. *Rothwell*, 6 Beav. 492. *S. C.*, at law, 5 Man. & G. 628; 6 Scott (N.R) 670; 12 L. J., C. P. 259.

Devise to A. for life, and at her death to her lawful issue, share and share alike; but if A. should die without lawful issue, then over:—Held, an estate tail in A. *Heather* v. *Winder*, 5 L. J., Ch. 41.

Devise to A. and the heirs of his body and their heirs for ever, but in case of death of A. without leaving issue, then over:—Held, an estate tail in A. *Denn* d. *Geering* v. *Shenton*, Cowp. 410.

Devise of freeholds and copyholds to trustees to the use of testator's daughter for life, and after her decease, then to the use of the issue of her body lawfully begotten ; and in default of issue, or in case none of such issue lived to attain twenty-one, then over :—Held, that the daughter took an estate for life. *Golder* v. *Cropp*, 5 Jur. (N.S.) 562. S. P., *Merest* v. *James*, 1 Br. & B. 127 ; 4 Moore, C. P. 327. *Doe* v. *Goff*, 11 East, 668. But see *Jesson* v. *Wright*, 2 Bligh, 1 ; 21 R. R. 1. —H. L. (E.)

Testator devised his freehold lease in P. and his chief rents in the town of M., and his two warehouses in the said town, unto his two sons, H. and O., in moieties, as tenants in common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety to H. for life, with remainder to his lawful issue, and their respective heirs, in such shares and subject to such charges as H. should by deed or will appoint, but in case H. should not marry and have issue who should attain twenty-one, then to O. in fee :—Held, that H. took an estate for life in the moiety, with remainder to his children as tenants in common in fee. *Lees* v. *Mosley*, 1 Y. & C. 589 ; 5 L. J., Ex. Eq. 78.

Testator devised lands to his nephew for life, and after his death to the issue male and female of the nephew by his then wife, to be divided amongst them in such manner and shares as the nephew should by will appoint :—Held, that the nephew took an estate for life only, with a power of appointing the absolute interest amongst the children of his then marriage. *Crozier* v. *Crozier*, 2 Con. & L. 309 ; 3 Dr. & War. 353 ; 5 Ir. Eq. R. 415.

A testator devised real estates to trustees and their heirs upon trust to permit A. and his wife to receive the rents during their lives, and apply them for the maintenance of his four granddaughters, and after the decease of A. and his wife the testator devised the estate to his four granddaughters as "tenants in common, and not as joint tenants during the term of their respective natural lives, with benefit of survivorship," with remainder to the trustees and their heirs to support contingent remainders, with remainder to the issue male of his four granddaughters successively, with remainder to his own right heirs :—Held, that the granddaughters took estates for life as tenants in common, with benefit of survivorship, with several inheritances to their respective issue in tail. *Haddelsey* v. *Adams*, 22 Beav. 266 ; 25 L. J., Ch. 826 ; 2 Jur. (N.S.) 724.

Held, also, that the estate given to the trustees was not a general estate in fee, and that such estate did not prevent the operation of the rule in *Shelley's case*. *Ib.*

Absolute Interests in Personalty.]—*See* WILL.

8. EXECUTORY TRUSTS.

Marriage Articles.]—In marriage articles to settle lands on the husband for life, remainder to the heirs male of his body, a court of equity will decree a conveyance to be made in strict settlement, according to the intent of the parties, viz. to the husband for life, remainder to the first and every other son in tail, &c., and not direct an estate tail to the husband, according to the legal operation of the words. *Collins* v. *Plummer*, 1 P. Wms. 106 ; *Searle* v. *Searle*, ib. 291. S. P., *Trevor* v. *Trevor*, 1 P. Wms. 622 ; 10 Mod. 436. Affirmed, 5 Bro. P. C. 122.

The rule that a limitation to the heirs of the body in articles shall be carried into effect by a strict settlement does not prevail where the concurrence of both parties would be necessary to bar the entail. *Brudenell* v. *Elwes*, 7 Ves. 390 ; 6 R. R. 310.

The only difference between an executory trust raised by a voluntary settlement, or a will, and such a trust raised by an ante-nuptial settlement, is, that in the latter the object of the settlement supplies an intention to create a strict settlement, and that in the former such an intention must appear on the face of the instrument. *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1 ; 4 Ir. Eq. R. 375. *S. C.*, nom. *Rochford* v. *Fitzmaurice*, 1 Con. & L. 158.

By post-nuptial articles, J. F. having then two living sons, H. and T., and one daughter, covenanted with trustees to settle lands of which he was seised in fee as counsel should direct, to the use of J. F. for life, remainder to trustees to preserve, &c. ; remainder to the use of H., and to permit him to take the rents and profits for his life ; remainder to the heir male of the body of H., and to permit him to take the rents and profits for his life ; remainder to the use of T., and to permit him to take the rents and profits for his life ; remainder to the issue male of T., with remainder to the unborn sons of J. F. in tail male in strict settlement, with remainders over :—Held, that H. took an estate for life only. *Ib.* And see *Brennan* v. *Fitzmaurice*, 2 Ir. Eq. R. 113.

A marriage settlement, purporting to be made in pursuance of articles recited in it, conveyed an estate to A. and his wife, and the heirs of their bodies :—Held, that they became tenants in tail special, and that a court of law could not construe the deed as rendering them tenants for life, with remainder to their issue in tail, even if that might have been the construction to be put upon the articles by a court of equity. *Woodroffe* v. *Doe* d. *Daniel*, 15 M. & W. 769 ; 15 L. J., Ex. 356 ; 10 Jur. 959. Affirmed, 2 H. L. Cas. 811 ; 18 L. J., Ex. 498 ; 13 Jur. 1013.

Devises.]—There is no difference between the construction to be put on an executory trust created by marriage articles, and on an executory trust to be created by will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust. *Sackville-West* v. *Holmesdale* (*Viscount*) 39 L. J., Ch. 505 ; L. R. 4 H. L. 543.

Where, therefore, a codicil to a will clearly indicated the intention of a testator to annex estates and movables to a peerage, to correspond as nearly as might be with the limitations in the patent, though the words creating the trust, and directing what should be done by the trustees, appeared to require that an estate tail should be given to the first holder of the peerage, those words were held to be explained and overruled by the expression of the general intent and a life estate alone was given to him. But to this life estate were appended (in order to satisfy the general intent of the testator) the conditions that the tenant for life should be without impeachment for waste, and that he might to the extent specified in a will which the codicil recited (but for certain purposes revoked), charge the property with a jointure for his wife, and provide portions for younger children. *Ib.*

Devise subject to life interest of testator's widow, upon trust to convey freehold property "unto and to the use of my son T. F. and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter, R. F. her heirs, executors, administrators, and assigns":—Held, that the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first and other sons, and daughters as purchasers in tail, with remainder to R. F. in fee. *Thompson* v. *Fisher*, L. R. 10 Eq. 207; 18 W. R. 860.

A will contained a direction to trustees to convey to the testator's son in strict settlement if he should marry, but if the son should die unmarried, or without lawful issue, the property was to be limited to A. for life, remainder to A.'s eldest son for life, remainder to his issue male, and on failure of such issue to A.'s other sons in succession, the eldest of such sons and his heirs male always to be preferred:—Held, that the trusts in favour of A. and her sons was not executory; and that the testator's son having died unmarried, A.'s eldest son on her death was entitled in tail male. *Nelley, In re*, 26 W. R. 88.

A testator directed his executors to purchase an estate which was to be made hereditary and settled upon his constituted heir. He appointed his nephew his heir and successor, and desired that the estate should be settled upon him, and should descend to his heirs and successors in the direct male line, and in case of his nephew dying without issue, the estate to devolve upon his brother, his heirs and successors in the direct male line:—Held, that the nephew was not to take as tenant in tail in possession, but that the estate was to be settled upon him for life, with remainder to his sons in tail male, and afterwards to the next taker and his sons in like manner. *Shelton* v. *Watson*, 16 Sim. 543; 18 L. J., Ch. 223.

A. devised lands to trustees to pay debts and legacies, and then to settle the remainder on her son and the heirs of his body, with remainders over, and directed that special care should be taken in the settlement that it should never be in the power of her son to dock the entail. Decreed, the son should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him. *Leonard* v. *Sussex*, (*Earl*), 2 Vern. 526.

A. devised real estate to his sister B. and C. and their heirs and assigns, upon trust, until his granddaughter D. should marry or die, to receive the profits, and thereout to pay her 100*l.* a year for her maintenance; the residue to pay debts and legacies; and after payment thereof in trust for D; and upon further trust, that, if she lived to marry a Protestant of the Church of England, and at the time of such marriage be at the age of twenty-one or upwards, or, if under that age, such marriage to be with the consent of B., then to convey the estate, with all convenient speed after such marriage, to the use of D. for life, without impeachment of waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over:—Held, though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to D. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent. *Glenorchy* (*Lord*) v. *Bosville*, Cas. t. Talb. 3. S. P., *Papillon* v. *Voice*, 2 P. Wms. 471; 2 W. Kelyng, 27.

A testator empowered his trustees to purchase freeholds, to the amount of 1,500*l.* for the use of A. during life, and then to be divided among his issue, if any:—Held, that this was executory, and that A. took for life, with remainder to his children as tenants in common in tail, with cross-remainders between them in tail, with an ultimate reversion in fee to A. *Hadwen* v. *Hadwen*, 23 Beav. 551.

Devise in trust for a son of the testator's nephew A., at the age of twenty-four; if he have no son, to a son of the testator's great-nephew B.; but if neither have a son, then to a son of the testator's great-niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four; nor the executors to give up their trust "till a proper entail be made to the male heir by him," is an executory trust in tail for an only son of A., in ventre at the testator's death, and not void for uncertainty, nor too remote. *Blackburn* v. *Stables*, 2 V. & B. 367; 13 R. R. 120.

And see *Jervoise* v. *Northumberland* (*Duke*), 1 J. & W. 559; 21 R. R. 229.

See also TRUST AND TRUSTEE (EXECUTORY TRUSTS).

W. A. G. W.

SHERIFF.

Sheriffs Act, 1887, 50 & 51 Vict. c. 55.

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A. GENERALLY.

Disqualified as Justice of the Peace.]—1 Mary, sess. 2, c. 8, s. 2 (repealed and re-enacted by Sheriffs Act, 1887), not affected by any subsequent addition to duties of justices. *Colville, Ex parte*, 45 L. J., M. C. 108; 1 Q. B. D. 133; 24 W. R. 456.

When Judge is Presiding at Assizes.]—While a judge of assize is presiding in court the high sheriff has no right to address the jury, and his doing so against the prohibition of the judge is a contempt of court. *Surrey Sheriff, In re*, 2 F. & F. 234.

Sheriff, a Public Functionary.]—Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having at the same time duties to perform towards whom such writs are directed. *Hooper* v. *Lane*, 6 H. L. Cas. 443; 27 L. J., Q. B. 75; 3 Jur. (N.S.) 1026; 6 W. R. 146.

Refusal of Sheriff to Act — Procedure — Mandamus.]—Where a sheriff, duly appointed refuses to act or to take the oath of office, the appropriate remedy is by information ex officio or indictment, and a mandamus will not be granted. *Reg.* v. *Hutchinson*, 32 L. R., Ir. 142.

Illegal Agreement.]—Agreement to procure the performance by a sheriff of an act which would be a violation of his duty:—Held, illegal. See *Maher* v. *O'Grady*, 4 L. R., Ir. 54.

Trustee for Officer.]—An officer of the sheriff having, by payment of his own money, settled an action against the sheriff for an illegal arrest, produced by a false representation made to him:—Held, that the sheriff was competent to sue, for the benefit of his officer, the party who made such representation. *Evans* v. *Collins*, 5 Q. B. 805; D. & M. 72; 12 L. J., Q. B. 339; 7 Jur. 743.

Execution of Writs by Night—Assistance to Sheriff—Contempt of Court—Posse Comitatus.]—The sheriff, in his sole discretion, has the right to require the protection and assistance of the constabulary, as part of the power of the county, in the execution of writs of fieri facias of the superior courts, whether by night or day, and a refusal to give that protection and assistance will be punished as a contempt of the court whence the writ issued. *Att.-Gen.* v. *Kissane*, 32 L. R. Ir. 220—C. A.

Where the object of a bill is to restrain proceedings against the sheriff it is not improper to make the sheriff a party. *Farquharson* v. *Pitcher*, 2 Russ. 81.

B. DIRECTION AND DELIVERY OF WRITS TO.

Direction.]—A writ of capias directed to the sheriff of London, instead of sheriffs, is irregular. *Barker* v. *Weedon*, 2 D. P. C. 707; 1 C. M. & R. 396; 4 Tyr. 860; 3 L. J., Ex. 341.

But if directed to the sheriffs of London, the subsequent insertion of the word sheriff in the singular will not vitiate it. *Irving* v. *Heaton*, 4 D. P. C. 638; 2 Scott, 798.

A writ of capias directed to the sheriffs of Middlesex is irregular. *Jackson* v. *Jackson*, 3 D. P. C. 182; 1 C. M. & R. 438; 5 Tyr. 136; 4 L. J., Ex. 32.

A writ directed to the coroner need not show upon the face of it the reason why it is so directed. *Bastard* v. *Trutch*, 5 N. & M. 109; 3 A. & E. 451; 4 L. J., K. B. 214.

Delivery.]—A delivery of a writ to the sheriff's deputy in London is a delivery to the sheriff. *Woodland* v. *Fuller*, 3 P. & D. 570; 11 A. & E. 859; 4 Jur. 743; 9 L. J., Q. B. 181.

It is no defence to an action for a false return of nulla bona to a fi. fa. to show that it was delivered at the sheriff's office at a quarter-past five o'clock on the day on which it was returnable. *Towne* v. *Crowder*, 2 Car. & P. 355.

—— **Second Writ by different Judgment Creditor.**]—If a second execution creditor levies a writ at a date subsequent to the first execution creditor's levy and anticipates the first execution creditor in consequence of such arrangement as aforesaid, there is no duty cast upon the sheriff to report the fact of such second writ to the first execution creditor. *Shaw* v. *Airby*, 52 J. P. 182.

—— **Of Several Writs at same Time.**]—An attorney, acting for seven separate plaintiffs in different actions, delivered seven writs of fi. fa. contemporaneously and in one packet to the sheriff:—Held, that the sheriff could not call on the plaintiffs or their attorney, to say which writs should have the priority. *Ashworth* v. *Uxbridge (Earl)*, 2 D. (N.S.) 377; 12 L. J., Q. B. 39; 7 Jur. 237.

If the sheriff, having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainers any number of valid writs which he may then have, or which may after-

wards come to his hands. *Hooper* v. *Lane*, supra, col. 1131.

But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ. *Ib.*

The sheriff cannot, while a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ; to permit him to do so would be to allow him to take advantage of his own wrong. *Ib.*

Distinction on this point between writs against the person and against goods. *Ib.*

The duty of a sheriff who has several writs of execution to execute is to execute first that writ which is first delivered to him; and when he has sold enough to satisfy that writ, to sell under the next in order. Therefore, if the proceeds of the sale of the goods of a debtor are not enough to satisfy the earlier writs in the hands of the sheriff, there can be no sale under the subsequent writs. *Crosthwaite, Ex parte, Pearce, In re*, 54 L. J., Q. B. 316; 14 Q. B. D. 966; 52 L. T. 518; 33 W. R. 614; 2 Morrell, 105.

Concurrent Writs of Fi. Fa.—Seizure under—Poundage—Delay in Withdrawing.]—An execution debtor brought an action against the execution creditors, their solicitors, and the sheriff's officers for the county of London, for alleged illegal conduct in levying execution. The solicitors had issued two writs of fi. fa. for the amount of the judgment debt and costs, one directed to the sheriff for the city of London, the other to the sheriff for the county of London, and had given each set of sheriff's officers notice of the other writ, and requested them to be careful to prevent a double execution. Possession was taken under both writs. The execution in the city of London having been paid off, the sheriff's officers for the county of London demanded from the plaintiff payment of a sum which consisted in part of fees payable by the execution creditors, and did not withdraw till payment of this amount had been made under protest. They also claimed, but did not insist on, the payment of poundage. There was no evidence of malice on the part of either the execution creditors or their solicitors, or of want of reasonable cause for the course adopted:—Held, that neither the issue of, nor the seizure under, the two writs of fi. fa. was illegal; that the sheriff's officers for the county of London were not entitled to poundage; that they were liable to the plaintiff in nominal damages for not having sooner withdrawn; but that they were not liable to the penalty of 200*l.* under s. 29 of the act. *Lee* v. *Dangar*, 61 L. J., Q. B. 780; [1892] 2 Q. B. 337; 66 L. T. 548; 40 W. R. 469; 56 J. P. 678—C. A.

Oxford, City of.]—The sheriff of the city of Oxford has not the execution in Oxford of writs from the superior courts. *Grainger* v. *Taunton*, 3 Bing. (N.C.) 64; 5 D. P. C. 190; 3 Scott, 393; 2 Hodges, 196; 5 L. J., C. P. 300.

C. LIABILITY FOR ACTS OF OFFICER.

1. In What Cases.

Generally.]—All actions for breach of duty of the office of sheriff must be brought against the high sheriff, though by default of the under-sheriff or bailiff. *Cumeron* v. *Reynolds*, Cowp. 403.

A sheriff is liable for the acts of his officer acting under colour of his warrant. *Anon.*, Lofft, 81.

The sheriff is responsible for the acts of his officer, though not within the line of his duty, provided such acts are afterwards assented to or adopted by the sheriff. He is civilly liable for the misconduct of his officer in executing a writ, though the act done is contrary to the express terms of the writ; as if he takes the person under a fi. fa. *Smart* v. *Hutton*, 8 A. & E. 568, n.; 2 N. & M. 426.

On the 26th January, 1846, a sheriff, under a fi. fa., sued out by the plaintiff, seized the defendant's goods. At the plaintiff's request the sale was deferred. On the 9th May the plaintiff paid all expenses up to that date, and wrote to the officer in possession, "Provided the defendant satisfies all future claims the sale may be postponed." The officer remained in possession till September, and, after a peremptory order from the plaintiff, sold the goods on the 20th of that month. On being ruled, the sheriff returned, on the 24th October, that, after deducting various sums for expenses (among which was an item of 20*l.* possession money), he had 34*l.* ready to pay to the plaintiff. The plaintiff applied to the court to order the sheriff to pay him the 20*l.* possession money, as well as the 34*l.*:—Held, that the plaintiff, by his communications with and directions to the officer, did not thereby discharge the sheriff, and that the proper course to enforce the sheriff's liability was by summary application, and not by an action. *Botten* v. *Tomlinson*, 16 L. J., C. P. 138.

A bailiff to whom the sheriff had given his warrant to execute a fi. fa., sent a bailiff's assistant to execute it in the bailiff's absence, which was done:—Held, that the ruling of the judge at the trial that the sheriff was answerable for this act, as being done by colour of the warrant, was correct. *Gregory* v. *Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 33; 2 Jur. (N.S.) 16; 4 W. R. 48—Ex. Ch.

The judgment debtor paid the amount at the office of the bailiff, who held the warrant, in the absence of the bailiff, to an assistant of the bailiff, authorised by the bailiff to receive the money. This assistant did not pay it over to the bailiff, and the sheriff never in fact received the money:—Held, that the ruling of the judge at the trial that a payment under such circumstances was good as against the sheriff, and satisfied the writ, was correct. *Ib.*

—— **Wrongful Act of Bailiff—Sheriff not Liable.**]—An execution debtor brought an action against a sheriff under s. 29, sub-s. 2, of the Sheriffs Act, 1887, to recover a penalty of 200*l.* on the ground that the sheriff's bailiff in executing a writ of fi. fa. had not excepted from seizure wearing apparel, bedding, tools, and implements of trade to the value of 5*l.*, as required by 8 & 9 Vict. c. 127, s. 8:—Held, that the liability to a penalty was imposed by the section only upon the person actually guilty of the wrongful act, and that the sheriff was, therefore, not liable. *Bagge* v. *Whitehead*, 61 L. J., Q. B. 778; [1892] 2 Q. B. 355; 66 L. T. 815; 40 W. R. 472; 56 J. P. 548—C. A.

Receiving Money without Authority.]—If a sheriff's officer take money colore officii for anything done in the course of his duty, and to which he it not entitled by law, an action lies against the sheriff, though there is no evidence

that the money came to his hands. *Jons* v. *Perchard*, 2 Esp. 507.

Pound Breach and Rescue.]—Where a bailiff in possession of goods under a landlord's distress receives a fi. fa. from a sheriff, and sells the goods under it, the sheriff is liable in an action for pound breach and rescue, at the suit of the landlord. *Reddell* v. *Stowey*, 2 M. & Rob. 358.

Illegal Entry.] — Assistants of a sheriff's officer, for the purpose of executing a fi. fa., illegally entered the plaintiff's premises on a Sunday by breaking open a window. They afterwards, by the officer's direction, obtained possession on the Monday following. On the Thursday afterwards, the officer himself entered the same premises to execute a distress warrant: —Held, that he was not barred by the act of his assistants from selling the goods when seized on a second time. *Percival* v. *Stamp*, 9 Ex. 167; 2 C. L. R. 282; 23 L. J., Ex. 25; 2 W. R. 14.

Improper Conduct of Sale.]—The sale of goods under a fi. fa. having been fixed for the 26th July, the sheriff's officer, at the request of the debtor, delayed issuing advertisements till the 25th. On that day a further delay of some hours was granted at the request of the debtor's attorney, who ultimately instructed the officer to go on and sell at the same time, under another writ which had been delivered to the officer during the day. The goods were thereupon sold together, without being lotted, at a considerable loss:—Held, that the interference of the debtor did not make the officer his agent, and that the sheriff was not relieved from his liability in respect of the negligent conduct of his officer in conducting the sale. *Wright* v. *Child*, 4 H. & C. 529; 35 L. J., Ex. 209; L. R. 1 Ex. 358; 15 L. T. 141.

Assignment.] — Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff. *Wood* v. *Rowcliffe*, 6 Hare, 186; 11 Jur. 707, 915.

2. Evidence to Connect the Sheriff.

Warrant — Production of.] — In an action against the sheriff, whose officer has seized the goods of A., under a fi. fa. against B., it is sufficient to produce the warrant without producing the writ; and it lies upon the sheriff to show that no such writ issued. *Gibbins* v. *Phillips*, 2 M. & Ry. 238; 7 B. & C. 529, 535, n.; 6 L. J. (o.s.) K. B. 209.

In an action against the sheriff for the wrongful act of a bailiff, it is not enough, in order to affect the sheriff, to prove him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving the copy of a warrant under which he entered and seized the plaintiff's goods; but the privity between such bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff; or at least by proving such notice to produce it, as will, in case of non-production, let in secondary evidence of its contents. *Drake* v. *Sykes*, 7 Term. Rep.

In an action against the sheriff for seizing the plaintiff's goods, to connect him with the trespass, it is sufficient to prove the warrant under which the goods were seized by the bailiff. *Grey* v. *Smith*, 1 Camp. 387.

In an action against a sheriff's officer for an illegal arrest, it is evidence against him that the warrant was directed to him. *Slack* v. *London Sheriff*, 1 Esp. 42.

In an action against a sheriff for seizing and converting goods as the goods of A., in which the plaintiff claimed property under a prior bill of sale from A., the plaintiff, to connect the sheriff with the transaction, put in in evidence his warrant to his officer to levy on the goods of A., which warrant recited a fi. fa. at the suit of an execution creditor:—Held, that the recital in the writ was sufficient evidence, and that the sheriff was not obliged to put in the judgment or the fi. fa. *Bessey* v. *Windham*, 6 Q. B. 166; 14 L. J., Q. B. 7; 8 Jur. 824. See *White* v. *Morris*, 11 C. B. 1015; 21 L. J., C. P. 185.

—— **When Production will be Dispensed with.**]—The regular way of connecting the sheriff with his officer, so as to make him responsible, is by the production of the warrant; but any recognition by the sheriff that the officer acted under his authority will dispense with the necessity of producing it. *Jones* v. *Wood*, 3 Camp. 228.

Where the sheriff of the county palatine of Lancaster was sued for goods alleged to have been wrongfully seized and sold under an execution, and the defence was, that the plaintiff claimed the goods by virtue of an assignment, which was void as against creditors:—Held, that the sheriff could take advantage of this defence without, as in ordinary cases showing his authority by proof of the writ, and that proof of the mandate to him from the chancellor of the county, was sufficient for the purpose. *Ogden* v. *Hesketh*, 2 Car. & K. 772.

In an action against a sheriff for not arresting under a ca. sa., in order to connect the sheriff with the transaction, the bailiff (who had not been served with a subpœna duces tecum) proved, that when the defendant went out of office the warrant was sent to the persons who, while the defendant was sheriff, acted as the London agents, and who were also his attorneys on the record:—Held, that notice to them to produce the warrant, after the defendant had gone out of office, was sufficient to entitle the the plaintiff to give secondary evidence of its contents. *Suter* v. *Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193.

In order to charge the sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept with the bailiff's name indorsed upon it, although the sheriff has returned cepi corpus; the plaintiff in such case must either produce the warrant, or prove some recognition of the act of the bailiff by the sheriff. *Martin* v. *Bell*, 1 Stark. 413; 6 M. & S. 220; 18 R. R. 354.

In an action for a penalty against the sheriff for taking the plaintiff, who had been arrested by the sheriff, to a public drinking-house without the plaintiff's consent, the plea traversed the taking the plaintiff to the drinking-house without his consent. Evidence was given at the trial the the same officer of the sheriff who arrested the plaintiff also took him to the drinking-house against his consent:—Held, that as the plea admitted the officer who arrested was the sheriff's agent, and the evidence showed that the same officer took the plaintiff to the drinking-house, it

was not necessary to produce the warrant to make him liable. *Barsham* v. *Bullock*, 2 P. & D. 241 ; 10 A. & E. 23.

—— **When Warrant has been Lost.**]—A sheriff's officer proved that he had seized goods under a warrant on a fi. fa., which was brought to him by his man, who told him that he had obtained it from the sheriff's office. The officer also stated, that he knew the handwriting on the warrant, which he had subsequently lost :—Held, that this was sufficient evidence to prove that the officer acted under the authority of the sheriff. *Moon* v. *Raphael*, 2 Scott, 489 ; 2 Bing. (N.C.) 310 ; 1 Hodges, 289 ; 7 Car. & P. 115 ; 5 L. J., C. P. 46.

A sheriff's officer, after making a seizure, handed over the warrant to the auctioneer by whom the goods were sold. Diligent search had been made for the warrant among the papers of the auctioneer (who was deceased), but it could not be found, nor was it annexed to the returns of the sale delivered into the excise office :—Held, sufficient to let in secondary evidence of the contents of the warrant, in order to connect the sheriff with the officer, and that it was not necessary to produce the supervisor for the district through whom the returns were made to the excise office, or to show that a search had been made among his papers. *Minshall* v. *Lloyd*, 2 M. & W. 450 ; 6 L. J., Ex. 115.

—— **Officer need not be Sworn.**]—A sheriff's officer subpœnaed to produce his warrant, need not be sworn. *Rex* v. *Menlis*, M. & M. 515, n. S. P., *Shepherd* v. *Wheble*, 8 Car. & P. 534.

Indorsement on Writ.]—In an action against the sheriff, for not arresting a party, proof of the indorsement of the officer's name on the writ by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and show that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis* v. *Neave*, 6 Moore, 120 ; 3 Br. & B. 126.

In order to connect the sheriff with the act of his bailiff, it is sufficient to produce the writ with the name of the bailiff indorsed upon it, in the sheriff's office, without proving an authority to indorse upon the writ the name of the bailiff by whom it is to be executed. *Tealby* v. *Gascoigne*, 2 Stark. 202.

But it was afterwards held that it was not sufficient. *Morgan* v. *Brydges*, 2 Stark. 314 ; 1 B. & Ald. 647.

An indorsement upon the writ (returned and filed by the sheriff) of the name of the officer is not sufficient to make the sheriff responsible without proving that his name was written upon it by the authority or with the privity of the sheriff. *Hill* v. *Middlesex* (*Sheriff*), Holt, 217 ; 7 Taunt. 8.

In an action against the sheriff for the extortion of his officer, the plaintiff proved an examined copy of the writ on which the officer's name was indorsed, and that a person of that name actually executed the writ, and that the course of the sheriff's office was that the name of the officer to whom the warrant was granted was usually indorsed on the writ :—Held, sufficient primâ facie evidence to connect the sheriff with the acts of the officer. *Scott* v. *Marshall*, 2 C. & J. 238 ; 2 Tyr. 257 ; 1 L. J., Ex. 97.

Where, in an action for an escape against the sheriff, the writ in the former action was produced to connect him with his officer, on which was indorsed "warrant to B.," who, on being called, stated that he had delivered the warrant to another who did not produce it :—Held, that it should have been left to the jury to say whether B. acted under the sheriff's authority, the indorsement being primâ facie evidence that he did so act. *Fermor* v. *Phillips*, 5 Moore, 184, n. ; 3 Br. & B. 27, n. ; Holt, 537 ; 17 R. R. 675.

A sheriff obtained judgment against A., in an action on a bail-bond. On this a fi. fa. issued, directed to the coroner. S., who was attorney for the sheriff, and also for others, indorsed the name of the sheriff's officer on the writ ; the coroner's broker seized a barge, which was bought by B., and the price paid to the officer ; subsequently the barge was claimed by others, and B. lost his purchase :—Held, that under these circumstances the officer was not the agent of the sheriff, so as to make the sheriff liable for money had and received at the suit of B., although it was proved to be the practice at the sheriff's office to indorse the name of the officer on the writ. *Sarjeant* v. *Cowan*, 5 Car. & P. 492 ; 1 C. & M. 491 ; 3 Tyr. 538 ; 2 L. J., Ex. 235.

Sheriff's Return.]—The writ with the sheriff's return upon it is only evidence against him to the extent of his duty under it, and it is no part of his duty to annex the officer's name to the return. *Hill* v. *Middlesex Sheriff*, Holt, 217 ; 7 Taunt. 8.

In an action by the assignees of a bankrupt, for goods taken by the sheriff under an execution, it appeared that the goods were taken at about that period of the year when the sheriffs were changed ; and it was proved that a witness, after the cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the sheriff :—Held, to be sufficient evidence that he was the sheriff who executed the writ ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous sheriff substituted, it will be a question for the jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff. *Whitehouse* v. *Atkinson*, 3 Car. & P. 344.

In an action against a surviving sheriff of London, a return to a writ directed to both the sheriffs, purporting to be the return of both, is conclusive to show that the return was authorised by the survivor. *Carlile* v. *Parkins*, 3 Stark. 163.

A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, is not, after the death of the officer, evidence of the place of arrest in an action, between a bankrupt and his assignees. *Chambers* v. *Bernasconi*, 1 Tyr. 335 ; 1 C. & J. 451. Affirmed, 1 C., M. & R. 347 ; 4 Tyr. 531 ; 3 L. J., Ex. 373—Ex. Ch.

Evidence as to Time of Execution.]—A sheriff's officer, having a fi. fa. against A., called at his house when he was from home, waited till he returned, and then informed him of his business :—Held, sufficient evidence to warrant the jury in finding that the writ was executed at the time of the officer's entry. *Bird* v. *Bass*, 6 Man. & G. 143 ; 6 Scott (N.R.) 928.

Admissions by Officers.]—In an action against the sheriff, admissions by the under-sheriff are

not evidence, unless they accompany some official act of the latter, or tend to charge himself. *Snowball* v. *Goodricke*, 4 B. & Ad. 451; 1 N. & M. 235; 2 L. J., K. B. 53.

Therefore, in an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion was the sheriff's authorised agent. *Ib.*

In an action against the sheriff for taking the goods of the plaintiff, an affidavit made by the officer under the interpleader act, respecting the goods, is admissible to prove that the officer who seized the goods is the servant of the sheriff. *Brickhill* v. *Hulse*, 2 N. & P. 426; 7 A. & E. 454; 7 L. J., Q. B. 18. See *Gardiner* v. *Moult*, 2 P. & D. 403; 10 A. & E. 464; 8 L. J., Q. B. 270.

In an action against the sheriff for a false return to a writ, what was said by the bailiff, to whom the warrant under it was directed, when asked by the plaintiff's attorney, before the return of the writ, why he did not execute it, is evidence against the sheriff. *North* v. *Middlesex Sheriff*, 1 Camp. 389; 10 R. R. 710.

So, declarations made by him whilst the party was in his custody may be given in evidence in an action for an escape against the sheriff. *Bowsher* v. *Wilts Sheriff*, 1 Camp. 391.

Declarations made by an officer whilst in possession of goods, after the return of the fi. fa., are evidence against the sheriff; and no new warrant is necessary after a venditioni exponas to connect the officer with the sheriff. *Jacobs* v. *Humphrey*, 2 C. & M. 413; 4 Tyr. 272; 3 L. J., Ex. 82.

Notice to Under-Sheriff—How far Notice to Sheriff.]—In an action against the sheriff for not arresting a person on mesne process, notice of this person being within the defendant's bailiwick, given to the under-sheriff's agent in town, is no evidence of such notice to the sheriff. *Gibbon* v. *Essex Sheriff*, 2 Camp. 189; 11 R. R. 692.

3. Special Bailiffs.

Appointment of — Discharge of Sheriff.]—Where a plaintiff appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility, until the party is arrested, and delivered into the actual custody of the sheriff. *Ford* v. *Leche*, 1 N. & P. 737; 6 A. & E. 699; 6 L. J., K. B. 150.

F., commencing an action against D., wrote to the sheriff, "F. *v.* D.: I enclose you a writ herein, and shall feel obliged by your granting a warrant thereon, directed to M. and B.; I shall write to B. in a day or two." The warrant was accordingly made out, and was afterwards directed to B.:—Held, sufficient evidence, that B. was employed by F. as a special bailiff. *Ib.*

Appointing a special bailiff, or giving special directions to a particular bailiff for the execution of a fi. fa. discharges the sheriff. *Porter* v. *Viner*, 1 Chit. 613, n.

So, the sheriff is discharged by the plaintiff's appointing a special bailiff and agent to manage the sale of goods seized under a fi. fa., although the sheriff had returned that he had sold, and that he had paid a sum illegally deducted for the auction. *Pallister* v. *Pallister*, 1 Chit. 614, n.

—— **What Sufficient to Constitute.**]—The plaintiff's attorney being about to issue a ca. sa. against H. at the suit of the plaintiff, requested of the sheriff a particular sheriff's officer; delivered the warrant to that officer; took him in his carriage to the scene of action, and then encouraged an illegal arrest, from which H. afterwards escaped:—Held, that the plaintiff could not sue the sheriff for such escape, and that the officer must be taken to be his special bailiff. *Doe* v. *Try*, 5 Bing. (N.C.) 573; 7 D. P. C. 636; 7 Scott, 704; 8 L. J., C. P. 346.

A mere request that a particular officer may be employed in the execution of process, does not constitute that officer a special bailiff of the party. *Corbet* v. *Brown*, 6 D. P. C. 794. S. P., *Balson* v. *Meggat*, 4 D. P. C. 557.

Judgment having been signed against a defendant, the plaintiff's attorney sent two writs of ca. sa. to a sheriff's officer, with directions to arrest the party, and instructions as to where he was likely to be found. The officer having sent back these writs they were then sent to the under-sheriff, with directions to forward warrants to the same officer:—Held, that these facts did not amount to an appointment of that officer as a special bailiff, so as to exonerate the sheriff. *Alderson* v. *Davenport*, 1 D. & L. 966; 13 M. & W. 42; 13 L. J., Ex. 352; 8 Jur. 650.

Semble, the mere writing of the name of a particular officer on the back of a fi. fa. or a ca. sa., in the place where the directions to levy or arrest are written, coupled with a letter by the plaintiff's attorney, directing the particular officer to hold possession after a levy, is not sufficient to constitute an appointment as special bailiff. *Seal* v. *Hudson*, 2 B. C. Rep. 55; 4 D. & L. 760; 11 Jur. 610.

Effect as regards Ruling the Sheriff to Return.]—The general rule is, that, where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of fi. fa.: but where such a rule had been obtained, and the object was to procure a return of nulla bona, with a view to sue out a ca. sa., the court discharged a rule on the part of the sheriff to set the rule aside upon payment of costs by the plaintiff, the plaintiff also undertaking not to bring an action. *Harding* v. *Holder* or *Holden*, 9 D. P. C. 659; 3 Scott (N.R.) 293; 2 Man. & G. 914.

Plaintiff Attending when Goods Seized.]—If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person, under an execution which he has sued out, he makes himself responsible for the officer's acts. *Meredith* v. *Flaxman*, 5 Car. & P. 99.

4. Sureties for Officers.

Extent of Liability of.]—The sureties of a sheriff's officer are only liable for the due performance of the officer's duty. *Cook* v. *Palmer*, 6 B. & C. 739; 9 D. & R. 723; 5 L. J. (O.S.) K. B. 234.

Therefore, when the officer entered into an agreement on the sale of goods taken in execution, and thereby exceeded his authority, they were held not to be liable for money had and received under this agreement. *Ib.*

Where a keeper of a county gaol covenanted with the sheriff "that he would personally attend the assizes and general quarter sessions of the county, and convey prisoners, when ordered to be removed by habeas corpus, safely and without

escape, from the gaol to such place as the writ should direct"; and he and two sureties gave the sheriff a bond for the due performance of such covenants; and the former being in attendance at the quarter sessions, the sheriff, on receiving a habeas corpus for the removal of a prisoner, directed a warrant for that purpose to the defendant and S., "by him (the sheriff) for that time only thereto specially appointed"; and S., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination, but allowed him to escape:—Held, that the sheriff having specially directed the warrant to S., and appointed him for that particular purpose, neither the gaoler nor his sureties were liable on the bond, for a breach of the covenants contained in the indenture. *Ryland* v. *Lavender*, 9 Moore, 71; 2 Bing. 65; 2 L. J. (o.s.) C. P. 116.

An action by a sheriff against the sureties of his bailiff, on a deed to indemnify the sheriff from costs, touching or concerning any matter wherein the bailiff should act as bailiff, and to indemnify him from all damage, loss, costs, &c., by reason of any return, and against all loss, costs, &c., the sheriff should be liable to by reason of returning, not returning, or misreturning any writ, by the act or default of the bailiff, may be maintained, where costs or loss have been incurred by the sheriff in defending an action, if he has been damnified by consequence of the act of the baliff, although the bailiff may not have done anything wrong in the matter wherein he acted, in respect of which the action had been brought against the sheriff, or the loss had been sustained. *Farebrother* v. *Worsley*, 1 Tyr. 424; 1 C. & J. 549; 5 Car. & P. 102; 9 L. J. (o.s.) Ex. 166.

If a sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained. *Ib.*

—— **When Sheriff Compromises an Action brought against him.**]—If, after he has obtained a rule nisi for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred, he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable. *Ib.*

Retaking from, in Ireland.]—Retaking from special bailiff a man's own goods without force, no criminal rescue under 27 & 28 Vict. c. 99, s. 26 (the Civil Bill Courts Procedure Amendment Act (Ireland), 1864), or at common law. *Reg.* v. *Walshe*, Ir. R. 10 C. L. 511.

Indemnity Bond procured by Fraud of Sheriff's Officer.]—A sheriff cannot recover on an indemnity bond which has been produced by the fraud of his own officer. *Raphael* v. *Goodman*, 8 N. & P. 547; 8 A. & E. 565; 1 W., W. & H. 363; 7 L. J., Q. B. 220.

A plea to an action on such a bond, that it was obtained by the sheriff and others in collusion with him by fraud and covin, is a good plea. *Ib.*

How Discharged.]—A man who becomes surety for an officer to the sheriff cannot discharge his obligation within the year, without the consent of the sheriff and of the other sureties. *Martin* v. *Wenman*, Lofft, 225.

D. DUTY AND LIABILITY OF.

1. On Crown Process.

The duty of the sheriff with respect to the roll of fines sent to him by the clerk of the peace pursuant to 3 Geo. 4, c. 46 (the Levy of Fines Act, 1822), is not purely ministerial, and the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. *Wildes* v. *Morris*, 22 L. J., M. C. 4; 16 Jur. 1115; 1 W. R. 65.

If a deputy sheriff in possession of goods seized under an immediate extent, on receiving a subsequent fi. fa., at the suit of a subject, contracts, with the judgment-creditor to deliver him a certain quantity of the goods on his paying into the sheriff's hands the debt due to the crown, which is accordingly paid, and if, afterwards, whilst his officer is in the act of delivering and measuring the quantity, the goods are rescued, the sheriff is liable on such contract to the judgment-creditor, who may maintain an action on the contract, or recover on a common count for goods sold and delivered, or money had and received; and a beginning to measure and deliver is not such a delivery as will satisfy this particular contract. *Thomas* v. *Pearse*, 5 Price, 578.

Sessions discharging Defendant before Money paid over.]—Where, upon a recognizance forfeited at quarter sessions, the sheriff has levied part of the penalty and has the defendant in execution for the residue, the session have jurisdiction over the whole recognisance; and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the treasury, an action lies against the sheriff for the amount. *Harper* v. *Hayton*, 5 M. & Ry. 307; 8 L. J. (o.s.) M. C. 129.

2. On Writ of Fieri Facias.

a. Manner of Executing.

Amount to be Seized.]—The duty of a sheriff, in the first instance, is to seize so much goods as will be reasonably sufficient, if sold, to satisfy the sum indorsed on the writ; and his duty to seize in respect of rent does not arise until the landlord has made a claim, when, on the refusal of the tenant to pay the rent, the sheriff is bound to levy it under the writ, and, consequently, to seize to a larger amount. *Gawler* v. *Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.

Breaking open Doors.]—A sheriff having entered at the open doors of a house need not demand to have the inner doors opened to him before he breaks them, in order to take, under a fi. fa., goods which are within the house. *Hutchinson* v. *Birch*, 4 Taunt. 619; 13 R. R. 703. And see *Johnson* v. *Leigh*, 1 Marsh. 565; 6 Taunt. 246; 16 R. R. 614.

Where the sheriff was lawfully in a room occupied by an under-tenant of the plaintiff in his

dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods; and having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff nor anyone on his behalf being present whom the sheriff could request to open the door:—Held, that he was justified in breaking the outer door and the lock thereof, in order to carry away the goods. *Pugh* v. *Griffiths*, 3 N. & P. 187; 7 A. & E. 827; 7 L. J., Q. B. 169.

A sheriff's officer, in execution of available writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest:—Held, that the officer was justified in so doing. Held, also, that demand of re-entry under such circumstances was not requisite to justify his breaking open the outer door. *Aga Kurboolie Mahomed* v. *Reg.*, 4 Moore, P. C. 239.

Quære, if indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer. *Ib.*

Searching House of Administratrix.]—Under a fi. fa. against the goods of an intestate, in the hands of his administratrix, or of the husband of the administratrix in her right since her marriage, the sheriff may justify entering the house of the husband to search for goods of the intestate, though none are found therein, because that is the most natural place of custody for them. *Cooke* v. *Birt*, 5 Taunt. 765; 1 Marsh. 333; 15 R. R. 652.

Seizure on Sunday—Withdrawal—Subsequent Seizure on Thursday—Effect of.]—A warrant having been directed to the defendant as bailiff on a fi. fa. against the plaintiff's goods on Sunday, some assistants employed by the defendant broke into the plaintiff's house and seized his goods. They continued in possession until the following Tuesday, when they withdrew. They returned on the following Thursday and proceeded to lot the goods for sale, and remained in possession until the Saturday, when the defendant, for the first time, came on the premises and sold the goods under the writ and warrant:—Held, that the sale was not vitiated by the previous illegal seizure of the goods, since the principle which governs an arrest of the person does not apply to an execution against goods. *Percival* v. *Stamp*, 9 Ex. 167; 2 C. L. R. 282; 23 L. J., Ex. 25; 2 W. R. 14.

b. Notice to Withdraw.

What Amounts to.]—Under a fi. fa. at the suit of P., lodged with the sheriff of Hants, the goods of the execution debtor were seized. Before the return of the writ, P. issued a ca. sa., under which the debtor was arrested in Middlesex. The attorney of P. by letter directed the sheriff of Hants to withdraw the fi. fa. There was at the time another fi. fa., at the suit of W., lodged with the sheriff, and no directions were in fact given to the bailiff in possession to withdraw, and he continued in possession holding both warrants; an order was subsequently made by a judge that, upon payment of the debt to P. on a day mentioned, no ca. sa. should be issued against the debtor; but that in the meantime P. should be at liberty to proceed on the fi. fa. already issued:—Held, that the writ never was, in fact, withdrawn, and consequently that P. was entitled to the proceeds of the sale of the goods in the sheriff's hands as against W. who claimed them under a bill of sale executed by the judgment debtor before the direction to withdraw the fi. fa. *Withers* v. *Parker*, 4 H. & N. 524; 28 L. J., Ex. 292. Affirmed, 5 H. & N. 725; 29 L. J., Ex. 320—Ex. Ch.

Subsequent Delivery of Writ by Second Creditor.]—If a fi. fa. is delivered to a sheriff, with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent to protect the goods of a debtor. *Hunt* v. *Hooper*, 12 M. & W. 664; 1 D. & L. 626; 13 L. J., Ex. 183.

Retaining Possession after.]—Goods having been seized under a fi. fa. against a plaintiff, at the suit of G., a claim was made under a bill of sale, with a schedule annexed. The clerk of G.'s attorney, in consequence, called on the officer, and was told by him, that the goods were being compared with the schedule; and, subsequently, in the course of the day, G. being indisposed to contest the claim, the clerk gave the following notice to the officer:—"*W.* v. *W.*, withdraw under the fi. fa. herein, the goods having been claimed." The officer afterwards discovered, that part of the goods were not included in the schedule, and these he retained and sold; and he for some time retained possession of part of the goods claimed, which, when seized, were in the plaintiff's possession. Three days afterwards, in consequence of the plaintiff's application, the clerk called on the officer, to enquire why he did not withdraw; and being told that these were goods which did not belong to the claimant, expressed his approbation of their detention:—Held, first, that the terms of the order, though primâ facie giving a direction to the sheriff to withdraw generally, were to be interpreted with reference to the circumstances under which it was given, and that they sufficiently negatived an intention on the part of G., that it should be treated as a general order. *Walker* v. *Hunter*, 2 C. B. 324; 15 L. J., C. P. 12; 9 Jur. 1079.

Held, secondly, that the act of detention having been done for G.'s use and benefit, a ratification by him had a retrospective operation, and would have rendered him liable to an action of trespass, had it not been justifiable. *Ib.*

c. Withdrawing from Possession and Rescue.

Withdrawal from Possession.] — Where a sheriff has taken possession of goods and chattels under a fi. fa., his officer should continue in possession; or, if he may abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing, in order to sustain his right against others, afterwards claiming under legal authority to seize the same goods; and, in case of an abandonment on the return day of the writ, possession cannot afterwards be resumed. *Ackland* v. *Paynter*, 8 Price, 95.

A sheriff returned that he seized the defendant's goods, and kept possession until he received

from the attorney of the plaintiff an order to withdraw from possession:—Held, that the return was good, for the attorney of the plaintiff meant the attorney in the action; and that he had power to order the sheriff to quit possession. *Levi* v. *Abbott*, 4 Ex. 588; 7 D. & L. 185; 19 L. J., Ex. 62.

After the sheriff had seized under a fi. fa., the execution debtor executed a deed under the Bankruptcy Act of 1861, which was duly registered and gazetted. On an application by the debtor to the court, the sheriff was directed to withdraw. *Rogers* v. *Roberts*, 36 L. J., Ex. 40; L. R. 2 Ex. 35; 15 L. T. 254; 15 W. R. 340. S. P., *Marks* v. *Hall*, 7 B. & S. 839; 36 L. J., Q. B. 40; L. R. 2 Q. B. 31; 15 L. T. 242; 15 W. R. 155.

Power to Re-enter.]—Where the sheriff has entered and then withdrawn his writ in consequence of an arrangement having been come to between the execution creditor and the execution debtor, the sheriff cannot re-enter again without fresh instructions from the execution creditor. *Shaw* v. *Kirby*, 52 J. P. 182.

Rescue.]—If A., under a pretence of a purchase, obtains possession of B.'s goods with a preconceived design not to pay for them, and absconds to avoid a suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to A., it seems that B. may lawfully rescue them out of the hands of the sheriff even by stratagem; but the validity of the purchase by A. is a question for a jury, as it depends upon whether the vendee had obtained possession of the goods with a preconceived design not to pay for them. *Bristol* (*Earl*) v. *Wilsmore*, 2 D. & R. 755; 1 B. & C. 514; 1 L. J. (O.S.) K. B. 178.

A bailiff, under a sheriff's warrant addressed to him alone, and not to him and his assistants, seized goods in execution, left them in charge of keepers, and went away; during his absence, the goods were rescued by the prisoner from the keepers:—Held, that, under these circumstances, he could not be convicted of having by threats and violence compelled the bailiff to abandon the seizure. *Reg.* v. *Noonan*, Ir. R. 10 C. L. 505.

d. Sale of Goods.

Compare cases post, ACTION FOR WRONGFUL OR NEGLIGENT EXECUTION.

Duty to Sell under Fi. Fa.—Bankruptcy—Absence of Request by Official Receiver or Trustee to Sheriff to deliver Goods.]—After goods had been taken in execution under a writ of fi. fa., but before sale, a receiving order was made against the execution debtor, and notice thereof given to the sheriff by the official receiver. The official receiver, however, made no request for delivery of the goods, but informed the sheriff that he would leave him to realise the goods, and account to the official receiver in due course. The sheriff accordingly sold the goods. Afterwards the execution debtor was adjudicated bankrupt, and a trustee appointed. In an action by the trustee in bankruptcy against the sheriff, to recover damages for a wrongful and illegal sale:—Held, that in the absence of a request to the sheriff to deliver the goods to the official receiver or trustee, as provided by s. 46, and sub-s. 1, of the Bankruptcy Act, 1883, there was nothing in ss. 9, 45, and 46 of that act to alter the authority of the sheriff to sell in pursuance of the writ of fi. fa., and that the sheriff, therefore, was justified in selling the goods, notwithstanding the making of the receiving order. *Woolford's Trustee* v. *Levy*, 61 L. J., Q. B. 546; [1892] 1 Q. B. 772; 66 L. T. 812; 40 W. R. 483; 56 J. P. 694—C. A.

Amount to be Offered for Sale.]—It is the duty of the sheriff's officer to stop the sale as soon as sufficient money is raised. *Cook* v. *Palmer*, 6 B. & C. 739; 9 D. & R. 723; 5 L. J. (O.S.) K. B. 234.

A sale by a sheriff is for ready money and immediate delivery; and he is not justified, after he has sold as much as will apparently satisfy the writ, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident. *Aldred* v. *Constable*, 6 Q. B. 370; 8 Jur. 956.

Indemnity to Execution Creditor in order to Delay Sale.]—An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit. *Lyall* v. *Lamb*, 4 B. & Ad. 468.

Not Selling within Reasonable Time.]—An action lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure. *Bales* v. *Wingfield*, 2 N. & M. 831. S. P., *Airton* v. *Davis*, 3 M. & Scott, 138; 9 Bing. 740; 2 L. J., C. P. 89.

But the plaintiff can recover nominal damages only, unless actual injury is proved. *Ib.*

A sheriff must sell the goods within a reasonable time, and before the return of the venditioni exponas, or he will be liable to an action. *Jacobs* v. *Humphrey*, 4 Tyr. 272; 2 C. & M. 413; 3 L. J., Ex. 82.

Pressure by Creditor.]—A sheriff who seizes under a fi. fa. may proceed at once to prepare for selling unless such a sale would in the circumstances be unreasonable. There is no rule requiring him to hold his hand for a reasonable time. A sheriff may properly consult the interests and conform to the instructions of the execution creditor where doing so involves nothing incompatible with his duty. *Crook, In re, Southampton Sheriff, Ex parte*, 63 L. J., Q. B. 756; 10 R. 394; 71 L. T. 236; 42 W. R. 650; 1 Manson, 410.

Remaining on Premises after Sale.]—Action against a sheriff for breaking and entering a dwelling-house; plea, that he entered under a fi. fa., and seized a lease under which the plaintiff held the house, and, before the return of the writ, sold the term, and continued in possession of the house for the further execution of the writ. The plaintiff new assigned, that the sheriff continued in possession an unreasonable time after he had seized and sold the lease. The term was sold by auction, but there was no assignment executed:—Held, that the action was maintainable; that the seizure did not vest the term in the sheriff until he executed an assignment to the purchaser; that, whether the word "sold" meant an actual assignment or not, the sheriff could not remain in the house after he had sold the term. *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 72; 15 L. J., Ex. 26; 9 Jur. 783.

Failure of Delivery to Purchaser.]—A party purchased goods of the sheriff under an execution, with a knowledge that they were deposited at the manufacturer's, but did not apply for a delivery till after the time the sheriff was bound to pay over the money :—Held, that he could not maintain an action against the sheriff, upon the manufacturer refusing to deliver them up. *Duncan* v. *Garrett*, 1 Car. & P. 169 ; 2 L. J. (o.s.) K.B. 142 ; 26 R. R. 629.

A fi. fa. directed to the coroner issued on a judgment obtained by a plaintiff, and the plaintiff's attorney indorsed thereon the name of S., an officer of the sheriff, who, after the goods seized under the fi. fa. had been sold, received the proceeds from the broker, and did not hand them over. A person who bought goods at the sale which had been seised under the fi. fa., but which were afterwards claimed by a third party, and taken away from him, brought an action against the sheriff for the purchase-money paid by him, the consideration having failed :—Held, that S. was not the officer of the sheriff, but of the coroner, and that the defendant was not connected with the proceedings so as to be liable. *Sarjeant* v. *Cowan*, 1 C. & M. 491 ; 3 Tyr. 538 ; 5 Car. & P. 492 ; 2 L. J., Ex. 235.

Partnership Property.]—One partner cannot maintain trover against a sheriff for a mere sale of his share of the partnership property under a fi. fa. issued against the other partner for a separate debt. The sheriff in such case is in the same position, so far as regards his liability in trover, as if the sale had been by the execution partner ; and upon a plea of not guilty the partnership is good evidence. *Mayhew* v. *Herrick*, 7 C. B. 229 ; 18 L. J., C. P. 179 ; 13 Jur. 1078.

Liability for not Selling Goods.]—A sheriff who, having seized goods under a fi. fa., receives notice in general terms that the execution debtor has committed an act of bankruptcy, may take reasonable time to inquire whether the statement is true before proceeding to sell, unless he is aware of circumstances which cause him to think that the notice is a mere pretence. *Ayshford* v. *Murray*, 23 L. T. 470.

At the trial of an action by an execution creditor against a sheriff, for not levying a debt of 60*l*., the landlord of the debtor was called as a witness, and stated that the sum of 46*l*. was due from the debtor for rent ; and it appeared that the sheriff had withdrawn the execution, upon notice from the landlord, who had subsequently distrained and realised less than the rent due :—Held, that the plaintiff was entitled to recover from the sheriff the amount realised under the distress. *Augustin* v. *Challis*, 1 Ex. 279 ; 17 L. J., Ex. 73.

Sale by Sheriff to Defendant of Goods not belonging to Execution Debtor—Sale by Defendant of his Bargain to Plaintiff—Validity of latter Sale.]—The defendant, at a sheriff's sale, bought goods from the sheriff for 18*l*. The plaintiff, who was also at the sale, bought the defendant's bargain of him for 5*l*., and paid him 23*l*. The defendant paid the sheriff the 18*l*., and the sheriff began to deliver the goods to the plaintiff, but they were then claimed as not being the property of the execution debtor, and were recovered by the true owner :—Held, that there was no implied warranty by the defendant that he had title, nor any failure of consideration, the plaintiff having paid the 23*l*. to the defendant, not for the goods, but for the right which the defendant had acquired by his purchase, and that this consideration had not failed, *Chapman* v. *Speller*, 14 Q. B. 621 ; 19 L. J., Q. B. 239 ; 14 Jur. 652.

Purchase of supposed Interest in Land, which Turns out Worthless—Return of Deposit.]—In 1861, C., tenant from year to year of lands, died intestate, leaving several children, and a widow, who continued in possession, and in 1864 married P. No administration was taken out to C., and P. remained in possession, letting and subletting the lands, but the landlord declined to recognise him, and gave receipts for the rent, which was always paid by P.'s wife, to the representatives of C. In 1874, writs of fi. fa. issued against P. were lodged with R., who, as subsheriff, thereupon announced a public sale of P.'s "interest" in the premises, the advertisement stating that they had been seized under the writs ; and referring to B., the auctioneer, for further particulars. B. and R. deposed that at the auction they announced they were selling P.'s interest, "whatever it is." This, however, was not admitted by the plaintiff, who became the purchaser for 900*l*. and paid 300*l*. deposit, but afterwards refused to complete, on the ground that P. had no interest in the premises. The plaintiff then brought an action for money had and received against R., to recover his deposit, when the jury found that R. had sold a subsisting term in the lands, on the supposition that C.'s interest was vested in P., and that as R. had no right to sell that interest, the plaintiff was entitled to recover :—Held, that P. had no interest in the lands which the sheriff could seize and sell, and that consequently the plaintiff was entitled to repudiate his contract, and have his deposit returned. *Kearney* v. *Ryan*, 2 L. R., Ir. 61—C. A.

Injunction restraining Sale by Sheriff.]—Goods having been taken in execution under a fi. fa. against W., the trustees of Mrs. W.'s settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in the common pleas division, upon which an order was made that upon the trustee paying 115*l*. into court within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell and pay the proceeds into court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. W. thereupon commenced an action in the chancery division to have the trusts of the settlement carried into execution, a new trustee appointed, and in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted by Malins, V.-C. :—Held, on appeal, that this order was a restraining by injunction a proceeding pending in the common pleas division, and was inconsistent with the Judicature Act, 1873, s. 24, sub-s. 5, and must be discharged. *Wright* v. *Redgrave*, 11 Ch. D. 24 ; 40 L. T. 206 ; 27 W. R. 562—C. A.

The court will not interfere to restrain a sheriff from selling goods seized by him, on an offer of indemnity by a third person, claiming

the goods. *Harrison* v. *Foster*, 4 D. P. C. 588; 1 H. & W. 650.

On the 20th of August the sheriff, under a fi. fa. against A. took possession of B.'s furniture in A.'s house. Both before and after seizure B. gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th of August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into court. The sheriff accordingly withdrew from possession on the 1st of September. B.'s title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of court to B. B. now brought this action to trial against the sheriff for damages and costs:—Held, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff. *Aylwin* v. *Evans*, 52 L. J., Ch. 105; 47 L. T. 568.

—— **Duty of Sheriff's Officer receiving Telegram as to.**]—It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the court of bankruptcy to restrain a sale in the country under an execution, to telegraph to the court of bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 49 L. J., Bk. 1; 13 Ch. D. 110; 43 L. T. 187; 28 W. R. 174.

—— **Liability of Sheriff's Officer for Acts of Deputy.**]—A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram. *Ib.*

Payment of Proceeds—Rule for Payment of Money Levied.]—A rule calling on a sheriff to show cause why he should not pay to the plaintiff's solicitors the money levied under a fi. fa. is a rule or an order to show cause in an action within Ord. LIII. r. 2; and the application cannot be heard unless notice of motion has been given to the sheriff under Ord. LIII. rr. 3 and 4. *Delmar* v. *Freemantle*, 47 L. J., Ex. 767; 3 Ex. D. 237; 26 W. R. 683.

—— **How far Demand is Necessary.**]—After a return to a fi. fa. that the money is levied, the sheriff is liable to an action for it, without any demand of payment. *Dale* v. *Birch*, 3 Camp. 347.

But when the action was brought without any previous demand of the sum levied, the court stayed the proceedings on the payment of that sum, without costs. *Jefferies* v. *Sheppard*, 3 B. & Ald. 696.

—— **When Writ has been Issued Fraudulently to Defeat Bonâ fide Creditor.**]—Although there is strong reason to believe that a fi. fa had been issued in order to defraud the execution of a bonâ fide creditor, and that the sheriff is a party to the fraud, the court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the bonâ fide creditor, but the question of fraud must be tried by a jury. *Barber* v. *Mitchell*, 2 D. P. C. 574.

—— **To Assignees in Bankruptcy.**]—A fi. fa. issued against B. When the officer went to B.'s premises, on the 11th July, to execute the warrant, he found a man in possession on behalf of trustees under a deed of assignment executed by B. for the benefit of his creditors. The officer thereupon returned without making a levy. On the 14th a fiat issued against B., under which he was declared bankrupt. On the 15th August the officer again entered and made an inventory of the goods on the premises, asserting that he considered himself in possession. On the 2nd September the assignees paid the sum claimed under the writ, in order to prevent the sheriff from proceeding to a sale, which he threatened to do:—Held, that the assignees were entitled to recover the money so paid, and that, if necessary, it must be assumed as against the sheriff, that he was, at the time, in possession of the goods. *Valpy* v. *Manley*, 1 C. B. 594; 14 L. J., C. P. 204; 9 Jur. 452.

Defendants suffered judgment by default, and the sheriff levied upon their goods for the amount of the damages and costs. A rule nisi was obtained, calling on them to show cause why the same should not be paid over to the plaintiff. On behalf of the sheriff, it was then stated, that, by a resolution of the house of commons, he was ordered to refund to the defendants, who were printers to the house of commons, the amount levied upon their goods; and that, for disobedience thereto, the sheriff had been committed to the custody of the serjeant-at-arms. It also appeared that the plaintiff, being an insolvent debtor, his assignees claimed the amount of damages, and required the sheriff to pay the same over to them:—Held, that the resolution of the house of commons did not authorise the sheriff to withhold the payment of the proceeds of the levy to the plaintiff; that the imprisonment of the sheriff for disobeying that resolution was no ground for the court to discharge the rule; and that the assignees of the plaintiff should have applied to the court. *Stockdale* v. *Hansard*, 3 P. & D. 330; 8 D. P. C. 522; 11 A. & E. 253; 9 L. J., Q. B. 75.

—— **Payment of Interest on.**]—Where a sheriff retained for several years a sum of money in his hands, the balance of the produce of the effects of a crown debtor, seized by him and sold under an extent after the crown debt had been satisfied, claiming himself a lien thereon for poundage, the court ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it from the time when the court had determined, on a former occasion, that the claim of the sheriff was unfounded; notwithstanding which determination he had continued to keep the question before the court; and that, although the sheriff should not have made interest, or any use or advantage of the money in the meantime, the court proceeding wholly on the ground of the injury done to the party entitled to it. *Rex* v. *Villiers*, 11 Price, 575; 22 R. R. 778.

Damage to Goods Sold.]—In an action against a sheriff for seizing waggons, breaking,

damaging them, and converting and selling them, not stating expressly any delivery to the vendee; he denied the breaking and damaging, but justified the conversion and sale, as sheriff, under a fi. fa. The plaintiff new assigned, that the conversion did not consist in the mere sale, but in the delivery also, and in causing the purchaser to use and damage the waggons:—Held, that there was no conversion except in selling as alleged; that that was no conversion in law, and no cause of action, and that the plea was good; and that the new assignment was not a departure from the declaration, and it showed a good cause of action. *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231; 3 L. T. 703.

Setting aside Sale—Plaintiff Purchasing for Nominal Consideration.]—The defendant's chattel interest in a farm of land was put up for sale under a fi. fa. at the suit of the landlord, who was the execution creditor. The sale was fully advertised, and, after two adjournments for want of bidders, the solicitor for the plaintiff, who was the only bidder at the third sale, was declared the purchaser for 1*l*. The interest in the farm was admittedly of value, but in the absence of collusive or improper conduct by the sheriff, the court refused to set aside the sale. *Cramer* v. *Murphy*, 20 L. R., Ir. 572.

—— **Insufficient Advertisement.**]—The defendant's chattel interest in a farm of land was put up for sale by public auction by the sheriff, under a fi. fa. at the suit of the landlord, who was the execution creditor. The sale was advertised by a public notice, and the plaintiff's agent, who was the only bidder, was declared the purchaser for 5*l*. The interest in the lands was admittedly valued at 600*l*. The court set aside the sale and conveyance, on the ground that the sheriff did not take reasonable and proper care to advertise the sale, and that the farm was sold at undervalue. *Edge* v. *Kavanagh*, 24 L. R., Ir. 1.

Sale of "Chattel Interest (if any)" in Tenancy—Sale of a Speculation—Outstanding Legal Mortgage—Deposit—Failure of Consideration.]—A sheriff set up for sale "the chattel interest (if any)" of an execution debtor in a tenancy from year to year, giving full notice to intending purchasers of the fact that it was alleged that there was a legal mortgage thereon outstanding, but without inquiring further into the existence or validity of such alleged mortgage. It subsequently was proved that the mortgage was a valid and legal one. The purchaser rescinded before conveyance, and brought an action to recover the amount of his deposit, as paid upon a consideration that had wholly failed:—Held, that the sheriff sold a speculation merely, and that the plaintiff was not entitled to recover. *Ronan* v. *King*, [1894] 2 Ir. R. 648—C. A.

e. Execution of Bill of Sale.

Goods seized by a sheriff were valued and delivered to the execution creditor upon a bonâ fide purchase by him, but no bill of sale was executed:—Held, that there was a valid sale of the goods. *Hernaman* v. *Bowker*, 11 Ex. 760; 25 L. J., Ex. 69; 4 W. R. 261.

A bill of sale or a warrant, signed by a deputy of the under-sheriff, is valid. *Cookson* v. *Fryer*, 1 F. & F. 328.

Where a bill of sale of chattels was proved to have been executed by an under-sheriff in the name of the sheriff, it was held unnecessary to prove the power of attorney or other authority enabling the under-sheriff to assign the property in the name of the sheriff. *Wood* v. *Rowcliffe*, 11 Jur. 707.

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. *Cameron* v. *Reynolds*, Cowp. 406.

f. Return to Writ.

Form of—Value of Goods.]—The court will not compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a fi. fa., on the ground that his officer has wasted the goods. *Willett* v. *Sparrow*, 9 Marsh. 293; 6 Taunt. 576.

A return to a fieri facias must state the value of the goods. *Barton* v. *Gill*, 1 D. & L. 593; 12 M. & W. 315; 13 L. J., Ex. 83.

In making a return, a reasonable degree of certainty is sufficient. *Reynolds* v. *Barford*, 8 Scott (N.R.) 233; 7 Man. & G. 449; 2 D. & L. 327; 13 L. J., C. P. 177; 8 Jur. 961.

Where a sheriff returns that he has retained a sum for possession money, it is no ground for quashing the return that the plaintiff is charged with more possession money than the amount payable by him for keeping possession. *Ib.*

—— **When Several Writs are Issued.**]—If a sheriff returns a seizure under that and another writ, it is bad. *Wintle* v. *Chetwynd* (*Lord*), 7 D. P. C. 554; 1 W., W. & H. 581.

Where there are two writs, and the goods remain in the sheriff's hands for want of buyers, he must make some return as to the value of the goods, although he will not be bound by the amount stated. *Ib.*

It is a sufficient return that he has seized goods of the defendant by virtue of several previous writs of fi. fa., according to their priority. *Chambers* v. *Coleman*, 9 D. P. C. 588.

—— **Nulla Bona.**]—Nulla bona is a proper return, where the sheriff has paid the proceeds of an execution, either in discharge of rent or of a prior writ. *Wintle* v. *Freeman*, 1 G. & D. 93; 11 A. & E. 539; 10 L. J., Q. B. 161.

Where, before the issuing of a fi. fa., a fiat in bankruptcy was issued against a debtor, and before a return of the writ an order was made by the court of review for annulling the fiat, and after the return the order was confirmed by the lord chancellor, the sheriff's return of nulla bona was well founded. *Smallcombe* v. *Olivier*, 13 M. & W. 77; 2 D. & L. 217; 13 L. J., Ex. 305; 8 Jur. 606.

The meaning of a return of nulla bona is, that there are no goods applicable to the plaintiff's writ. *Shattock* v. *Carden*, 6 Ex. 725; 2 L., M. & P. 466; 21 L. J., Ex. 200.

—— **Sufficient Goods originally Sold—Insufficient after Payment of Claim of Landlord subsequently made.**]—Where a sheriff, after being ruled to make a return to a fi. fa., made a return that he had sold the goods seized, and had received for them sufficient to satisfy the moneys directed to be levied; but that he afterwards had notice from the landlord that two quarters' rent was due; that he had applied to the landlord, but had not been permitted by him to have evi-

dence of his claim; and that though he, the sheriff, had used due diligence, he was unable to ascertain whether the landlord had any just claim in respect of the rent, the court quashed the return for insufficiency, and allowed an attachment to issue. *Hall* v. *Crawley*, 7 L. T. 721; 11 W. R. 344.

—— **No Power of Ascertaining as to Whether Defendant had Goods.**]—If the sheriff returns that the premises of the defendant are so barricaded that he is unable to ascertain whether the defendant has goods within the bailiwick on which a levy may be made, it is a bad return, as he should state either that the defendant has goods or that he has none. *Munk* v. *Cass*, 9 D. P. C. 332.

—— **Ordered to Withdraw.**]—To a fi. fa. the sheriff returned that he received from E. L. L., the attorney of the plaintiff in the writ named, an order to withdraw from possession, and that he thereupon withdrew:—Held, good. *Levy* v. *Abbott*, 7 D. & L. 185; 4 Ex. 588; 19 L. J., Ex. 62.

—— **Special Bailiff.**]—When a sheriff has appointed a special bailiff to execute a writ of fi. fa. at the request and peril of the plaintiff, he should move to set aside any rule subsequently obtained by the plaintiff upon him to return the writ. If instead of doing so he returns that he appointed a special bailiff, to whom he refers as to the execution of the writ, the return may be set aside, even on motion by the plaintiff. *Tait* v. *Mitchell*, 22 L. R., Ir. 327.

Pending Interpleader.]—On a levy by a sheriff under a fi. fa. three persons claimed different portions of the goods. The sheriff interpleaded, and three separate orders were made directing that, on payment of certain distinct sums into court by the claimants within seven days, the sheriff should withdraw and issues should be tried; in default of payment he should sell and pay the proceeds into court. One of the claimants paid money into court, and the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—Held, that the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ. *Angell* v. *Baddeley*, 47 L. J., Ex. 86; 3 Ex. D. 49; 37 L. T. 653; 26 W. R. 137—C. A.

A return that he, the sheriff, had seized goods which were claimed by a third party, and thereupon he applied under the interpleader act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; and that, afterwards, the plaintiff directed him to deliver up possession of the goods to the claimant, is insufficient. *Cleaver* v. *Fisher*, 2 D. (N.S.) 292.

Amending Return.]—A sheriff having returned that the goods seized by him remained in his hands for want of buyers, an action was brought against him for a false return, when he obtained an order for time to plead on the usual terms, taking short notice of trial. Having subsequently applied to amend his return, by the insertion of the words nulla bona in lieu of the return first made, the court refused to allow the amendment. *Wylie* v. *Pearson*, 1 D. (N.S.) 807; 6 Jur. 806.

The plaintiff's attorneys having ceased to act or him, and become attorneys for the defendant, fraudulently procured the sheriff to return on a fi. fa. a sum larger than that actually levied and accounted for to the plaintiff; the court (at the expense of the attorneys) ordered the return to be amended according to the fact. *Green* v. *Glassbrooke*, 2 Scott, 261; 2 Bing. (N.C.) 113; 1 Hodges, 193.

Effect in Evidence.]—A return of nulla bona, made by the sheriff to a fi. fa. against A., is admissible upon the trial of a question as to the property in goods at the time of such return between A. and a succeeding sheriff. *Avril* v. *Warwick Corporation*, 3 N. & M. 871.

So, although the bailiff entrusted with the execution of such writ did not himself search for goods of A., but sent his assistant. *Ib.*

g. Action for a False Return, or Non-Return.

Mode of Trying.]—The court will not try, on affidavits, whether the return made by a sheriff to a writ is false, even though a strong case is made out showing fraud and collusion, but the party must resort to his remedy by action. *Goubot* v. *De Crouy*, 2 D. P. C. 86; 1 C. & M. 772; 3 Tyr. 906; 2 L. J., Ex. 267.

When it Lies.]—If the sheriff takes on himself to state facts which constitute a good return in point of law, the only remedy is by an action for a false return. *Ib.*

Actions against sheriffs for false returns are transitory, for they may make and deliver their returns anywhere; and that which is false is universally so. *Griffith* v. *Walker*, 1 Wils. 336.

—— **Only Part of Debt Levied—Acceptance by Creditor on Account.**]—If, after a return to a fi. fa., that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. *Holmes* v. *Clifton*, 4 P. & D. 112; 10 A. & E. 673; 2 P. & D. 556; 8 L. J., Q. B. 247.

—— **Charge of Defendant in Execution.**]—An action lies against the sheriff for a false return to a fi. fa., notwithstanding the plaintiff, before commencing the suit, has charged the original defendant in execution. *Wordall* v. *Smith*, 1 Camp. 332.

—— **Seizure of Goods on Writ founded on Judgment Fraudulent against Creditors—Return of Nulla bona to subsequent Writ.**]—Where goods seized under a former writ, founded on a judgment fraudulent against creditors, are capable of being seized by the sheriff, he is compellable, under the 13 Eliz. c. 5, to seize and sell such goods under a writ received by him subsequently, and founded on a bonâ fide debt; and if, after notice of such fraud, he neglects to sell, and returns nulla bona to the latter writ, he is liable to an action for a false return. Nor does the fact that the sheriff has assigned the goods upon the prior execution to a supposed bonâ fide purchaser (but who is in truth a party to the fraud) innocently and in ignorance of the fraud, excuse the sheriff from such liability. *Christopherson* v. *Burton*, 3 Ex. 160; 18 L. J., Ex. 60.

—— **Bankrupt Debtor—Return of Nulla bona—Bankruptcy subsequently Annulled.**]—A fi. fa. having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned nulla bona. Before the return was made, the court of review had ordered that the fiat be annulled, if the Lord Chancellor should think fit; and, after the return, the Lord Chancellor made an order accordingly:—Held, that the return was not false, since the annulling of the fiat had not a retrospective effect, and that, even if it had, the sheriff, being a public officer, and having made the only return which he could at the time have made, ought to be protected. *Smallcombe* v. *Olivier*, 2 D. & L. 217; 13 M. & W. 77; 13 L. J., Ex. 305; 8 Jur. 606.

—— **Of Nulla bona when Sheriff has not Levied.**]—In an action against a sheriff for a false return of nulla bona to a fi. fa. for 125*l.*, it appeared that the sheriff had not levied at all. There were goods of the execution debtor of the value of 50*l.* upon which he might have levied. There were two writs of fi. fa. against the execution debtor for more than 50*l.* lodged with the sheriff prior to the plaintiff's writ; but these prior writs were proved to be fraudulent as against creditors; the sheriff had, however, no information as to this fact:—Held, that the plaintiff was entitled to recover the 50*l.*; that it was the sheriff's duty to have levied, and the plaintiff might then have disputed the validity of the prior writs, and so obtained the proceeds of the levy. *Dennis* v. *Whetham*, 43 L. J., Q. B. 129; L. R. 9 Q. B. 345; 30 L. T. 514; 22 W. R. 571.

Allowing that the award of a writ of sequestration out of chancery has the same obligatory effect to bind the goods as a fi. fa., yet, if the party at whose prayer such sequestration is issued takes no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at the distance of eighteen months, a fi. fa. is directed against the goods of the party, for not executing such writ, and selling the goods; the plaintiff in the sequestration having at all events lost his priority by such laches; and therefore the sheriff, who had seized under the fi. fa., having, on notice of such supposed obstacle, returned nulla bona, was holden liable to the plaintiff in an action for a false return. *Payne* v. *Drewe*, 4 East, 523; 1 Smith, 170.

In an action against a sheriff for returning nulla bona to a fi. fa., which had been lodged with him at seven o'clock in the evening to be levied, and no writ of error had been allowed at half-past six in the evening of that day, but it appeared that the allowance was made within the day:—Held, that the sheriff should not have returned nulla bona, but that a writ of error had been allowed, and that therefore the plaintiff was entitled to recover nominal damages. *Cleghorn* v. *Desanges*, 3 Moore, 83; Gow, 66.

Liability for Non-return.]—A sheriff cannot be held liable for the non-return of a writ of fi. fa. until he has been called upon and has neglected to make a return, and such neglect as will give a cause of action must be specifically alleged in the statement of claim. *Shaw* v. *Kirby*, 52 J. P. 182.

Where a sheriff had failed to make any return to a writ of fi. fa., notwithstanding an order of course directing him to make his return forthwith, he was, upon an application ex parte against him for an order nisi, directed, upon the authority of *Davies* v. *Evans* (7 Beav. 81), to pay both the costs of the order nisi and of the previous order of course. *Heiron's Estate, In re*, *Hall* v. *Ley*, 48 L. J., Ch. 688; 12 Ch. D. 795; 27 W. R. 750.

How far Damage must be Shown.]—A declaration in an action against a sheriff alleged, that although he could have levied of the goods of the execution debtor within his bailiwick the moneys indorsed on the writ, yet he, disregarding his duty, did not levy of the goods the moneys, or any part thereof; and that he, further disregarding his duty, falsely returned, &c.:—Held, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. *Mullett* v. *Challis*, 16 Q. B. 239; 20 L. J., Q. B. 161; 15 Jur. 243.

Held, also, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realised if sold for the best price which the sheriff could have obtained. *Ib.*

No action is maintainable, without an averment of special damage, against a sheriff for a false return to a fi. fa., where no damage could necessarily result to the creditor, it appearing that the goods in question had become vested in the assignees of the debtor, who had become bankrupt. *Wylie* v. *Birch*, 3 G. & D. 629; 4 Q. B. 566; 12 L. J., Q. B. 260.

To sustain an action against a sheriff for false returns to writs of fi. fa. and venditioni exponas, damage to the plaintiff must be shown. *Levy* v. *Hale*, 29 L. J., C. P. 127; 6 Jur. (N.S.) 702; 1 L. T. 132; 8 W. R. 125.

In action against sheriff for false return, a plea that the plaintiff sustained no damage is good. *O'Dowd* v. *Kirwan*, Ir. R. 11 Ch. 75. S. P., *Todd* v. *Batt*, ib. 473.

S., having obtained a judgment against F., issued a fi. fa. and placed it in the hands of the sheriff for execution, who, on proceeding to make a levy, found the goods claimed by his brother under a bill of sale; S. being informed of this, requested the officer to remain on the premises, which he did until after the goods were sold under the bill of sale, and then at S.'s request withdrew. The sheriff being ruled to make a return to the writ, returned that he had seized the goods and chattels of the debtor and kept them safely until ordered by S. to withdraw from possession. S. thereupon brought an action against the sheriff for not levying, and for making a false return thereto, but on the trial gave no evidence of having sustained any damage by the sheriff's neglect. The defence set up was the validity of the bill of sale, and the jury found that it was valid, and returned a verdict for the sheriff:—Held, that the circumstance of the sheriff being a public officer to whose services the plaintiff was entitled did not constitute the case an exception to the rule that in an action for tort actual damage must be proved or a presumption of law implying damage established. *Stimson* v. *Farnham*, 41 L. J., Q. B. 52; L. R. 7 Q. B. 175; 25 L. T. 747; 20 W. R. 183.

Held, under the facts stated above, that the sheriff was not estopped by the admission in his formal return from setting up as a defence that the goods were not the goods of the debtor at the time of the attempted seizure, and that consequently he had not sustained actual damage, and that the facts were not such as from which the law would imply damage necessarily resulting. *Ib.*

False Return—Levy—Cheque from Debtor—Performance of Condition.]—After the death, in May, 1880, of A., a shopkeeper, his daughter B. carried on the business. Judgment was obtained against B. personally, and a fi. fa. issued thereon and delivered to the sheriff in March, 1881. At this time B. was in possession of shop goods of considerable value, some of which had been the property of A. in his lifetime, and the rest were purchased out of the proceeds of sale of other goods of A. The sheriff, having required and obtained an indemnity from the execution creditor before seizure, received from the execution debtor a cheque for 98*l.*, which, according to the evidence of some of the witnesses on behalf of the sheriff, was given to him as a security that the goods would be forthcoming in a short time, with the view of awaiting the result of certain proceedings in the chancery division then pending. The sheriff subsequently made a return of nulla bona, and the execution creditor having brought an action against him for a false return, and for money had and received, he repaid the amount of the cheque to the execution debtor, having retained it for a period of about ten months; and at the trial claimed to have a verdict directed in his favour on the grounds that the goods were not the goods of B., and that the giving of the cheque under the circumstances was not a levy. No evidence was given of any testamentary disposition by A. The judge having refused to give such direction, and a verdict having been found for the plaintiff:—Held, that assuming the cheque to have been given conditionally, its retention for so considerable a period by the sheriff was evidence from which the jury were at liberty to presume that the condition upon which it was to be returned to the execution debtor was not performed. *Kelly* v. *Browne*, 12 L. R., Ir. 348.

Evidence—Amount of Goods Seized.]—In an action against a sheriff for a false return of nulla bona, the declaration alleged that he seized and took in execution goods of A., the judgment debtor, of the value of the moneys indorsed on the writ, and levied the same thereout. Plea, that he did not seize or take in execution any goods of A., and levy thereout the moneys so indorsed. The affirmative of the issue is not proved by showing that A.'s goods were taken in pursuance of a warrant granted by the sheriff upon the plaintiff's writ, such goods being insufficient to satisfy a fi. fa. delivered to the sheriff before the plaintiff's writ. *Heenan* v. *Evans*, 3 Man. & G. 393; 4 Scott (N.R.) 2; 1 D. (N.S.) 204; 11 L. J., C. P. 1.

In an action for a false return of nulla bona to a fi. fa., if the plaintiff shows the debtor to be possessed of certain goods, it is no defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff also returned nulla bona; nor if the sheriff has the proceeds of the goods in his hands. *Towne* v. *Crowder*, 3 Car. & P. 355.

If a plaintiff declares for a false return of nulla bona against the goods of R. and S., and alleges that although R. and S. had goods, &c., within his bailiwick, yet the sheriff did not levy, &c.; this allegation is sustained, though the plaintiff does not prove that R. and S. had any goods, for it is severable, that both or either of them had goods. *Jones* v. *Clayton*, 4 M. & S. 349.

—— **That Goods were Seized.**]—Where the sheriff returns nulla bona, it is sufficient prima facie evidence for the plaintiff to prove that the sheriff seized the goods. *Stubbs* v. *Lainson*, 2 Gale, 122; 1 M. & W. 728; 5 D. P. C. 162; 1 T. & G. 1000; 5 L. J., Ex. 240.

—— **As to Property of Goods Seized.**]—A sheriff returned to a fi. fa. against W., that before the delivery thereof to him another fi. fa. against W. was delivered to him, and that by virtue thereof he seized the goods of W. In an action against the sheriff for a false return:—Held, first, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W. *Remmett* v. *Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25; 14 Jur. 1067.

Held, secondly, by Erle, J., that though the judgment on which the first writ issued was fraudulent, the sheriff seized the goods of W. under the first writ, and not under the plaintiff's writ. *Ib.*

In an action against a sheriff for a false return of nulla bona to a fi. fa., in which the question is, whether the goods of the debtor had passed to his assignees under his bankruptcy, the defendant need not put in the deposition of the petitioning creditor, to show what the petitioning creditor's debt was; nor is the defendant limited to the debt only which is stated in the deposition of the petitioning creditor. *Birt* v. *Stephenson*, 8 Car. & P. 741.

—— **To Impeach the Judgment.**]—The sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud. *Tyler* v. *Leeds (Duke)*, 2 Stark. 218. See *Harrod* v. *Benton*, 8 B. & C. 217; 2 M. & Ry. 130; 6 L. J. (O.S.) K. B. 270.

—— **Plea that Goods are Covered by Prior Writs—Evidence to show that such Writs are Fraudulent.**]—Where the sheriff (who was not indemnified) proved that the goods of the debtor were absorbed by a prior execution:—Held, that the plaintiff might give evidence to show that the prior execution was concocted in fraud; it appearing that the sheriff had paid over the money, in defiance of notice to retain the proceeds in his hands until the first execution was set aside; and, consequently, that the sheriff was liable for his misconduct in lending himself to the other party. *Warmoll* v. *Young*, 8 D. & R. 442; 5 B. & C. 660; 4 L. J. (O.S.) K. B. 293.

In an action against a sheriff for making a false return of nulla bona, to which the defence is, that, at the time of receiving the plaintiff's writ, the sheriff had in his hands other writs of execution, to an amount sufficient to cover the whole of the defendant's property, the plaintiff may give evidence to show that those other judgments and executions were fraudulent and void against creditors, without proving that the sheriff was party to the fraud. *Imray* v. *Magnay*, 2 D. (N.S.) 531; 11 M. & W. 267; 12 L. J., Ex. 188; 7 Jur. 240.

False Return in Colony.]—The sheriff of a colony is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of capias ad respondendum for the damage which results to the plaintiff therefrom. *Brasyer* v. *Maclean*, 44 L. J., P. C. 79; L. R. 6 P. C. 398; 33 L. T. 1.

Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court without being allowed to show that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. *Ib.*

h. Action for Wrongful or Negligent Execution.

Compare Cases, ante, col. 1145.

When it Lies—Taking Goods not the Property of the Execution Debtor.]—Trespass lies against a sheriff for taking the goods of A. instead of the goods of B. by his bailiff, upon the sheriff's warrant upon a fi. fa. *Saunderson* v. *Baker*, 3 Wils. 309; 2 W. Bl. 832. *S. P.*, *Ackworth* v. *Kempe*, 4 Dougl. 40.

Trespass is maintainable against a sheriff for seizing under a fi. fa. goods of A. mortgaged to B., though in A.'s possession. *Watson* v. *Macquire*, 5 C. B. 836.

The plaintiffs, brewers in Dublin, supplied a customer in Wales with porter in casks, on the terms that the empty casks were to be returned to Dublin, at his expense and risk, within six months from the date of the contract, or paid for at invoice price, at the option of the shippers:—Held, that as soon as the casks were empty, the vendee of the porter was a mere bailee of the casks during pleasure, and that the vendors had such an immediate right of possession as entitled them to maintain trover against a sheriff who wrongfully took them in execution. *Mauders* v. *Williams*, 4 Ex. 339; 18 L. J., Ex. 437.

A. being indebted to B. by a bill of sale, which was found to have been bonâ fide executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale (which was under seal) contained a covenant by A. to pay the debt on demand; and a proviso for redemption on payment of the debt and interest on demand; and a further proviso that the assignor should continue in possession until default. The goods having been subsequently, and before demand made by B., seized by the sheriff under a fi. fa., upon a judgment entered up against A. on a warrant of attorney:—Held, that B. had not such a right of immediate possession as to entitle him to maintain trover against the sheriff. *Bradley* v. *Copley*, 1 C. B. 685; 14 L. J., C. P. 222; 9 Jur. 599.

After verdict, but before judgment, W., a plaintiff in ejectment, on the 11th of July, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter of the action, to his attorney, as a security for money advanced by the attorney, and for the amount due for costs incurred in the action. A sheriff's officer, on the 17th of July, seized the crop of potatoes under a fi. fa. against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field, under a habere facias possessionem, to W., who immediately transferred the possession to an agent attending for the attorney. On the 30th of July, the first sheriff's officer sold the potatoes, by auction, as a separate lot, after notice given him of the plaintiff's title, to J., who, after taking an assignment of the lease from the sheriff, entered and took the potatoes:—Held, that the assignment to the attorney was not void by reason of the statute against maintenance and champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances; and that an action, quare clausum fregit, lay by the attorney against the sheriff and his officers, as his title related back to the time when it accrued. *Anderson* v. *Radcliffe*, El., Bl. & El. 806; 29 L. J., Q. B. 128; 6 Jur. (N.S.) 578; 1 L. T. 487; 8 W. R. 283—Ex. Ch.

An action against the sheriff, for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor, cannot be suspected unless actual damage has been sustained. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362.

A count alleged that the plaintiff was the owner of goods which had been let to hire to T. for a term, and that the defendant sold the goods and dispersed them so as to prevent them being followed or found, whereby the plaintiff was injured in her reversionary estate. A plea, that the defendant seized, and took and sold the goods not in market overt, but as sheriff under a fi. fa. against T. and that the plaintiff had not sustained and would not sustain any damage by reason of the premises:—Held, that as the damages sustained by the plaintiff were the foundation of the action, the plea was an answer to the action. *Ib.*

The mere sale by a sheriff (not in market overt), under a fi. fa., of a chattel let an execution debtor without notice of the owner's interest in it, is not a conversion or a ground of action against the sheriff, but an absolute sale, and delivery of the chattel under the sale, to a purchaser; and a user by the purchaser, causing damage to the chattel, constitutes a cause of action. *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231; 3 L. T. 703.

Refusal of Application by Sheriff for Protection.]—An application by a sheriff, who, in the execution of a fi. fa. for costs under the order of May, 1839, had seized goods, which were claimed as the property of third parties, to be protected from an action, and that the claimants might come in pro interesse suo, refused: the sheriff not being, like a sequestrator, an officer of this court, and the protection given to him by the interpleader act being confined to execution of process at law. *Rock* v. *Cook*, 2 Ph. 691. Affirming 2 De G. & Sm. 493.

Action against Sheriff for Injunction pending Interpleader—Costs.]—Under a writ of fi. fia. against a son, the sheriff seized goods of his father, in whose house the son lived. The son had, in fact, no goods there, except some wearing apparel. The writ was indorsed with a statement that the son lived at a certain address, which was, in fact, the father's house, though the indorsement did not state this. The father gave verbal notice to the bailiff that he claimed the goods, and the next day the sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff alone, claiming an injunction to restrain him from remaining in possession, and Hall,

V.-C., without requiring notice to be given to the execution creditor, granted the injunction. The sheriff appealed, and meanwhile the execution creditor, on the hearing of the interpleader summons, had admitted that the goods seized were the father's. No misconduct on the part of the sheriff was proved:—Held, that the action was premature; that the father ought to have waited to see the result of the interpleader proceedings; and that he must bear his own costs of the motion for the injunction in both courts. *Hilliard* v. *Hanson*, 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151—C. A.

Held, also, that the vice-chancellor ought not to have granted the injunction without hearing the execution creditor, who should have been made a party to the action, or at any rate served with notice of it. *Ib.*

Seizing more Goods than Necessary.]—A declaration stated that writs of fi. fa. against the plaintiff's goods had been directed to the sheriff; he seized goods of much greater value than was sufficient to pay the sums of money, interest, poundage and expenses indorsed on the writs, although he knew that the money arising from the sale of the goods would be sufficient to satisfy the sums of money, interest and expenses so indorsed and directed to be levied; that he sold more goods than were necessary to pay the sums of money indorsed, and levied thereout a greater sum than was sufficient to pay all the sums of money indorsed; and that he sold the goods for a less sum than the same were really worth, and for which he could and might and ought to have sold them:—Held, that the declaration was good. *Gawler* v. *Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.

Where he sells more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor* v. *Vyse*, 4 M. & Scott, 552. Overruling *S. C.*, 1 M. & Rob. 331.

Continuing in Possession beyond Time allowed by Law.]—If a sheriff continues in possession after the return day of the writ, that irregularity makes him a trespasser ab initio, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution. *Aithenhead* v. *Blades*, 5 Taunt. 198; 1 Marsh. 17.

A sheriff who has entered under a fi. fa, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law. *Ash* v. *Dawnay*, 8 Ex. 237; 22 L. J., Ex. 59.

Where, after seizure and sale by auction of chattels real, under a fi. fa., the sheriff remained in possession an unreasonable time for the further execution of the writ:—Held, that the execution debtor might maintain trespass against him. *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 72; 15 L. J., Ex. 26; 9 Jur. 783.

Executing Warrant after Payment of Debt.]—In an action against a sheriff and S., his bailiff, for breaking into the plaintiff's house and taking his goods there, it appeared that L., the clerk and head officer of J., entered the plaintiff's house and seized his goods under a warrant from the sheriff. The plaintiff paid the amount to L. at J.'s office, and L. withdrew the man in possession, and sent notice to the execution creditor in J.'s name that the money was levied. In the course of the same day J. died, and the execution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S., who seized the plaintiff's goods, and remained in possession several days. The jury did not agree as to whether L. paid the money to J. before his death, but they found that L. executed the warrant by the direction of J., and that the money was received by L. in pursuance of an authority from J. The judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages 400*l.*:—Held, first, that there was sufficient evidence of a payment to J. after an execution de facto under the prior warrant; and that no irregularity in the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and therefore there was no misdirection. *Gregory* v. *Cotterell*, 1 El. & Bl. 350; 22 L. J., Q. B. 217; 17 Jur. 525. Affirmed, 5 El. & Bl. 571; 25 L. J., Q. B. 33; 2 Jur. (N.S.) 16—Ex. Ch.

Held, secondly, that the damages, though not excessive as against the sheriff, were excessive as against S. *Ib.*

Not Seizing — Ignorance of Sheriff as to Existence of Goods.]—A sheriff is not liable for not seizing goods of the presence of which in his bailiwick he has no notice, though he uses all due diligence. *Yourrell* v. *Proby*, Ir. R. 2 C. L. 460.

Amount of Diligence to be exercised by the Sheriff.]—A sheriff, who has exercised reasonable diligence in the execution of a writ, is not liable to an action because he did not use extraordinary exertion or provide against an unexpected and unforeseen contingency. *Hodgson* v. *Lynch*, Ir. R. 5 C. L. 353.

Semble, a sheriff acts improvidently in removing goods for sale from the judgment debtor's establishment without his assent or other sufficient grounds. *Purcell, In re*, 13 L. R., Ir. 489.

Immunity from Actions of Trespass on executing Process or Orders of the Court.]—B. brought an action for assault and false imprisonment against the sheriff and the attorneys. They pleaded a justification under a judge's order made under the Debtors Act, 1869, ordering the plaintiff as judgment debtor to pay a certain sum of money within two months, and in default of payment to be imprisoned, which order was, after default made, delivered by the attorneys for the judgment creditors to be executed by the sheriff. The plaintiff demurred on the ground that the order was not warranted by the debtors act:—Held, that the question of the validity of the order was not arguable, for the order having been made by the judge under the statute, no action of trespass lay against the sheriff, or anyone lawfully acting in aid of the sheriff for acts done in pursuance of the order. *Brown* v. *Watson*, 23 L. T. 745.

So long as a judgment exists, it protects those who seize the property under an execution founded on it; and if the judgment and execution are set aside, no action can be maintained against the sheriff for anything he did under such judgment, while it remained in existence. *Ives* v. *Lucas*, 1 Car. & P. 7.

A sheriff justifying in trespass under a fi. fa.

need not show its return, the distinction being in this respect, between a justification under mesne process, and under process in execution; at least, where in the latter case no ulterior process is necessary to complete the justification. *Cheaseley* v. *Barnes*, 10 East, 73.

A plea, justifying a trespass under a fi. fa., must show that the outer door was open, and if that allegation is not proved, the justification fails. *Brunswick* (*Duke*) v. *Slowman*, 8 C. B. 317; 18 L. J., C. P. 299.

Damages Recoverable.]—A. succeeded B. in the occupation of a house, and, on taking possession, agreed with B. for the lease at 80*l*., and to take the furniture and fixtures at a valuation, as between an outgoing and incoming tenant. The goods were accordingly valued at 109*l*. 15*s*. 10*d*., and the amount paid by A., and an assignment executed. The plaintiff afterwards commissioned the auctioneer, who had valued the goods, to sell them; and, before he could do so, the sheriff entered and seized them under an execution against B.; and (the same auctioneer being employed by the sheriff) the goods were sold and produced only 73*l*., the plaintiff himself being a purchaser to the amount of 20*l*. In an action of trespass by A. against the sheriff:—Held, that the jury was justified in giving damages for the full amount of the valuation. *Lockley* v. *Pye*, 8 M. & W. 133; 9 D. P. C. 744; 10 L. J., Ex. 305.

If a sheriff wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the sheriff, recover as special damages the amount necessarily paid to the other wrongdoer, in order to get back the goods. *Keene* v. *Dilke*, 4 Ex. 388; 18 L. J., Ex. 440.

In an action against a sheriff for negligence in executing a fi. fa., the plaintiff cannot recover more than nominal damages, unless he proves actual damage. *Bales* v. *Wingfield*, 4 Q. B. 580, n.; 2 N. & M. 831.

An action cannot be maintained against a sheriff for negligence in not levying under a fi. fa. without showing actual pecuniary damage; and although primâ facie the measure of damage is the value of the goods which might have been and were not levied, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the creditor would have derived any benefit from it, by reason of the other creditor of the execution debtor being in a position to make him a bankrupt. *Hobson* v. *Thelluson*, 8 B. & S. 476; 36 L. J., Q. B. 302; L. R. 2 Q. B. 642; 16 L. T. 837; 15 W. R. 1037.

Liability for Damage to Goods seized.]—A sheriff is not liable for damages to goods which he has seized under a fi. fa. caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence in protecting them. *Willis* v. *Combe*, Cab. & E. 353.

Semble, if a sheriff is let into possession of goods, of which a receiver, appointed by the court of bankruptcy, is already in possession, he will not be liable in damages for not protecting the goods against third parties. *Ib.*

Action by Sheriff against Execution Creditor for Money paid to him under Mistake.]—A creditor having issued execution against H., on the 25th April, lodged a fi. fa. against his goods with the sheriff. Prior to the seizure of the goods, which took place on the 27th April, the creditor had notice of an act of bankruptcy committed by H. On the 11th May the sheriff executed an assignment of the goods of H. to the creditor, for 256*l*., by an instrument which expressed that the creditor had paid that sum, and the sheriff then made a return of fieri feci. A fiat in bankruptcy having issued against H., in August, his assignees sued the sheriff, and recovered from him the value of the goods with costs. The sheriff thereupon brought an action to recover the 256*l*. from the creditor:—Held, first, that, as between themselves, the sheriff and the creditor were in the same situation as if the sheriff had sold to the creditor and had received the money, the evidence showing that the money was treated as paid over to the creditor. *Standish* v. *Ross*, 3 Ex. 527; 19 L. J., Ex. 185.

Held, secondly, that if the money was not the sheriff's money, still he was entitled to recover the money, which he ought to have received as soon as he had been compelled to pay for the goods seized by the real owner. *Ib.*

Held, thirdly, that the sheriff was not estopped in another action, by his return of fieri feci, from saying, that the then title of the debtor was defeated by matter subsequent. *Ib.*

Held, fourthly, that the money having been paid by the sheriff necessarily in ignorance of the facts, and without any misconduct, he was not prevented from recovering it by the fact, that the creditor had in the meantime paid the money to him, and therefore could not be placed in the same situation. *Ib.*

A fi. fa. issued against the goods of A.; the goods were seized by the plaintiff. The execution creditor authorised the bailiff to quit possession the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale another fi. fa. issued at the suit of a second creditor. To that writ the sheriff returned nulla bona. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the first creditor under the first fi. fa., brought an action against him to recover from him that money:—Held, that he was entitled to recover the same, unless it was shown by the debtor, that, at the time when the sheriff made the payment, he was acquainted with the misconduct of his officer, and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered an act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder* v. *Long*, 8 B. & C. 598; 3 M. & Ry. 17; 7 L. J. (O.S.) K. B. 86.

Execution Creditor not Liable by Ratification of Trespass only.] — Where goods are wrongfully seized by a sheriff under a valid writ, the execution creditor does not, by a subsequent ratification only, become liable in trespass for the original seizure. *Wilson* v. *Tummon*, 6 Scott (N.R.) 894; 1 D. & L. 513; 6 Man. & G. 236; 12 L. J., C. P. 306.

Evidence as to Sheriff's Liability.] — A., a sheriff's officer, to whom a fi. fa. was directed, offered for a pecuniary consideration to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with

A., afterwards illegally executed the writ, by breaking open an outer door; and A. subsequently withdrew his men from possession on payment of the amount indorsed on the writ, and of a bonus to himself:—Held, sufficient to warrant the jury in finding A. to be a co-trespasser, as having authorised the unlawful act of his partner B. *Brunswick (Duke)* v. *Slowman*, 8 C. B. 317; 18 L. J., C. P. 299.

In such a case the damages are peculiarly in the discretion of the jury; and they may include the sum paid for the withdrawal of the execution. *Ib.*

——**Of Execution Debtor.**]—A. sued out a fi. fa. against the goods of B., and the sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, and the sheriff again took them under another execution against B.:—Held, that in an action brought by A. against the sheriff for taking these goods, the declarations of B. were evidence for the sheriff, to show that A.'s execution was merely colourable. *Willies* v. *Farley*, 3 Car. & P. 395.

—— **Of Execution Creditor.**]—If an execution creditor has indemnified the sheriff, what he says is evidence in an action against the sheriff, for taking the plaintiff's goods under an execution against a third person. *Proctor* v. *Lainson*, 7 Car. & P. 629.

—— **Of Illegal Entry.**]—In an action against a sheriff for illegally entering the plaintiff's premises for the purpose of executing a fi. fa., the declaration stated that the defendant on the 6th March, 1853, broke and entered the premises of the plaintiff, and continued and remained therein a long space of time, to wit, eight days:—Held, that evidence was admissible of an entry on the day first named, and also on a subsequent day, although the defendant had, after the first entry, left the premises without intending to return. *Percival* v. *Stamp*, 9 Ex. 167; 2 C. L. R. 282; 23 L. J., Ex. 25; 2 W. R. 14.

—— **As to Person against whom Writ is Issued—Father and Son having same Name.**]—If father and son bear the same name, and a fi. fa. issues against the son, but without the addition of "the younger," primâ facie the father is intended. *Jarmain* v. *Hooper*, 7 Scott (N.R.) 663; 1 D. & L. 769; 6 Man. & G. 827; 13 L. J., C. P. 63; 8 Jur. 127.

This is merely a primâ facie intendment, and, therefore, if a sheriff under such a writ takes the father's goods, and, to an action of trespass by the father, pleads that the fi. fa. was issued against him, the primâ facie intendment may be rebutted, and the sheriff made liable, by showing that the judgment was obtained and the writ issued against the son. *Ib.*

i. Right to Contribution or Indemnity.

Of Auctioneer against Sheriff.]—Where the owner of goods recovered in trespass against a sheriff, the auctioneer, and others who had taken and sold the goods under a fi. fa., and levied the whole damages on the auctioneer alone, who was only employed by the sheriff's officer:—Held, that the auctioneer had no right of action for contribution against any of his co-defendants, and that there was no implied promise of indemnity on the part of the sheriff. *Farebrother* v. *Ansley*, 1 Camp. 343.

Of Sheriff against Execution Creditor.]—H. delivered a fi. fa. to a sheriff to be executed against the goods and chattels of D., and pointed out some cattle on the lands of D. as being the property of D., when in reality they were not; and, upon this representation, the sheriff took them in execution. The real owner sued the sheriff and recovered, and the sheriff then sued H. for his damages and costs incurred through the misrepresentation:—Held, that he was entitled to recover them against H. *Humphrys* v. *Pratt*, 2 Dow & Clark, 288; 5 Bligh (N.S.) 154.

(The ground of the decision was, that a sheriff is a public officer, and as such is liable to an action if he refuses to execute the writ—per Tenterden, C.J., Clark's Index, 306.)

A bailiff, having seized goods under a fi. fa. against B., was authorised by A., the creditor, to quit possession, B. consenting that he might return and sell. The bailiff quitted possession, and afterwards returned and sold, and the sheriff paid the proceeds to A. Before the sale, C. issued a fi. fa. against B., to which the sheriff returned nulla bona. C. recovered the value of the goods from the sheriff in an action for a false return:—Held, that A. was liable to the sheriff for the damages and costs recovered by C., unless he could show that the sheriff was cognisant of the misconduct, or that the action was brought for the benefit of the bailiff. *Crowder* v. *Long*, 3 M. & Ry. 17; 8 B. & C. 598; 7 L. J. (O.S.) K. B. 86.

3. On Writ of Venditioni Exponas.

What is.]—The legal and proper mode in compelling a sale by the sheriff is by venditioni exponas. *Cameron* v. *Reynolds*, Cowp. 406.

Venditioni exponas branch of fi. fa. not distinct process. *Hughes* v. *Rees*, 7 D. P. C. 56; 4 M. & W. 468; 1 H. & H. 347; 8 L. J., Ex. 46.

Liability of Sheriff for not Selling.]—Where the sheriff in Michaelmas term returned to a fi. fa. "goods in hand for want of buyers, value unknown," and no further proceedings were taken by the plaintiff until the Trinity term following, but in the interim the goods were seized under an extent; the court would not compel the sheriff to make good the loss to the plaintiff, and quashed a distringas which had been issued for that purpose, although it appeared that the sheriff had lain by so long at the request and with concurrence of the sheriff's officer. *Ruston* v. *Hatfield*, 3 B. & A. 204.

The court refused to grant an attachmen against a sheriff for not selling goods under a venditioni exponas, where he had returned he could not sell for want of buyers. *Anon.*, 2 Chit. 390.

And when he had returned that part of th goods levied remained in his hands for want o purchasers. *Leader* v. *Danvers*, 1 Bos. & P. 359.

Where several writs of fi. fa. at the suit of different persons against the same defendant, were successively delivered to the sheriff, to the last of which he returned that he had seized goods, which remained in his hands for want of buyers, but stated nothing about the previous writs; the court afterwards relieved the sheriff from an attachment for not returning the venditioni exponas, on his paying over the balance remaining in his hands after satisfying the former writs. *Reg.* v. *Hertfordshire Sheriff*, 9 D. P. C. 916.

—— **Return to Fi. fa. of "No Buyers"—Goods Sold by Auctioneer without the Knowledge of Sheriff—Liability of Sheriff.**]—A sheriff returned to a fi. fa. the seizure, and that the goods remained in his hands for want of buyers, he being at the time unaware that the goods had been sold by the auctioneer (the plaintiff's brother) by private contract; and the day after this return the plaintiff issued a venditioni exponas. In an action by him against the sheriff for a false return:—Held, that under the circumstances under which the writ was issued, the judge was right in refusing to direct the jury to find some damages for the plaintiff in respect of issuing this writ. *Lecy* v. *Hale*, 29 L. J., C. P. 127; 7 Jur. (N.S.) 702; 1 L. T. 132; 8 W. R. 125.

A sheriff returned to a venditioni exponas accounting for the disposal of the proceeds of the sale, by stating an application of a part to payment of rent due to the landlord of the premises in which the seizure took place, and the retention of the remainder for charges to which he was entitled, with the exception of a sum charged for possession money. But the premises where the seizure occurred consisted of two tenements, held of different landlords; and besides the sum accounted for by the sheriff as for rent paid to one of the landlords, there was owing for rent to the other a sum exceeding the value of the proceeds. In an action by an execution creditor against the sheriff for a false return:—Held, that the sheriff might show that the second rent was due. *Ib.*

Return to.]—A sheriff having returned a levy under a fi. fa. cannot return to the venditioni that he has sold the goods but detains the money for another party, under a prior writ of execution. *Rowe* v. *Tapp*, 9 Price, 317.

If, to a venditioni exponas for goods already taken in execution with a clause of fi. fa. for the residue, the sheriff returns that he has made of the goods 20*l.*, but omits, "by mistake," to return nulla bona to the fi. fa., the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return. *Rex* v. *Monmouth Sheriff*, 1 Marsh. 344; 15 R. R. 678.

4. Delaying Execution of Writ.

When Action Maintainable for.]—If a sheriff unnecessarily delays putting a writ of execution in force, an action lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default. *Clifton* v. *Hooper*, 6 Q. B. 468; 14 L. J., Q. B. 1; 8 Jur. 958.

The measure of damages for such default is not necessarily the whole debt, but such a sum as the jury thinks equivalent to the real loss. *Ib.*

If there is no actual loss, still, in the case of final process, the plaintiff must have nominal damages. *Ib.*

It is sufficient in such action if the jury finds that the sheriff could have executed the process, and omitted doing so; it need not be expressly found that he ought to have executed. *Ib.*

An action is maintainable against a sheriff for wilfully, and without any reasonable or probable cause, delaying to sell the goods of the plaintiff which he has seized under a levari facias. *Carlile* v. *Parkins*, 3 Stark. 163.

The lessor of the plaintiff in ejectment, having recovered judgment against the casual ejector, obtained a habere facias possessionem, and delivered the warrant to the sheriff's officer to be executed. The sheriff having received notice that the landlord intended to apply to set aside the proceedings for irregularity, his officer did not execute the writ; and the proceedings were afterwards set aside by a judge's order, but not for irregularity, the landlord being let in to plead on payment of costs. The sheriff had not been ruled to return the writ. The lessor of the plaintiff incurred expenses before the judgment was set aside in endeavouring to get the writ executed, which expense the master refused to allow on taxation:—Held, that he was entitled to recover his expense in an action against the sheriff for delaying to execute the writ. *Mason* v. *Paynter*, 1 Q. B. 974; 1 G. & D. 381; 10 L. J., Q. B. 299; 6 Jur. 214.

A sheriff is not justified in delaying the execution of a ca. sa. or a fi. fa., for the purpose of enabling the judgment debtor to carry on his business (even though the sheriff bonâ fide believes that by so doing he may the better enable the debtor to raise the money), and his doing so renders him liable to an attachment. *Terrell* v. *Fisher*, 10 W. R. 796.

If a sheriff refuse to try to execute an attachment which has issued to compel an appearance in an equity suit, he will be attached. *Morgan* v. *Copeland*, 1 Jones, 248.

The court, on motion, will order a sheriff to pay such a sum of money as it appears has been lost in consequence of his refusing or neglecting to execute, with due diligence, an attachment issued out of the court, and directed to him. *Comyns, In re*, 1 Ir. Eq. R. 72.

Attendance at quarter sessions, where the chairman threatened to fine the sheriff for absence, will not be admitted as any excuse for delaying to excute the process of this court. *Ib.*

Mode of enforcing the sheriff's return to a writ of fieri facias issuing out of chancery. *Davies* v. *Evans*, 7 Beav. 81.

5. Payment of Money.

An attachment for costs was issued by A. and B. (A.'s solicitor), against C., who paid the amount to the sheriff, and lodged with him a sequestration for a larger amount against A.:—Held, that the sheriff was not justified in paying the amount received on the attachment to the sequestrators without the order of the court. *Williams* v. *Reeves*, 12 Ir. Ch. R. 173.

The sheriff, having taken a defendant under an attachment for nonpayment of a large sum of money, in obedience to an order of the court, received part of the amount, and a deposit of title deeds as security for payment of the balance on the return of the writ. At the return of the writ the defendant did not pay the balance. Upon the motion of the sheriff, the court permitted him to pay the sum he had received into court, and to issue an attachment in the names of the plaintiffs without prejudice to the question of his liability to them; he also indemnifying them against consequent costs, and undertaking to allow the defendant inspection of the title deeds deposited as security. *Thomas* v. *Hall*, 2 De G. & Sm. 264.

E. RULING SHERIFF TO RETURN WRITS.

Sending Warrant by Letter—Not received by Sheriff.]—Where the plaintiff's attorney obtained from the sheriff's deputy in London, a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office :—Held that under these circumstances the sheriff could not be called on to return the writ. *Hart* v. *Weatherley*, 4 D. P. C. 171.

False Return—Scire fieri Inquiry—Costs of.]—In action against executors, the plaintiff having obtained a verdict, sued out a fi. fa. against the goods of the testator, to which the sheriff returned nulla bona. A scire fieri inquiry then issued, to which the sheriff also returned nulla bona. This return was set aside, on the ground that there was evidence of a devastavit, and a new scire fieri inquiry issued. The executors then paid to the sheriff the debt and costs in the original action, and he returned that he had levied them out of the goods of the testator :—Held, that the sheriff should be made a party to a rule, to compel payment to the plaintiff of the costs of the two inquiries. *Palmer* v. *Waller*, 5 D. P. C. 315 ; 2 Gale, 105 ; 1 M. & W. 689.

Sheriff Delaying Return.]—On the 3rd August the sheriff levied. On the 4th September he was ruled to return the writ in eight days. On the day after the expiration of this rule the defendant died. The writ was not returned until the 1st November. The court set aside, on payment of costs, an attachment against the sheriff, it not appearing that the plaintiff could have sustained injury by the officer's neglect. *Reg.* v. *Essex Sheriff*, 8 Scott, 363 ; 6 Bing. (N.C.) 150 ; 8 D. P. C. 5 ; 9 L. J., C. P. 126.

Mandates.]—Where a ca. sa. without a non omittas clause has been directed to the sheriff, and he has issued his mandate to the bailiff of a liberty in which the defendant resides, and after obtaining time to return the writ, he has returned cepi corpus in due time, the bailiff cannot be compelled to return the mandate, although he has also obtained time to return it. *Jackson* v. *Taylor*, 5 D. P. C. 140 ; 2 H. & W. 135. See *Jackson* v. *Hill*, 2 P. & D. 455 ; 10 A. & E. 477.

An instrument, in form a sheriff's warrant to levy execution, was addressed by the sheriff to S. and Job Doe. S. was deputy bailiff of a liberty, and having, on consultation with the chief bailiff's agent, acted on this warrant as if a mandate to the bailiff of the liberty :—Held, that the chief bailiff was bound to make a return, and could not insist that no mandate had been delivered to him. *Platel* v. *Dowse*, 4 Bing. (N.C.) 204 ; 5 Scott, 549 ; 1 Arn. 38 ; 7 L. J., C. P. 140.

A mandate was issued by the sheriff of York, directing the bailiff of a liberty within that county to take the defendant on a ca. sa. The bailiff took the defendant and carried him to the county gaol, which was out of the liberty. The defendant was afterwards discharged under the insolvent debtors act, and the plaintiff appointed assignee of his estate :—Held, that the plaintiff was thereby estopped from ruling the bailiff to return the mandate. *Hepworth* v. *Sanderson*, 1 M. & Scott, 64 ; 8 Bing. 19 ; 1 L. J., C. P. 15.

After Compromise between the Parties.]—The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return. *Balson* v. *Meggat*, 3 D. P. C. 557.

Where a ca. sa. has been sued out, and the parties subsequently compromise, the court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. *Hedges* v. *Jordan*, 5 D. P. C. 6.

Failure to Return after Rule—Costs.]—Where a sheriff had failed to make any return to a writ of fi. fa., notwithstanding an order of course directing him to make his return forthwith, he was, upon an application ex parte against him for an order nisi, directed, upon the authority of *Evans* v. *Davies* (7 Beav. 81), to pay both the costs of the order nisi and of the previous order of course. *Heiron's Estate, In re*, *Hall* v. *Ley*, 48 L. J., Ch. 688 ; 12 Ch. D. 795 ; 27 W. R. 750.

Who Entitled to Rule—Defendant.]—It is irregular that a defendant should, without the plaintiff's authority, rule the sheriff to return a ca. sa., which has not been executed, but such proceeding is not, in itself, a contempt of process of the court. *Daniels* v. *Gompertz*, 3 Q. B. 322 ; 2 G. & D. 751.

The court will not assent to an application on the part of the defendant against a sheriff to resurn a ca. sa. issued against him unless he shows some special grounds for the application. *Williams* v. *Webb*, 2 D. (N.S.) 904 ; 5 Scott (N.R.) 901 ; 7 Jur. 155.

Where the sheriff seizes goods, and keeps possession at the defendant's desire, to enable him to pay the debt and costs without sale ; the defendant, after such payment, may rule the sheriff to return the writ. *Edmunds* v. *Watson*, 2 Marsh. 330 ; 7 Taunt. 5.

The defendant as well as the plaintiff may rule the sheriff to return the writ. *France* v. *Clarkson*, 2 D. P. C. 532.

Where a defendant, against whom a fi. fa. had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods :—Held, that the sheriff could not be ruled to return the writ on behalf of the bankrupt. *Gilbert* v. *Whalley*, 2 C., M. & R. 722.

Where a fi. fa. has been executed, it is competent to the defendant, without showing special grounds, to call upon the sheriff to return it. *Richardson* v. *Trundle*, 8 C. B. (N.S.) 474 ; 29 L. J., C. P. 310 ; 7 Jur. (N.S.) 28 ; 2 L. T. 568.

Effect of Ruling.] — The act of ruling the sheriff to return a fi. fa. does not estop the plaintiff from showing that the writ was not a good writ ; neither does the filing it of record affirm the existence of a void writ. *Jones* v. *Williams*, 8 M. & W. 349 ; 9 D. P. C. 302.

Enlarging Time for Return.]—Where a defendant had been arrested on a ca. sa., but was too ill to be removed from his house, without danger to his life, the court enlarged the time for returning the writ, but would not afford the sheriff any relief against the extra costs of

keeping up the caption. *Jones* v. *Robinson*, 11 M. & W. 758; 2 D. (N.S.) 1044; 12 L. J., Ex. 415; 7 Jur. 657.

F. TURNING OVER WRITS.

Change of Sheriffs.] — The same sheriff, by whom any writ directed and delivered to him is executed while in office, ought to make his return to the same, and hand such writ and return over to the new sheriff who comes into office before the return-day; and such new sheriff will return the writ with the old sheriff's return thereon; and if the old sheriff, after arresting the defendant, suffers him to escape and goes out of office before the return-day, he alone is answerable for the escape. *Rex* v. *Middlesex Sheriff*, 4 East, 604; 1 Smith, 286.

—— **Liability of former Sheriff.**]—A sheriff is bound, subsequently to the abolition of his office by act of parliament, to account for all writs previously executed by him. *Warner* v. *Powell*, 2 D. (N.S.) 531; 12 L. J., Ex. 23.

A fi. fa. was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff went out of office on the 14th February following. A rule to return the writ was taken out in June following, which was served in the same month on the under-sheriff of the new sheriff; but it was not served on the under-sheriff of the old sheriff till November following:—Held, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular, and the court set it aside. *Yaroth, Ywroth*, or *Yrath* v. *Hopkins*, 2 C., M. & R. 250; 3 D. P. C. 711; 1 Gale, 141; 5 Tyr. 794; 4 L. J., Ex. 196.

—— **When not requested to return Writ within Six Months of Expiration of Office.**]—A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding that he was requested by the party to return it before the six months expired. *Rex* v. *Jones*, 2 Term Rep. 1; 1 R. R. 411.

A sheriff is not liable to be called upon to return process unless within six lunar months after the expiration of his office, and the day on which he goes out of office is to be reckoned as part of the six months. *Rex* v. *Adderley*, 2 Dougl. 463.

A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his under-sheriff obtained an order for a week's further time to return the writ:—Held, that obtaining the rule after six months was merely an irregularity, and that such irregularity was waived by obtaining the order for further time to return the writ. *Walker* v. *Davis*, 3 H. & N. 374; 27 L. J., Ex. 387.

—— **Liability of New Sheriff.**]—A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office, notwithstanding the 3 & 4 Will. 4, c. 99, s. 7. *Thomas* v. *Newman*, 2 D. (N.S.) 33.

The new sheriff is not answerable for the escape of a debtor taken in execution, and removed to London by habeas corpus in the time of his predecessor, and not delivered over to him by indenture under 20 Geo. 2, c. 37, s. 1. *Davidson* v. *Seymour*, M. & M. 34.

Under-Sheriff — Liability of, for Proceeds of Execution — Death of Sheriff — Vacancy of Shrievalty.] — Where an under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, s. 8, wrongfully retained the proceeds of an execution:—Held, that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully retained. [See now the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 25.] *Gloucestershire Banking Co.* v. *Edwards*, 57 L. J., Q. B. 51; 20 Q. B. D. 107; 58 L. T. 463; 36 W. R. 116—C. A.

Non-Execution of Process — Same Under-Sheriff Acting under Successive Sheriffs.]—In November, 1883, while D. was high sheriff of the county of K., civil bill decrees for money demands were delivered to his sub-sheriff, L., for execution in February, 1884. The solicitor for the plaintiff in the decrees wrote to L., complaining of their non-execution, and by letter, dated the 18th of that month, L. wrote in reply, stating that he had been unable to levy the amounts, and asking for information as to the goods of the defendant which the plaintiff alleged were available. On the 21st February, H. succeeded D. as high sheriff, and re-appointed L. sub-sheriff, who retained the decrees until July, when he returned them unexecuted. They were in force until June. It was admitted that after H.'s appointment the defendants had sufficient goods from which the amounts of the decrees might have been levied:—Held, that H. was liable in an action for negligence for not having executed the decrees; that, having regard to the fact that L. continued in office as sub-sheriff, it was immaterial that no list had been made if the decrees in question were more than two months old; that the measure of damages was the amount of the decrees. *Simmons* v. *Henchy*, 16 L. R., Ir. 467.

G. LIABILITY OF SHERIFF TO ATTACHMENT.

Grounds for.]—The court granted an attachment against a sheriff for returning an escape of an execution debtor, notwithstanding 5 & 6 Vict. c. 98, s. 31 (repealed). *Reg.* v. *Leicestershire Sheriff, In re, Arden* v. *Bingham*, 1 L., M. & P. 414; 11 C. B. 637; 19 L. J., C. P. 320; 14 Jur. 1026.

Where a sheriff's officer was, as he alleged, in possession of goods under a fi. fa. issued out of the court of common pleas, and an officer of the palace court levied and took away the goods, under process of that court, using no violence, the court refused to grant an attachment against the officer of the palace court, there being reason to believe that the possession of the sheriff's officer was a matter in dispute. *White* v. *Chapple*, 4 C. B. 628; 16 L. J., C. P. 233; 11 Jur. 543.

An interpleader order directed the sheriff to sell goods seized under a fi. fa. Before the sale, the judgment debtor became bankrupt, and the goods were claimed by a messenger of the court of bankruptcy, and the sheriff gave up possession to the messenger. The court refused an attach-

ment against the sheriff for contempt of court in not selling the goods. *Collins* v. *Cliff*, 11 W. R. 786.

A demand of costs, which, by the rule, are payable to a high sheriff, made under the authority of a power of attorney executed by the under-sheriff, after the high sheriff has gone out of office, is sufficient to support an attachment. *Reg.* v. *Mattey*, 6 D. P. C. 515.

If a sheriff's officer is guilty of extortion, the party complaining may call upon the sheriff to show cause why he should not refund the excess, and upon the officer to show cause why an attachment should not issue against him under the same rule. *Blake* v. *Newburn*, 2 B. C. Rep. 263; 5 D. & L. 601; 17 L. J., Q. B. 216; 12 Jur. 882.

Non-Return—Subsequent Directions by Creditor—Waiver of Right to Attachment.]—A plaintiff does not waive his right to an attachment against a sheriff for not duly returning a fi. fa., by directing him, after the expiration of the rule to return the writ, to proceed with the execution, which had been suspended by an adverse claim. *Howitt* v. *Richaby* or *Rickby*, 9 M. & W. 52; 1 D. (N.S.) 389; 11 L. J., Ex. 73.

Application for—When made.]—An attachment against a sheriff may be moved for at the rising of the court on the last day of term (where a rule to return the writ expires on that day), after the period for closing the office has passed, if the motion is made on an affidavit stating that no return was made at the closing of the office. *Reg.* v. *Shropshire Sheriff*, 9 Jur. 12.

—— **For not returning a Writ of Fi. fa.—How made.**]—An application, or notice, under Ord. XLIV. r. 2, to attach the sheriff for not returning a writ of fi. fa., should be for an order nisi. *Fowler* v. *Ashford*, 45 L. T. 46.

An attachment against the sheriff for not returning a writ of fi. fa. is not, as formerly, obtained as of course, but since Ord. XLIV. r 2, can only be applied for "on notice." *Jupp* v. *Cooper*, 5 C. P. D. 26; 28 W. R. 324.

Rule for.]—A rule for an attachment against a sheriff, for the non-payment of money directed to be paid by an order made a rule of court, and of the costs of the rule, is only in the first instance a rule to show cause. *Hatfield* v. *Haverfield* or *Hatherfield*, 6 Man. & G. 724; 1 D. & L. 809; 7 Scott (N.R.) 430.

In discussing a rule nisi for an attachment against a sheriff for an insufficient return to a writ, the court will not take cognisance of the return, unless an office copy is produced, verified by affidavit by a party as to his belief that no sufficient return has been made. *Wilton* v. *Chambers*, 5 N. & M. 431; 1 H. & W. 582; 5 L. J., K. B. 72.

—— **Service of.**]—To ground an attachment absolute against a sheriff for not returning a writ, the service must be personal upon the under-sheriff at his public office. *Anon.*, Lofft, 301.

Or upon his deputy. *Woodland* v. *Fuller*, 2 P. & D. 570; 11 A. & E. 859; 9 L. J., Q. B. 181.

—— **When Irregular.**]—An attachment against a late sheriff for disobedience to a judge's order, calling on the "sheriff" to return a writ, instead of "the late" sheriff, is irregular, and may be set aside, though the sheriff has not applied to set aside the order. *Reg.* v. *Cornwall Sheriff*, 7 D. P. C. 600.

Affidavits—How entitled.]—An attachment may be said to be granted when the rule for the attachment is obtained, and after that, the proceedings are on the crown side of the court, and affidavits in the matter are properly entitled "*Rex* v. *Middlesex Sheriff*." *Rex* v. *Middlesex Sheriff*, 2 M. & W. 107; 6 L. J., Ex. 9.

Affidavits in support of a rule for an attachment against a sheriff or his officer for extortion in the execution of a fi. fa. are properly entitled "in the cause." *Masters* v. *Lowther*, 11 C. B. 948; 21 L. J., C. P. 130; 16 Jur. 347.

Non-Enforcement of Writ — Discharge of Sheriff.]—The plaintiff, at the desire of the sheriff's officer, forbore to enforce an attachment in the first instance, and ten days afterwards applied to the sheriff for the debt and costs:—Held, that the sheriff was not discharged by the indulgence given to the officer. *Rex* v. *London Sheriff*, 1 Taunt. 489.

Where a plaintiff, on account of negotiations between himself and the defendant, delays for a term his proceedings against the sheriff, the latter is discharged by the plaintiff's laches. *Rex* v. *Middlesex Sheriff*, 1 D. P. C. 53.

H. ARREST BY SHERIFF.

See Debtors Act, 1869, 32 & 33 Vict. c. 62.

1. By Whom to be Made.

By Person authorised by Bailiff.]—An arrest must be made by the authority and direction of the bailiff, but it need not be his hand which actually arrests; nor need it take place in his presence and in his sight; nor is there any precise distance from the person arrested within which he must be at the time. *Blatch* v. *Archer*, Cowp. 65.

By Person to whom Warrant is Directed.]—A sheriff's officer cannot justify an arrest made without a warrant by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself with his name inserted after the arrest. *Collins* v. *Yewens*, 2 P. & D. 439; 10 A. & E. 570; 8 L. J., Q. B. 332.

An arrest under a ca. sa. by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, and the defendant will be discharged out of custody. *Rhodes* v. *Hull*, 26 L. J., Ex. 265.

A rule to discharge him is properly directed to the plaintiff, and not to the sheriff. *Ib.*

Validity of Warrant.]—The sheriff having directed a warrant to A. and all his other officers to arrest B., A. afterwards inserted the name of C.:—Held, that the warrant was illegal, and the arrest by C. consequently void. *Housin* v. *Barrow*, 6 Term Rep. 122; 3 R. R. 135.

But a mistake in the warrant will not invalidate the arrest. *Williams* v. *Lewis*, 1 Chit. 611.

It is not necessary that the sheriff's warrant

issued upon a capias should specify the court out of which the process issues. *Astley* v. *Goodyer*, 2 D. P. C. 619 ; 2 C. & M. 682 ; 4 Tyr. 414 ; 3 L. J., Ex. 210.

A sheriff's warrant on a capias, filled up by an attorney after the writ is signed and sealed, is bad. *Burslem* v. *Fern*, 2 Wils. 47.

Warrant to Four, jointly but not severally.]—If the sheriff makes a warrant to four, jointly and not severally, and one makes the arrest, the court will not interfere to discharge the defendant. *Boyd* v. *Durand*, 2 Taunt. 161.

A warrant to four, jointly and not severally, clearly will not authorise an arrest by one. *Ib.*

2. Where made.

In Wrong County.]—To set aside an arrest in a wrong county, there must be an affidavit that it did not take place on the borders of the county, and that there is no dispute as to boundaries. *Webber* v. *Manning*, 1 D. P. C. 24.

Privileged Places — Kensington Palace.]—Kensington Palace, being kept in a constant state of preparation for the king's reception at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process. *Winter* v. *Miles*, 10 East, 578 ; 1 Camp. 475, n. ; 10 R. R. 391. See *Att.-Gen.* v. *Donaldson*, 10 M. & W. 117 ; 11 L. J., Ex. 338.

—— **Hampton Court Palace.**]—But Hampton Court Palace is not. *Att.-Gen.* v. *Dakin*, 39 L. J., Ex. 113 ; L. R. 4 H. L. 338 ; 23 L. T. 1 ; 18 W. R. 1111.

—— **Within the Verge of Palace.**]—An arrest within the verge of the palace is no ground for discharging the defendant out of custody. *Sparks* v. *Spink*, 7 Taunt. 311 ; 18 R. R. 492.

A man arrested within the verge of the court is not entitled to be discharged, an arrest in a franchise being only a breach of the privilege of the lord of the franchise. *Kirkpatrick* v. *Kelly*, 3 Dougl. 36.

—— **The Tower.**]—Arrests cannot be made within the Tower. *Batson* v. *M'Lean*, 2 Chit. 48, 51 ; 23 R. R. 742. And see *Bell* v. *Jacobs*, 4 Bing. 523 ; 1 M. & P. 359 ; 6 L. J. (o.s.) C. P. 82.

In Gaol.]—It is no objection to an arrest, that it takes place in a gaol, if the party is there for his own purposes. *Loveitt* v. *Hill*, 4 D. P. C. 579.

Evidence as to.]—A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer, contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons. *Chambers* v. *Bernasconi*, 1 C., M. & R. 347 ; 4 Tyr. 531 ; 3 L. J., Ex. 373—Ex. Ch.

3. When Made.

After Writ is Returnable.]—If a person is arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ is continued. *Loveridge* v. *Plastow*, 2 H. Bl. 29.

A gaoler is bound to receive a prisoner tendered to him after the return day of the writ on which he is arrested. *Brandling* v. *Kent*, 1 Term Rep. 60.

Warrant to Arrest Party "to appear at the next Sessions."]—A warrant to arrest the party "to the end that he may become bound, &c., to appear at the next sessions, &c.," means the next session after the arrest, and not after the date of the warrant : therefore, the officer executing it may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew* v. *Parker*, 8 Term Rep. 110 ; 4 R. R. 605.

On Sunday.]—A. was arrested at the suit of B. and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of C. ; on the Sunday following he was arrested at C.'s suit, and discharged by the court, by virtue of the statute. The arrest on the Sunday was considered as an original taking, and not as a retaking after an escape. *Atkinson* v. *Jameson*, 5 Term Rep. 25.

Where, by the contrivance of a plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till Monday, and then arrested on the civil process, the court ordered him to be discharged out of custody. *Wells* v. *Gurney*, 8 B. & C. 769.

Where a defendant was seized on a Sunday, and detained till next morning, and then arrested upon process out of the exchequer :—Held, that the arrest was void, and could not be made good even by a subsequent consent. *Lyford* v. *Tyrrel*, 1 Anst. 85 ; 3 R. R. 553.

E., having been dismissed from the office of town clerk of a borough, was, at the instance of the town council, convicted before justices, under the (repealed) Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, s. 60, of wilfully refusing to deliver accounts, books, &c., after notice ; and thereupon the justices issued their warrant for his imprisonment in the common gaol of the county (within which the borough was situate), which was delivered to P., who arrested E. on a Sunday, and on the next day delivered him to the keeper of the gaol :—Held, that this was substantially a civil proceeding, and the arrest therefore illegal under the Sunday Observance Act, 1677, 29 Car. 2, c. 7, s. 6, and that the execution was not made legal by the delivery to the keeper, after the arrest, of another warrant upon the same conviction. *Eggington, Ex parte*, 2 El. & Bl. 717 ; 2 C. L. R. 385 ; 23 L. J., M. C. 41 ; 18 Jur. 224 ; 2 W. R. 10, 76.

Before Officer has Warrant—Before Delivery of Writ to Sheriff.]—A bail-bond was ordered to be delivered up to be cancelled, where the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff. *Hall* v. *Roche*, 8 Term Rep. 187.

4. How Made.

a. What amounts to Arrest.

Generally.]—A sheriff's officer, having a writ which had been issued against A., communicated that fact to him by saying "I arrest you" ; upon which he said, "Very well, I will come to

you immediately" ; and shortly afterwards made his escape, without having been touched by the officer :—Held, that this was no arrest ; but, if he had acquiesced, or afterwards gone with the officer, it would had been sufficient to constitute an arrest. *Russen* v. *Lucas*, 1 Car. & P. 153 ; R. & M. 26.

Placing a party under restraint of a sheriff's officer, who holds a capias, is an arrest without proceeding to actual contact. *Grainger* v. *Hill*, 4 Bing. (N.C.) 212 ; 5 Scott, 561 ; 7 L. J., C. P. 85.

A sheriff's officer in execution of a ca. sa., put his hand into the debtor's dwelling-house, by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor, who was inside the house, and said, "You are my prisoner." He was unable then to secure the person of the debtor ; but he thereupon broke open the outer door of the house, and seized the debtor :—Held, that the officer had acted legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the outer door being justifiable for the purpose of taking into custody the debtor so arrested. *Sandon* v. *Jervis*, El., Bl. & El. 935 ; 28 L. J., Ex. 156 ; 5 Jur. (N.S.) 860 ; 7 W. R. 290—Ex. Ch.

Where two bailiffs kept watching a defendant at a particular house, and had a warrant to arrest him, and in fact, would have arrested him if he had endeavoured to get away, but did not produce the warrant or act on it :—Held, that it did not constitute an arrest. *Hender* v. *Robins*, 1 H. & W. 204. S. C., nom. *Robins* v. *Hender*, 3 D. P. C. 543.

Evidence as to.]—Evidence that a bailiff's assistant apprehended a party on a false pretence, and that the bailiff being at hand took advantage of the apprehension to arrest him on a ca. sa., is sufficient to establish an issue that the bailiff illegally seized and imprisoned the party. *Humphrey* v. *Mitchell*, 2 Bing. (N.C.) 619 ; 3 Scott, 44 ; 2 Hodges, 72 ; 5 L. J., C. P. 186.

b. Breaking open Doors.

Civil Process.]—The maxim of "Every man's house is his castle," is confined to those who are owners of the house, which is not the sanctuary of a stranger ; and the privilege of the outer door belongs only to one door, and not to others, although belonging to the separate apartments of lodgers. *Lee* v. *Gansell*, Lofft, 374 ; Cowp. 1.

And therefore a bailiff, in the execution of mesne process, may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house. *Ib.*

So he may break open the window of the apartment of a person residing in the house of another, having first gained peaceable entrance at the outer door of the house, if such person refuses to open the door of his apartment after being informed by the officer that he has process to serve on him. *Lloyd* v. *Sandilands*, 2 Moore, 207 ; 19 R. R. 507.

But an officer cannot justify breaking the inner doors of the house of a stranger, upon suspicion that a defendant is there, to search for him in order to arrest him on mesne process. *Johnson* v. *Leigh*, 1 Marsh. 565 ; 6 Taunt. 246 ; 16 R. R. 614.

The sheriff is justified or not in entering the house of a stranger by the event. *Ib.*

Semble, that a sheriff's officer acting under civil process may justify breaking the inner doors of the defendant's house, though he is not therein at the time. *Ratcliffe* v. *Burton*, 3 Bos. & P. 223 ; 6 R. R. 771.

But in such case the officer must first demand admittance. *Ib.*

It is no objection that a bailiff gains admittance under false pretences ; and any resistance after he is once in will be punishable. *Rex* v. *Backhouse*, Lofft, 61.

A sheriff's officer, having a ca. sa., went to a house in which the execution debtor was, and climbing up a ladder against the house, put his hand through an aperture in a broken pane of glass, and touched the debtor, saying to him, "You are my prisoner" :—Held, that this was a good arrest, and justified the officer in breaking open the outer door of the house and carrying off the debtor to prison. *Sandon* v. *Jervis*, 27 L. J., Q. B. 279 ; 4 Jur. (N.S.) 737. Affirmed, El., Bl. & El. 935 ; 28 L. J., Ex. 156 ; 5 Jur. (N.S.) 156 ; 7 W. R. 290—Ex. Ch.

Process for Contempt.] — In a proceeding against a member for a breach of privilege, the speaker of the house may issue his warrant to an officer, under which, if the party refuses to open his door and admit the officer, after demand made and notice of his business, the officer may break into the house in like manner as he may in executing process of contempt issued by courts of justice. *Burdett* v. *Abbot*, 14 East, 1 ; 5 Dow, 165 ; 4 Taunt. 410 ; 12 R. R. 450.

On Escape or Expulsion.] — If a prisoner, after an arrest in the street, escapes, the bailiff may justify on a fresh pursuit breaking open the door of the house to retake him. *Anon*, Lofft, 390.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance through the outer door, but before he could make an actual arrest, was forcibly expelled from the house and the outer door fastened against him. The officer obtained assistance, forced open the outer door, and made the arrest :—Held, that he was justified in so doing. *Aga Kurboolie Mahomed* v. *Reg.*, 3 Moore, P. C. 164.

Held, also, that a demand of re-entry under such circumstances was not requisite to justify his breaking open the outer door. *Ib.*

Criminal Process.] — In the execution of criminal process against any man in the case of a misdemeanour, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified. *Launock* v. *Brown*, 2 B. & Ald. 592 ; 21 R. R. 410.

Operation on Execution of Process.]—Where a defendant has been taken in execution on a ca. sa., to execute which the sheriff's officer has broken open an outer door, the court will discharge him out of custody on a summary application. *Hodgson* v. *Towning*, 5 D. P. C. 410.

c. Other Matters as to.

Generally.]—A party, who issues a capias, is not under any legal duty to give information to the sheriff as to the person of the defendant. *Dyke* v. *Duke*, 4 Bing. (N.C.) 197 ; 5 Scott, 536 ; 1 Arn. 11 ; 7 L. J., C. P. 75.

A person may under particular circumstances lay hands on another, in order to serve him with

process. *Harrison* v. *Hodgson*, 10 B. & C. 445; 5 M. & Ry. 392; 8 L. J. (o.s.) K. B. 223.

Where a sheriff's officer having received a writ to arrest the defendant, let him at large, on his promising to put in good bail, and afterwards finding that they were not forthcoming, put in bail himself without the consent of the defendant; and, accompanied by them, arrested him the day previously to that on which the defendant's time for putting in bail expired: the court ordered the defendant to be discharged, and the sheriff's officer to pay the costs; on the ground that the proceedings had been highly improper. *Taylor* v. *Evans*, 8 Moore, 398; 1 Bing. 367; 2 L. J. (o.s.) C. P. 22.

A sheriff was bound, in executing a capias under 1 & 2 Vict. c. 110, s. 3, to provide such a force as would enable him to effect a caption, in spite of any resistance which he had reason to anticipate. *Howden* v. *Standish*, 6 D. & L. 312; 6 C. B. 504; 18 L. J., C. P. 33; 12 Jur. 1052.

Use of Violence in order to Serve Process.]—An attachment for non-payment of money to A. having issued against B., and the process being in the hands of an officer who had not been able to serve B. therewith, B. was met by A. in the street, and carried by violence to the chambers of C., who was A.'s attorney, and there detained while the original process was sent for and served upon him; the officer also was sent for (but not by A.) and on B.'s leaving the chambers of C. he was arrested; the court held this arrest illegal, and discharged B. *Birch* v. *Prodger*, 1 N. R. 135.

Searching House of Stranger.]—A sheriff's officer is not justified in entering and searching a stranger's house to arrest a defendant under a ca. sa., although he may have resided there immediately before the entry, and although the officer has reasonable cause to suspect that he is in the house, if the fact turns out to be that he was not in the house at the time of the entry and search. *Morrish* v. *Murray*, 2 D. & L. 199; 13 M. & W. 52; 13 L. J., Ex. 261.

Sheriff holding Several Writs—Discharge as to One only—Effect of.]—A party privileged from arrest redeundo, was arrested on a writ of capias ad respondendum, and applied for and obtained a judge's order for his discharge in that action, on the ground of his privilege at the time of his arrest. Other writs of ca. sa. against him were in the hands of the sheriff:—Held, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the judge's order, which made no mention of any writ but the first. *Watson* v. *Carroll*, 4 M. & W. 592; 7 D. P. C. 217; 8 L. J., Ex. 97. And see *Hooper* v. *Lane*, 6 H. L. Cas. 443, and ante, cols. 1131, 1133.

Calling in Military Assistance.]—The officer charged with making the arrest may, if he finds it necessary to the execution of his warrant, and to prevent personal danger to himself and his ordinary assistants from a mob assembled in extraordinary numbers, and with a show of force to overawe the civil power, call in the assistance of the military. *Burdett* v. *Colman*, 14 East, 188; 13 East, 27; 12 R. R. 478.

Executing Writ of Attachment.]—Where a writ of attachment has issued against a party owing to the default of the execution creditor to return the issue:—Held, that the claimant had no cause of action against the sheriff for the original seizure. *Martin* v. *Tritton*, Cab. & E. 226.

5. Notice not to Arrest.

Disobedience of Sheriff—Effect of.]—If, after a ca. sa. has been delivered to a sheriff, the plaintiff directs him not to execute the writ, and he notwithstanding does so, he becomes a trespasser; so, also, if he detains the debtor after notice from the creditor that he has released the debt. *Barker* v. *St. Quintin*, 12 M. & W. 441; 1 D. & L. 542; 13 L. J., Ex. 144.

Notice from the plaintiff's attorneys to the bailiff, charged with a warrant under a ca. sa. that it is withdrawn, is sufficient to render the bailiff liable for an arrest. *Futcher* v. *Hinder*, 3 H. & N. 757; 28 L. J., Ex. 28; 7 W. R. 57.

Where Party is Arrested at Suit of another Creditor.]—A plaintiff having issued a ca. sa. on a judgment against the defendant, directed the sheriff not to execute the writ until further notice; the defendant having been arrested at the suit of another creditor and paid the debt, was detained by the sheriff's officer until instructions were obtained from the plaintiff, who thereupon directed the officer to let him go:—Held, that there was no lawful arrest or discharge under the plaintiff's writ, and consequently that the debt was not satisfied. *Semple* v. *Keen*, 3 H. & N. 753; 28 L. J., Ex. 151.

A ca. sa. had been delivered to the sheriff. By the direction of the plaintiff's attorney, the sheriff issued a warrant to his officer, to whom notice was subsequently given by the plaintiff's attorney not to execute the writ, which, however, remained in the sheriff's hands. The defendant having subsequently, at the suit of another person, been arrested by the same officer:—Held, that the defendant could not insist, under these circumstances, that he had been ever in custody under the first writ. *Howard* v. *Canty*, 2 D. & L. 115; 13 L. J., Q. B. 294; 8 Jur. 984.

Indorsement on Writ "to be returned non est inventus."]—Where a ca. sa. is issued, with an indorsement "to be returned non est inventus," the sheriff is nevertheless bound to arrest and detain the party, if he either renders himself to the sheriff or is rendered by his bail after the writ has come to the sheriff's hands. *Magnay* v. *Monger* or *Mongor*, 4 Q. B. 817; D. & M. 24; 12 L. J., Q. B. 306; 7 Jur. 625.

The meaning of such indorsement is, that the sheriff is not to look for the party. *Ib.*

6. Persons Privileged from Arrest.

a. Queen's Household, &c.

Servants.]—The queen's servants, taken in execution, are entitled to be discharged on motion, on account of privilege. *Bartlett* v. *Hebbes*, 5 Term Rep. 686.

A menial servant of her majesty is not liable to arrest, although he publicly carries on trade, and the debt was contracted in the course of his trade. *King* v. *Foster*, 2 Taunt. 167.

A page of the presence, second class in ordinary to the queen, is, by reason of his situation privileged. *Reynolds* v. *Pocock*, 7 D. P. C. 4; 4 M. & W. 371; 8 L. J., Ex. 13; 2 Jur. 924.

A lord of the bedchamber is privileged. *Aldridge* v. *Barry*, 3 D. P. C. 450, n.

The court refused to discharge a party in execution for debt claiming privilege from arrest on the ground that he was one of the gentlemen of the king's privy chamber, it appearing that he was not a menial servant, had no stated duties to perform, received no fees in virtue of his office, and had no writ of privilege. *Tapley* v. *Battine*, 1 D. & R. 79.

As to the privilege of the king's yeoman of the guard, see *Sard* v. *Forrest*, 2 D. & R. 250; 1 B. & C. 139; 1 L. J. (O.S.) K. B. 31.

The candle and fire lighter to the yeoman of the guard is privileged. *Hatton* v. *Hopkins*, 6 M. & S. 271; 18 R. R. 371.

Priest in Ordinary.]—A chaplain in ordinary is privileged from arrest on final process. *Winter* v. *Dibdin*, 2 D. & L. 211; 13 M. & W. 25; 13 L. J., Ex. 263. S. P., *Byron* v. *Dibdin*, 1 C. M. & R. 821; 3 D. P. C. 448; 1 Gale, 58; 5 Tyr. 357. *Swan* v. *Dakins*, 16 C. B. 77; 3 C. L. R. 602; 24 L. J., C. P. 131; 1 Jur. (N.S.) 378; 3 W. R. 369.

The appointment of a priest in ordinary continues after the demise of the crown, and no fresh appointment is necessary; and the fact of a party having performed the duties of such office during the present reign, of his being in the receipt of the salary affixed thereto, and of his name appearing in the books of the household, is sufficient evidence of his holding the office to satisfy the court in discharging him from the custody of the sheriff. *Harvey* v. *Dakins*, 3 Ex. 266; 6 D. & L. 437; 18 L. J., Ex. 156.

Somerset Herald-at-Arms.]—The Somerset herald-at-arms is one of the queen's servants in ordinary with fee, and bound to attend her whenever required as well as on state ceremonials; and is therefore privileged. *Dyer* v. *Disney*, 16 M. & W. 312; 4 D. & L. 698; 16 L. J., Ex. 182.

Officer of the Tower.]—The court refused to discharge the major of the Tower, on the ground that he was arrested when returning from an attendance on the prince regent, it not appearing that he had been attending by command of his royal highness, although the major swore that he could not leave the Tower but on business connected with his official situation. *Batson* v. *McLean*, 2 Chit. 48; 23 R. R. 742.

Deputy governor of the Tower not privileged. *Ib.*

One of the wardens of the Tower was arrested, and informed at the time that the plaintiff would be satisfied if he would enter an appearance. He, however, claimed his privilege, but afterwards executed a bail-bond. The court refused to order the bail-bond to be delivered up to be cancelled. *Bidgood* v. *Davies*, 6 B. & C. 84; 9 D. & R. 153; 5 L. J. (O.S.) K. B. 64.

b. Officer of Court.

If an officer of the court upon a ca. sa. being sued out against him claims a general privilege from arrest at all times, and cautions the sheriff not to arrest him, he will be ordered to pay the debt out of his salary. *Cane* or *Kane* v. *Stewart*, 1 Jones, 630; Sau. & Sc. 84, n.

Secus, if he only claims privilege from arrest eundo, redeundo, et morando, at his office. *Ib.*

The court has no jurisdiction to compel one of its officers to pay his private debt out of his salary. *Ib.*

A general clerk of the clerk of the pleas in the exchequer is an officer entitled to privilege from arrest under a ca. sa., eundo, morando, et redeundo, from his office. *Ib.*

c. Privilege of Parliament.

Privilege of parliament is no protection against an attachment for any contempt which is of a criminal kind. *Wellesley* v. *Beaufort*, 2 Russ. & M. 639.

Member of House of Commons.]—A member of the house of commons is privileged from arrest for forty days before and forty days after each meeting of parliament, and the privilege is equally applicable to the meeting of a new parliament after a dissolution, as to the meeting of a parliament after prorogation. *Goudy* v. *Duncombe*, 5 D. & L. 209; 1 Ex. 430; 17 L. J., Ex. 76.

Since a member of either house of parliament is privileged from arrest, a capias against him is irregular, and will be set aside; although, in the case of a member of the house of commons, the writ is not intended to be put in execution till his privilege expires; nor, although, in either instance, no proceedings are contemplated against the person of the member. *Cassidy* v. *Steuart*, 2 Scott (N.R.) 432; 2 Man. & G. 437; 9 D. P. C. 366; 10 L. J., C. P. 57; 5 Jur. 25.

Peer.]—An Irish peer cannot be arrested. *Coates* v. *Hawarden* (*Lord*), 1 M. & Ry. 110; 7 B. & C. 388; 6 L. J. (O.S.) K. B. 62.

A party having voted at the election of Scotch peers is, as a Scotch peer, entitled to be discharged from arrest, although his vote has been protested against, and his claim to the title disputed, and never recognised by the house of lords or at a court. *Digby* v. *Stirling* (*Lord*), 8 Bing. 55; 1 M. & Scott, 116; 1 D. P. C. 248.

The court would not order a bail-bond given by a person claiming privilege from arrest as being an Irish peer to be cancelled on motion, unless his peerage was clearly proved. *Storey* v. *Birmingham*, 3 D. & R. 418; 1 M. & Ry. 111, n.; 2 L. J. (O.S.) K. B. 34.

One who had been appointed consul-general from the Porte, but was dismissed several months before, and another person resident here appointed in his room, is not privileged, though, at the time of the arrest, he had not received any official notification of his dismissal, or the appointment of his successor. *Marshall* v. *Cretico*, 9 East, 446; 14 R. R. Preface VIII., n.

Quære, whether a consul is privileged. *Clarke* v. *Cretico*, 1 Taunt. 106.

But a resident merchant of London who is appointed and acts as consul to a foreign prince, is not. *Vivcash* v. *Becker*, 3 M. & S. 284; 15 R. R. 488.

d. Coroners.

A deputy coroner is privileged while preparing to hold an inquest. *Deputy Coroner* (*Middlesex*), *Ex parte*, 6 H. & N. 501; 30 L. J., Ex. 77; 7 Jur. (N.S.) 103; 3 L. T. 754; 9 W. R. 281.

e. Magistrates.

A magistrate, attending petty sessions or the police court, in the discharge of his duty, is privileged from arrest. *Glendenning* v. *Browne*,

3 Ir. C. L. R. 115 ; *Dubois* v. *Wyse*, 5 Ir. C. L. R. 303.

f. Persons attending Judicial Proceedings.

Attendance—What is.]—A party who has attended his cause all day in court, and retires in the evening to dine with his attorney and witnesses at a tavern, is privileged, causâ redeundi. *Lightfoot* v. *Cameron*, 2 W. Bl. 1113. S. P., *Newland* v. *Harland*, 8 Scott, 70 ; 3 Jur. 679.

So, a plaintiff is protected, who, whilst attending the sittings in expectation of his cause being tried is waiting at a coffee-house in the vicinity, before the day of trial. *Childerston* v. *Barrett*, 11 East, 439.

A slight deviation will not deprive a party returning from attendance in a court of justice of his privilege. *Pitt* v. *Coombs*, 3 N. & M. 212 ; 5 B. & Ad. 1078. See *S. C.*, 4 N. & M. 535 ; 2 A. & E. 459 ; 4 L. J., K. B. 83.

An attorney stated, that having several causes to attend in the courts at Westminster, he was proceeding through the city on his way to Westminster, and when at the Bank of England, recollecting some business with a client whom he was likely to meet at the auction mart, he went there, and saw the party, and as he was leaving him to proceed to Westminster, he was arrested. Affidavits in answer stated that he was arrested between the hours of 2 and 3 p.m., in the auction mart coffee-house ; that he then said nothing about going to Westminster ; and that he said he was there to negotiate a loan, with which he intended to pay the plaintiff :—Held, that these facts did not show a case of privilege. *Strong* v. *Dickenson*, 2 Gale, 83 ; 1 M. & W. 488 ; 1 T. & G. 683 ; 5 D. P. C. 99 ; 5 L. J., Ex. 231.

To whom Privilege Extends.]—The privilege extends to all persons who have any relation to a cause which calls for their attendance in court, whether compelled by process or not, and whether parties, attorneys, witnesses, or bail. And, in general, the courts will discharge them on motion, without suing out a writ of privilege. *Walpole* v. *Alexander*, 3 Dougl. 45.

A defendant having been arrested on his way to court, to deliver himself up into the hands of the court, to receive judgment on a conviction, the court will only grant a rule nisi for his discharge on his own affidavit. *Sharplin* v. *Hunter*, 6 D. P. C. 632.

Though an appellant comes from Ireland to London long before it is necessary to do so in order to attend the hearing of his cause in the house of lords, so that if then arrested he would not be discharged ; yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody. *Persse* v. *Persse*, 5 H. L. Cas. 671.

A burgess, attending an election of burgesses, under a summons from the mayor, issued in obedience to a mandamus, directing the corporation to proceed to such election, is not privileged during his attendance there for that purpose. *Nixon* v. *Burt*, 1 Moore, 413 ; 7 Taunt. 682.

—— **At Petty Sessions in order to obtain Summons.**]—A person who attends before justices at petty sessions, in order to obtain a summons with a view to recover a penalty, and gives evidence before them for the purpose, is not privileged from arrest either in going there with a view to give the evidence and obtain the summons, or on his return after having done so. *Cobbett, Ex parte*, 7 El. & Bl. 955 ; 26 L. J., Q. B. 293 ; 3 Jur. (N.S.) 665 ; 5 W. R. 708.

Where the privilege from arrest on civil process does not exist when the party is going and staying, it does not exist when he is returning. *Ib.*

A voluntary prosecutor, as a common informer, is not entitled to any privilege from arrest. *Ib.*

—— **At Police Court.**]—A person attending a police court as prosecutor or witness on a charge there pending is privileged from arrest in civil process, though not attending under compulsion. *Montague* v. *Harrison*, 3 C. B. (N.S.) 292 ; 27 L. J., C. P. 24 ; 4 Jur. (N.S.) 29 ; 6 W. R. 43.

—— **Before Commissioners of Bankruptcy.**]—A creditor attending to prove his debt is privileged. *List, Ex parte*, 2 Ves. & B. 373 ; 2 Rose, 24. S. P., *King, Ex parte*, 7 Ves. 312.

So, any person attending under a summons of commissioners of bankruptcy. *Ib.*

A person attending in order to oppose the discharge of a debtor, is privileged. *Willingham* v. *Matthews*, 2 Marsh. 57 ; 6 Taunt. 356.

A petitioning creditor attending for the purpose of watching the progress of the commission, and proposing himself as assignee, is protected eundo, morando, et redeundo ; and it is for the party, who seeks to oust him of his privilege, to show an unreasonable delay, or an improper deviation from his course home. *Selby* v. *Hills*, 1 D. P. C. 257 ; 1 M. & Scott, 253 ; 8 Bing. 166 ; 1 L. J., C. P. 55.

An insolvent debtor is privileged when attending at or returning from the court in which his petition is heard, although on the day he was arrested the consideration of the final order was adjourned sine die. *Chauvin* v. *Alexander*, 2 B. & S. 47 ; 31 L. J., Q. B. 79 ; 8 Jur. (N.S.) 262 ; 5 L. T. 673 ; 10 W. R. 248.

Suitor or guardian of minor coming to pass an account in the master's office, as it might require his personal attendance, will be discharged from arrest. *Crone* v. *Odell*, 2 Moll. 525.

A principal defendant having come to town for hearing of a causei n the Lord Chancellor's list, and having been on his way from his hotel to his solicitor's office arrested under a capias ad resp. :—Held, that he was privileged and should be discharged, although he had deviated and remained a little for his amusement :—Held, also, that although the cause for which the defendant came to town was to be heard by the Lord Chancellor, yet, as it was generally depending in chancery, the master of the rolls might make the order allowing the defendant privilege, and ordering his discharge. *Mahon* v. *Mahon*, 2 Ir. Eq. R. 440.

A party in a suit, who was arrested under an execution while returning home from court, where he had been assisting his solicitor in the discharge of duties which were the proper business of his solicitor, is not privileged from arrest. *Flattery* v. *Anderson*, 6 Ir. Eq. R. 518.

A party in a cause who is interested in a decree which has been pronounced, is privileged from arrest in attending the registrar's office on passing the minutes of the decree. *Newton* v. *Ashew*, 6 Hare, 319 ; 18 L. J., Ch. 42 ; 13 Jur. 186.

Where a party had been summoned to attend the registrar on a matter which had been referred to him by the court, and, after being examined, was arrested near the outer door of

the registrar's office, he was ordered to be discharged, but without costs against the officer, as he would not undertake to bring an action for false imprisonment. *Burt, Ex parte*, 2 Mont. D. & D. 636.

Though an appellant comes from Ireland to London long before it is necessary to do so in order to attend the hearing of his cause in the house of lords, so that if then arrested he would not be discharged: yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody. *Persse* v. *Persse*, 5 H. L. Cas. 671.

A person in custody under an attachment out of chancery, for disobedience to an order to furnish accounts, is not entitled to be discharged upon the ground that, when arrested, he was attending the trial of an action to which he was a party. *M'Kinshy* v. *Henry*, Ir. R. 7 Eq. 465.

Writ of protection will not be given to a suitor or witness to protect him from arrest in any case, when, if arrested, he would not be entitled to his discharge without it. *Brien* v. *Brien*, 1 Hog. 34.

Witnesses.]—A person attending commissioners of bankruptcy, without a summons, swearing that he was a material witness, and not contradicted, protected from arrest, while remaining, though having left the room by order for the purpose of separate examination; and while returning; whether while going, quære. Ordered to be discharged immediately by the party in the first instance: if disobeyed, to be extended to the officers, with costs. Application at the bar without a petition the proper form in such cases, and time to answer the affidavit refused. *Byne, Ex parte*, 1 Ves. & B. 316; 1 Rose, 451.

Protection from arrest of persons attending commission of bankruptcy for the purpose of aiding them in the administration of justice eundo, morando, et redeundo, not by having a summons, but upon principle applying to a witness or party. *S. C.*, 1 Ves. & B. 319.

Privilege of person going to make an affidavit before a master. *List's Case*, 2 Ves. & B. 374; 2 Rose. 24.

Application to discharge must be to the court of which the proceeding is a contempt. *Ib.*

Witness, attending arbitrators upon an arbitration under an order of court, protected from arrest. *Temple, Ex parte*, 2 Ves. & B. 395.

Protection from arrest during attendance through interval of adjournment to another period of same day, at same place. *Ib.*

Person arrested on return from attending warrant before master at master's office, to produce papers, discharged. *Franklyn* v. *Colqhoun*, 1 Madd. 580.

A witness from Gravesend having attended this court pursuant to a summons, being arrested for debt in Pancras Lane, City, while waiting for the conveyance home, was discharged; although he had, on leaving this court, gone to Catherine Street, Strand: but without costs as against the officer, he not having been shown the summons to attend this court. *Clarke, Ex parte*, 2 Deac. & C. 99.

A person who resides in the country and comes up to Dublin, and is served in Dublin with a subpœna ad test., is only entitled to the privileges of a town witness. A witness, who has been served with a subpœna ad test. in the country, is entitled to privilege from arrest as long as he is detained in town by the examiner. *Burke* v. *Higgins*, 2 Hog. 210.

A person who is served with a subpœna ad testificandum in London, and is at the same time resident there, is not protected from arrest in the interval between the service of the subpœna and the day appointed for his examination. Semble, a witness who comes to London, in order to be examined, is protected from arrest during the whole time that he remains in London bonâ fide, for the purpose of giving evidence. A witness is not protected in going three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories with a view to prepare himself to give his evidence accurately. *Gibbs* v. *Phillipson*, 1 Russ. & M. 19; 8 L. J. (o.s.) Ch. 43.

No action lies against a sheriff or his officer for arresting a person attending court as a witness, although it is alleged that the sheriff and his officer knew that he was privileged, and arrested him maliciously. *Magnay* v. *Burt*, D. & M. 652; 5 Q. B. 381; 12 L. J., Q. B. 225; 7 Jur. 1116—Ex. Ch.

——**Before Arbitrators.**]—A party in a cause attending an arbitrator to be examined under a rule of court, is privileged eundo, morando, et redeundo. *Spence* v. *Stuart*, 3 East, 89; 6 R. R. 549.

But where a party residing in L. was summoned to attend an arbitrator at E., and was required to bring him certain papers then at C., and he went to the latter place, where all his papers were, to make a selection, and having stayed there more than twenty-four hours for that purpose and necessary refreshment, was arrested; the majority of the court held that he was not entitled to be discharged out of custody, having no right to stop and sort his papers. *Randall* v. *Gurney*, 1 Chit. 679; 3 B. & Ald. 252.

But held by the majority of the court of exchequer, that a defendant was under similar circumstances privileged from arrest. *Richett* v. *Gurney*, 1 Chit. 682; 7 Price, 699.

A party to a reference, who, after the adjournment of the hearing of the reference to a subsequent day, does not within a reasonable time return home for want of pecuniary means, is not, during the period of adjournment, privileged. *Spencer* v. *Newton*, 1 N. & P. 818; 6 A. & E. 623; 6 L. J., K. B. 119; 1 Jur. 52.

The protection exists during the attendance, though there is an interval of an adjournment to another period of the same day, at the same place. *Rishton* v. *Nisbett*, 1 M. & Rob. 347.

g. Barristers.

Barristers upon circuit are privileged. *Meekins* v. *Smith*, 1 H. Bl. 636.

A barrister attending the court to hear judgment in a cause in which he is concerned, is entitled to privilege from arrest, eundo, morando, et redeundo. *Newton* v. *Harland*, 8 Scott, 70.

A party is entitled to a similar privilege. *Ib.*

But a barrister who has been actually engaged at petty sessions, but without a previous retainer, for a party, or on a summary conviction, where counsel are allowed by 6 & 7 Will. 4, c. 114, is not privileged, redeundo. *Newton* v. *Constable*, 1 G. & D. 408; 2 Q. B. 157; 9 D. P. C. 933; 10 L. J., Q. B. 349; 6 Jur. 317.

A barrister who had attended the court, not professionally, but as a party interested on a motion for a receiver, was arrested by a sheriff'

officer shortly after he had quitted the court. The officer refused to bring him into court, and took him to a lock-up house. On motion for his immediate discharge, the court doubted whether he could be discharged without being brought into court, and recommended a writ of habeas corpus to be issued; which having been done, and the party brought into court, he was discharged, and the sheriff was ordered to pay the costs. *Anon.*, 1 Y. & Coll. 331; 4 L. J., Ex. Eq. 46.

h. Solicitors and their Clerks.

The court has no power to grant a writ of protection from arrest to a solicitor. *Anon.*, 1 Moll. 76.

There is no distinction in respect to privilege whether the business of his client in which he was engaged was such as required the personal attendance of the solicitor, or might be equally answered by his clerk. Lord Chancellor, expressing his disapproval of privilege, adheres to the practice as established in courts of equity, in respect to the extent of the privilege, so long as it exists at all. It would be reduced to next to nothing without the addition with respect to detainers. *Fitzmaurice's Case*, 1 Moll. 512.

Solicitor's privilege from arrest not extended to a case where it took place at the town lodgings of a country solicitor, on his return from the master's office, and while preparing certain documents by him directed in a cause: although the cause of his coming to, and remaining in, town was his necessary attendance on his client's business in court. *Foote's Case*, 2 Moll. 530.

The privilege of a solicitor from arrest is not confined to those cases only in which his personal presence is indispensable. *Keane, In re*, Sau. & Sc. 81.

An attorney is not privileged from arrest in execution, where he comes down to court to perform an act for his client which a clerk could do as well. *Salmon* v. *Kiernan*, Sau. & Sc. 83, n.

A solicitor is privileged from arrest going to, tarrying at, and returning from court, whilst he is in attendance upon a motion or cause. *O'Neill, In re*, Sau. & Sc. 78.

The party arresting, being aware of the existence of the privilege at the time, will be ordered to pay the costs of the solicitor's application to be discharged, and any other costs which may be incurred by his detention. *Ib.*

If a solicitor be bonâ fide attending a motion or other proceeding in court for his client, he is privileged from arrest; but where he was merely looking for his counsel in court, to consult him as to the course to be pursued in the cause, he was held not privileged from arrest. *Longfield* v. *Carpenter*, 1 Ir. Eq. R. 349.

A solicitor is privileged from arrest on his way to and from attendance at court, if it be bonâ fide on business, although the business be of a kind which a clerk could perform, he not keeping a clerk. *Aherne, In re*, 1 Con. & L. 250; 2 Dr. & War. 141; 4 Ir. Eq. R. 337.

An attorney is privileged while in attendance at the master's office taxing costs, as well as returning therefrom. *Hope, In re*, 9 Jur. 846.

A solicitor swore that, at the time of the caption, he was proceeding direct from his house, for the purpose of attending the hearing of two petitions at Westminster. On the other hand, two witnesses deposed, that the direction in which he was walking was not the direction in which they would have proceeded as the nearest and most direct way to Westminster:—Held, not a sufficient proof of deviation, so as to disentitle the solicitor to his discharge. *Att.-Gen.* v. *Leathersellers' Co.*, 7 Beav. 157.

An attorney, party to a cause in which a motion was about to be made in the court, left his private residence with the intention of calling at his office for some papers material in the cause, and proceeding with them to court. On his way to his office he was arrested, and forced to pay a sum to procure his discharge:—Held, that he was entitled to have the money refunded, being privileged both as an attorney and a party in a cause. *Williams* v. *Webb*, 2 D. (N.S.) 904; 5 Scott (N.R.) 898; 12 L. J., C. P. 89.

A solicitor on his way to attend a summons at the chambers of a judge in Serjeants' Inn is privileged from arrest under an attachment. *Jewitt, In re*, 33 Beav. 559; 33 L. J., Ch. 730; 10 Jur. (N.S.) 814; 10 L. T. 556; 12 W. R. 945.

An attorney who attends on the occasion of his client putting in bail for a defendant in an action in the lord mayor's court, and who acts there only as the attorney and adviser of such bail, and is not the attorney for either of the parties to the cause, is not privileged from arrest in going to or returning from the court on such occasion. *Jones* v. *Marshall*, 2 C. B. (N.S.) 615; 26 L. J., C. P. 229; 3 Jur. (N.S.) 916; 5 W. R. 623.

An attorney and solicitor, being in contempt for non-payment of money which he had been ordered to pay into court under a decree in equity was, when on his direct road to attend an appointment at the insolvent debtors court on behalf of an insolvent petitioner for whom he was acting as attorney, arrested under a writ of attachment. He also had other appointments, one of which was to attend at the taxing master's offices in Staple Inn. The court held that the arrest was improper, and that he was entitled to be discharged. *Barrow, In re, Eyre* v. *Barrow*, 27 L. J., Ch. 784; 4 Jur. (N.S.) 652; 6 W. R. 767.

A solicitor was arrested on the direct way from the taxing master's office, but it appeared that before his arrest he had deviated considerably from the direct way:—Held, that he was not entitled to be discharged. *Walsh* v. *Wilson*, 1 Ir. Ch. R. 610.

—— **Whilst Professionally Engaged.**]—An attorney of the queen's bench was arrested whilst he was attending in his professional character as an attorney in a county court. On an application to discharge him, on the ground that he was privileged, which was resisted on the ground that he had not shown that he had signed the roll of the county court, which it was contended was necessary under 6 & 7 Vict. c. 73, s. 27:—Held, that he had made out a primâ facie case of privilege, and that he was therefore entitled to his discharge, as no answer had been given to it. *Clutterbuck* v. *Hulls*, 4 D. & L. 80; 1 B. C. Rep. 165; 15 L. J., Q. B. 310; 10 Jur. 1082.

An attorney is privileged from arrest while in attendance at the master's office taxing costs, as well as returning therefrom. *Hope, In re*, 9 Jur. 856.

To entitle an attorney to privilege from arrest he must show that he is actually practising at the time; a solitary instance of employment at an election will not suffice. *Anon.*, 4 M. & P. 810; 1 D. P. C. 208.

Where an attorney defendant claims a privilege from arrest eundo, it must clearly appear that he left home for the purpose of attending the court. *Strong* v. *Dickinson*, 5 D. P. C. 86; 1 M. & W. 488; 2 Gale, 83; 1 Tyr. & G. 683; 5 L. J., Ex. 231.

Privilege from arrest will not be extended to the case of a solicitor returning from attending his client's business in court, if he is found at a place out of his direct line of road, unless he can show good reason for the deviation. The court refused to discharge from custody a solicitor taken under these circumstances; the reason for the deviation, as stated by the solicitor in his affidavit, being, that he was going to dine at a tavern in the neighbourhood, but it did not appear that this intention was communicated to the officer at the time of the arrest. *Jones* v. *Rose*, 11 Jur. 379.

When about to Leave the Country.]—Attorney about to leave the country not privileged from arrest. *Thompson* v. *Moore*, 1 D. (N.S.) 283; 5 Jur. 1009. S. P., *Flight* v. *Cook*, 1 D. & L. 174; 13 L. J., Q. B. 78.

—— **For Contempt of Court.**]—Disobedience by a solicitor to an order of court made against him as an officer of the court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order of court is process of a punitive and disciplinary character; and therefore no privilege from arrest exists or can be claimed against the execution of the attachment. Privilege from arrest for contempt of court, where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other court, although the proceedings at the police court consist merely of a preliminary inquiry on a charge of felony. F. was a solicitor, and an order was made at chambers that he should deliver up certain documents and should pay the sum of 10*l.* and certain costs. This order was made against F. as an officer of the court. F. delivered up the documents, but he did not pay the sum of 10*l.* or the costs. An order for the attachment of F. for contempt of court was thereupon made at chambers. F. then paid the sum of 10*l.*, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police court, where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—Held, that he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature. *Freston, In re*, 52 L. J., Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804—C. A.

When Party to Suit.]—A respondent in a matter, who was his own solicitor, and who came from the country to attend the master's office as to the letting of lands in his own occupation, was held to be privileged from arrest during his stay in town. *Lawlor* v. *Scollard*, 2 Ir. Ch. R. 146.

O., a party and solicitor in the cause, having been in attendance in the master's office, upon a summons in the cause, left the office, and was arrested on a ca. sa., near Carlisle Bridge, which was out of the direction of and beyond his residence in Jervis Street:—Held, the deviation was such as to deprive him of his privilege from arrest. The question in such cases always is, whether the person arrested was, at the time of the arrest, bonâ fide engaged in the business he was called on to execute. *Heron* v. *Stokes*, 6 Ir. Eq. R. 125.

Release—Costs.]—A solicitor's privilege was violated by his being arrested under an attachment, while he was on his way to conduct a case for a client at a county court in Surrey. The sheriff's officer who arrested him was distinctly warned that the arrest was unlawful:—Held, that all parties served with the notice of motion were liable for the costs attending his release. *Dodd* v. *Holbrook, Pitman, In re*, 35 L. J., Ch. 175; 11 Jur. (N.S.) 969; 13 L. T. 426; 14 W. R. 125.

Parliamentary Agent.]—A solicitor, who has ceased to take out his certificate and to practise, is privileged while attending the hearing of an appeal in the house of lords as a parliamentary agent. *Att.-Gen.* v. *Skinners' Co.*, 1 Cooper, 1.

Going into a house in the way home to take refreshment, is not a deviation that will destroy the privilege. *Ib.*

An agent, in an appeal in the house of lords, although not a solicitor or an attorney, being arrested on his return home, is entitled to his discharge. *Watkins, Ex parte*, 1 Jur. 236.

Clerks.]—An attorney's clerk is not privileged whilst going to judges' chambers for the purpose of conducting the attorney's business. *Phillips* v. *Pound*, 7 Ex. 881; 21 L. J., Ex. 277; 16 Jur. 645.

i. Minister of Religion.

Where a clergyman was arrested on Christmas-day whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the court ordered the writ and subsequent proceedings to be set aside; but without costs, it appearing that neither the plaintiff nor his attorney ordered the arrest to be made on Christmas-day. *Goddard* v. *Harris*, 5 M. & P. 122; 7 Bing. 320; 9 L. J. (O.S.) C. P. 109.

j. Insane Persons.

Court will not discharge a defendant out of custody on ground that he has become insane since the arrest. *Kernot* v. *Norman*, 2 Term Rep. 390.

Nor where it appeared that he was insane at time of arrest. *Nutt* v. *Verney*, 4 Term Rep. 121.

Court will refuse to discharge him even where a commission of lunacy has issued. *Steel* v. *Alan*, 2 Bos. & P. 362.

Court will not discharge the bail on the ground of the defendant's having become a lunatic since the commencement of the action. *Ibbotson* v. *Galway (Lord)*, 6 Term Rep. 133.

k. In Cases of Criminal Charges.

Person Charged.]—The privilege from arrest on civil process of a person whose attendance in court is required for the due administration of justice, extends to the party accused of a criminal charge when out on bail on remand, as well as to the prosecutor and witnesses. *Gilpin* v. *Benjamin*, 38 L. J. Ex. 50; L. R. 4 Ex. 131; 19 L. T. 830; 17 W. R. 885.

—— **After Acquittal—Returning.**]—A party

who had been detained upon a criminal charge, and tried, acquitted, and discharged, is not privileged during his return home from the gaol in which he has been confined. *Goodwin* v. *Lordon*, 3 N. & M. 879; 2 D. P. C. 504; 1 A. & E. 378.

A person acquitted on a criminal charge is not entitled to privilege from arrest, even in the presence of the court, under civil process, morando aut redeundo. *Hare* v. *Hyde*, 16 Q. B. 394; 20 L. J., Q. B. 185; 15 Jur. 315.

One, who has been wrongfully arrested upon a Sunday, upon a charge of forgery, without any warrant, may be lawfully arrested upon civil process as he is leaving the police office, after he has been ordered by the magistrate to be discharged. *Jacobs* v. *Jacobs*, 3 D. P. C. 675.

A party, discharged by habeas corpus from illegal custody on one criminal charge, is not privileged redeundo from an arrest under criminal process upon another and different criminal charge, where there is no ground for supposing that the former process had been originated for the purpose of procuring the arrest under the latter. *Reg.* v. *Douglas*, 3 Q. B. 825; 3 G. & D. 509; 12 L. J., Q. B. 49; 7 Jur. 39.

Witness.]—A person who is subpœnaed in a criminal prosecution tried in the sittings, but who is committed for a contempt of court, in striking the defendant, has the same privilege from arrest in returning home from the prison after his imprisonment has expired, that he would have had in returning home from the court if he had not been committed. *Rex* v. *Wigley*, 7 Car. & P. 4.

1. Proceedings to Liberate.

Application—To whom made.] — An application to discharge on the ground of the party being privileged as attending a judicial proceeding, must be to the court of which the proceeding is a contempt. *List's Case*, 2 Ves. & B. 373; 2 Rose, 24.

He may be discharged either by the court in which such proceedings are pending, or by that issuing the process upon which the caption is effected. *Att.-Gen.* v. *Skinners' Co.*, 1 Cooper, 1.

Where a party to a cause is arrested upon process out of another court, while attending at nisi prius, in expectation of its coming on, he must apply for relief to the judge at nisi prius, or to the court out of which the process issues, and not to the court in which the cause is. *Pitt* v. *Evans*, 2 D. P. C. 223.

If a party coming to attend the trial of his cause is arrested, the judge at nisi prius will grant a habeas corpus to discharge him, and will put off the trial until he be released, without payment of costs, if any collusion can be shown to exist between the opposite party and the creditor who arrested him; otherwise only on payment of costs. *Soloman* v. *Underhill*, 1 Camp. 229.

A witness on a trial at nisi prius was arrested redeundo, under a warrant of commitment for not appearing to a summons issued on a judgment recovered against him in a county court:—Held, that the application for his discharge was properly made to the court in banco. *Kingdon* v. *L. & N. W. Ry.*, 9 Ex. 766; 2 C. L. R. 1027; 23 L. J., Ex. 232; 2 W. R. 430.

—— **How made.**] — The proper mode of obtaining a discharge of a person privileged from arrest on process of a county court for non-attendance on a judgment summons is not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits showing his privilege), or by application to the judge of the county court. *Swan* v. *Dakins*, 16 C. B. 77; 3 C. L. R. 602; 24 L. J., C. P. 131; 1 Jur. (N.S.) 378; 3 W. R. 369.

Where a return to habeas corpus discloses a legal imprisonment of a person under civil process, it is competent to him to show that the detainer is illegal by reason of his privilege from such arrest. *Ib.*

Where an insolvent on his return from attending the court of bankruptcy, on his own petition for protection, under 5 & 6 Vict. c. 116, was arrested under an attachment of the court of chancery, his application to the court of chancery to be discharged was held improper, and refused. *Plomer* v. *Macdonough*, 1 De G. & Sm. 232; 16 L. J., Bk. 14; 11 Jur. 899.

Action against Sheriff for Escape—Plea under Bankruptcy Acts.]—To an action against a sheriff for an escape, he pleaded that he suffered the plaintiff's debtor to depart out of custody by reason of the production by him (the debtor) of a certificate, duly signed and registered by the chief registrar of bankruptcy, of the filing and registration of a deed of arrangement with his creditors. The deed of arrangement was invalid:—Held, that the production of the certificate was an answer to the action. *Lloyd* v. *Harrison*, 6 B. & S. 36; 35 L. J., Q. B. 153; L. R. 1 Q. B. 502; 12 Jur. (N.S.) 701; 14 L. T. 799; 14 W. R. 737—Ex. Ch.

By the Bankruptcy Act, 1849, s. 27, a registrar in bankruptcy may act in the commissioner's absence, as commissioner; but the rules issued under authority of the statute provided, that he shall not so act, unless by a request in writing, except in case of emergency, the nature whereof shall be entered on the proceedings. To an action for escape, the sheriff pleaded that the debtor had been released by order of a registrar. The plaintiff replied that the registrar had not been requested in writing to act for him as commissioner, nor had any emergency arisen, nor the nature thereof been entered on the proceedings:—Held, that if the order was voidable, it was not void, and protected the sheriff. *Hargreaves* v. *Armitage*, 38 L. J., Q. B. 46; L. R. 4 Q. B. 143; 17 W. R. 140.

7. Arrest by Wrong Name.

Duty of Sheriff to Release Prisoner on Discovery of Mistake.]—The sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.:—Held, that the sheriff having been informed of these circumstances while he had the real debtor in his custody was not bound to detain him, and therefore that an action would not lie against him for an escape. *Morgan* v. *Bridges*, 1 B. & Ald. 647; 2 Stark. 214.

S. D. having induced the sheriff to arrest her instead of E. D., against whom he had a ca. sa., by representing herself to be E. D., afterwards gave the sheriff notice that she was not the E. D. mentioned in the writ:—Held, that S. D. was

not estopped from showing that she was not E. D., and that the sheriff was therefore not justified in detaining her in custody after he had had notice that she was not the person mentioned in the writ. *Dunston* v. *Paterson*, 2 C. B. (N.S.) 495 ; 26 L. J., C. P. 267 ; 3 Jur. (N.S.) 982.

When Name in Writ is the same as that in Judgment.]—A sheriff is justified in taking a defendant in execution under a writ which pursues the name in the action in which the judgment has been obtained, though that is not his true name *Fisher* v. *Magnay*, 1 D. & L. 40 ; 5 Man. & G. 779 ; 6 Scott (N.R.) 588 ; 12 L. J., C. P. 276.

8. Arrest of Wrong Person.

Knowingly.]—A writ of summons issued in an action by A. against his debtor I. W. K., was by mistake served on M. K., who stated that he was not I. W. K. M. K. did not appear to the writ, and took no notice of it, but judgment was entered up in the action against I. W. K., and a ca. sa. issued on the judgment, commanding the sheriff to take I. W. K. The sheriff thereupon arrested M. K. :—Held, that the sheriff was liable to an action for false imprisonment at the suit of M. K., and that the facts would not warrant the sheriff in alleging by way of justification that the ca. sa. directed him to arrest M. K. by the name of I. W. K. *Kelly* v. *Lawrence*, 3 H. & C. 1 ; 33 L. J., Ex. 197 ; 10 Jur. (N.S.) 636 ; 10 L. T. 195 ; 12 W. R. 413—Ex. Ch.

Misleading Sheriff as to the Person to be Arrested.]—A sheriff, upon the representation of the attorney of a plaintiff in an action, having detained a party as the party against whom he held a ca. sa., and damages having been recovered against the sheriff by that party for an illegal detainer, an action lies by the sheriff for the false representation, although such representation was not false within the knowledge of the attorney. *Evans* v. *Collins*, D. & M. 72 ; 5 Q. B. 805 ; 12 L. J., Q. B. 339 ; 7 Jur. 743.

The attorney of an execution creditor in an action against W. F., caused a fi. fa. to be issued and indorsed on the writ. The defendant is a ——, and resides at Redcar. The writ was delivered to the sheriff, who executed it against W. F., who resided at Redcar, and was son of the real defendant, W. F., who resided at Coatham, near Redcar. The attorney and the sheriff both acted bonâ fide :—Held, that the indorsement on the writ was a mere statement by the attorney of the execution creditor for the purpose of affording information to the sheriff, and left him to his own discretion as to how he should act, and that it was not a requirement to the sheriff which made him the agent of the attorney for the purpose of seizing the goods of the son. *Childers* v. *Wooler*, 2 El. & El. 287 ; 29 L. J., Q. B. 129 ; 6 Jur. (N.S.) 444 ; 2 L. T. 49 ; 8 W. R. 321.

9. Taking to Prison.

What is a Beginning to Carry to Gaol.]—Carrying an arrested party to public-houses within twenty-four hours after the arrest, without lodging him in gaol within that time, is not a beginning to "carry to gaol." *Summers* v. *Moseley*, 4 Tyr. 158 ; 2 C. & M. 477 ; 3 L. J., Ex. 128.

The beginning to carry, and not the arrival at the prison, is to be considered as the carrying to prison. *Dewhirst* v. *Pearson*, 1 D. P. C. 664 ; 1 C. & M. 365 ; 3 Tyr. 243 ; 2 L. J., Ex. 143.

Duty of Officer on Arrest.]—The officer who makes the arrest ought to require the party arrested to nominate some convenient dwelling-house to be taken to : for the latter cannot be said to refuse till the proposal has been made ; and a mere omission by him to nominate a place does not justify carrying him immediately to gaol. *Simpson* v. *Renton*, 5 B. & Ad. 35 ; 2 N. & M. 52 ; 2 L. J., K. B. 157.

The sheriff is entitled to exercise a reasonable discretion in determining whether a house, nominated by a prisoner, as a safe and convenient dwelling-house, is a safe house for the custody of the prisoner. *Silk* v. *Humphrey*, 4 A. & E. 959.

If a prisoner requests to be taken to a house, for the purpose only of consulting a person there, that is not a nomination of a house within the statute. *Ib.*

In one case it was held that the omission of the party to name such dwelling-house entitled the officer to carry him direct to prison. *Pitt* v. *Middlesex Sheriff*, 4 M. & P. 726 ; 1 D. P. C. 201.

A sheriff's officer making an arrest must not carry the party to prison within twenty-four hours, unless such party has first been informed that he may, if he will, be carried to a safe and convenient house of his own nomination, and has refused to nominate. And it is not a refusal if the party, without being so informed, asks if he may go to a spunging-house, and being told that there are none, makes no further proposal, and suffers himself to be taken to one of the two prisons previously named by the officer. *Gordon* v. *Laurie*, 9 Q. B. 60 ; 16 L. J., Q. B. 98 ; 11 Jur. 98.

Duty on Commitment of Debtor—Debtors Act.]—An order of commitment under the Debtors Act, 1869, for making default in payment of a judgment debt is not an "attachment for debt" within the meaning of s. 14 of the Sheriffs Act, 1887, which provides that "where an officer being a sheriff, under-sheriff, bailiff, sergeant-at-mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not . . . . take such person to any prison within twenty-four hours of the time of his arrest" except as therein provided. *Mitchell* v. *Simpson*, 59 L. J., Q. B. 355 ; 25 Q. B. D. 183 ; 63 L. T. 405 ; 38 W. R. 565 ; 55 J. P. 36—C. A.

Action for Penalty under 32 Geo. 2, c. 28, s. 1.]—In an action for the penalty of 50*l.* for carrying the plaintiff to a prison under mesne process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent. Replication, that the plaintiff did not consent :—Held, that the defendant should begin, as the plaintiff did not go for unliquidated damages. *Silk* v. *Humphrey*, 7 Car. & P. 14.

The sheriff or any of his officers concerned in acting contrary to the statute is liable to the penalty. *Dewhirst* v. *Pearson*, 1 D. P. C. 664 ; 1 C. & M. 365 ; 3 Tyr. 243 ; 2 L. J., Ex. 143.

In order to justify a sheriff's officer in taking a party arrested to a tavern, the consent of the party arrested to be taken there is necessary ; and the mere submission or acquiescence of such party to the dictation of the officer is insufficient. *Ib.*

While the officer was illegally carrying a prisoner to gaol, within twenty-four hours after arrest, he, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged:—Held, that a consent so obtained was not free and voluntary within 32 Geo. 2, c. 28, s. 1. *Barsham* v. *Bullock*, 10 A. & E. 23; 2 P. & D. 241.

—— **When two Actions brought against Sheriff for same Offence—Stay of Proceedings.**]—The court will not stay the proceedings in an action against a sheriff's officer on 32 Geo. 2, c. 28, s. 12, though a similar action has been commenced against the sheriff for the same offence. *Pechell* v. *Layton*, 2 Term Rep. 512, 712.

10. Discharge from Custody.

By the Sheriff.]—A defendant, in custody on a ca. sa. received on Saturday an order from the creditor for his discharge. The order, on being shown to the gaoler, was by him forwarded to the sheriff, who lived at some distance from the gaol. On the Sunday, a warrant of detainer, founded on a ca. sa. which had been issued on the previous day, was served upon the gaoler, who thereupon detained the defendant:—Held, that he had no right to his discharge, as the sheriff was entitled to a reasonable time to search his office for other writs against him; and that the service of the warrant on the Sunday made no difference. *Samuel* v. *Buller*, 1 Ex. 439; 17 L. J., Ex. 54; 11 Jur. 978.

Under an Attachment.]—Trespass will not lie against a sheriff for refusing to discharge a prisoner in custody on an attachment for contempt, under 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, where he has received no notice of the nature of the attachment. *Smith* v. *Eggington*, 2 N. & P. 143; 6 D. P. C. 38; 7 A. & E. 167; 6 L. J., K. B. 206.

A. having been guilty of a contempt in chancery was arrested by the sheriff under a writ of attachment, and delivered into the custody of the governor of a county gaol, under a warrant commanding him to keep her in custody, so that the sheriff might bring her before the court of chancery to answer her contempt. The governor having detained her in custody beyond the prescribed period, although the plaintiff in chancery had not brought her to the bar according to 11 Geo. 4 & 1 Will. 4, c. 36, s. 15:—Held, first, that in proceedings against the governor for the undue detention, the proper form of action was trespass, and not case. *Moone* v. *Rose*, 38 L. J., Q. B. 236; L. R. 4 Q. B. 486; 20 L. T. 606; 17 W. R. 729.

11. Form of Return to Writ.

Cepi Corpus.]—Where a defendant was in custody under an extent, and a capias was issued against him at the suit of the plaintiff, and delivered to the sheriff, who returned "that he had taken the defendant, whose body remained in prison under his custody," the court refused to allow the return to be amended by striking it out, and making another according to the fact. *Ibbotson* v. *Tindall*, 1 Bing. 156; 7 Moore, 552.

Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody, the plaintiff should have proceeded as if the sheriff had returned cepi corpus; and the court set aside an attachment issued against the sheriff for not returning the writ. *Rex* v. *Kent Sheriff*, 1 Marsh. 289.

Non est inventus.]—"Not to be found" is an improper return to a writ of capias. *Rex* v. *Kent Sheriff*, 5 D. P. C. 451; 2 M. & W. 316; 6 L. J., Ex. 104.

If a sheriff returns non est inventus when the defendant is visible, and pursuing his business as usual, he is liable to an action for a false return. *Beckford* v. *Wilts Sheriff*, 2 Esp. 475.

But an attachment for not returning the writ was discharged without costs, upon an affidavit that the defendant was not seen in the county, and that the return of non est inventus was made too late by mistake. *Saxton* v. *West*, 2 Anst. 479.

Rescue.]—Semble, that a return by the sheriff to a bill of Middlesex, stating that he took and detained the defendant until he rescued himself, was sufficient, without naming the rescuers, or stating them to be people of the county; but the return not stating the arrest to have taken place in the county was held to be bad. *Rex* v. *Middlesex Sheriff*, 1 B. & Ald. 190. S. P., *Fermor* v. *Phillips*, Holt, 537; 5 Moore, 184, n.; 3 Br. & B. 27, n.; 17 R. R. 675.

Where a defendant has been rescued from a bailiff, the sheriff may return the rescue as from his bailiff, and not from himself. *Gobbey* v. *Dewes*, 3 M. & Scott, 556; 2 D. P. C. 747; 10 Bing. 112; 2 L. J., C. P. 226.

Where a defendant is brought up on an attachment for a rescue, it is the practice of the court to put interrogatories to him, though he does not deny the charge in the affidavits, unless the prosecutor waives putting them. *Rex* v. *Horseley*, 5 Term Rep. 362; 2 R. R. 619.

Languidus.]—By the return of languidus, the illness of the defendant at the return of the writ should appear. *Perkins* v. *Meacher*, 1 D. P. C. 21.

Where the return stated, that the defendant upon being arrested in his own house was confined to his bed by illness, and could not be removed without danger to his life, and so continued ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished; the court refused to grant an attachment against the sheriff, and allowed him to amend his return upon payment of costs. *Baker* v. *Davenport*, 8 D. & R. 606.

When a party in custody under a ca. sa. was too ill to be removed, the court enlarged the time for the return of the writ, but could afford the sheriff no relief for the extra costs of keeping up the caption. *Jones* v. *Robinson*, 11 M. & W. 758; 2 D. (N.S.) 1044; 12 L. J., Ex. 415.

Insane.]—Where a return to a latitat stated that the defendant was insane, and could not be removed without great danger, and continued so until the return of the writ:—Held, that an attachment would not lie against the sheriff. *Cavenagh* v. *Collett*, 4 B. & Ald. 279.

12. Action for False Return.

Sheriff of Colony—Capias ad respondendum.]—The sheriff of a colony is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a

writ of capias ad respondendum, for the damage which results to the plaintiff therefrom. *Brasyer* v. *Maclean*, 44 L. J., P. C. 79; L. R. 6 P. C. 398; 33 L. T. 1.

Estoppel by Return.]—Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court, without his being allowed to show that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. *Ib.*

13. Action for Escape.

Sheriffs Act, 1887, s. 16.

a. Generally.

Voluntary Release of Prisoner.]—Where a sheriff arrested a defendant on a ca. sa. in which there was not any non omittas clause, within a liberty where the mayor claimed the exclusive privilege of executing all process, and suffered him to go at large before his removal from such liberty:—Held, that the sheriff having taken such defendant, he was bound to keep him in custody; and, consequently, that he was liable for an escape. *Piggott* v. *Wilkes*, 3 B. & Ald. 502.

If, upon the execution of a ca. sa., which requires the sheriff to take and keep the body, so that he may have it on the return day of the writ at Westminster, to satisfy the plaintiffs of their damages, costs, and charges, the sheriff, before the return day, receives the money due from his prisoner, and thereupon liberates him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape. *Slackford* v. *Austen*, 14 East, 468.

B. was on the 3rd of August served with a writ under the Bills of Exchange Act at the suit of A., and on the 5th he executed a composition deed, which was registered on the 13th. On the 15th judgment was signed for non-appearance to the writ, and a ca. sa. issued on the 25th of September, under which he was arrested. The sheriff, having notice of these facts, released him from custody on being shown the certificate of registration of the deed:—Held, that the sheriff was liable for an escape. *Allen* v. *Carter*, 39 L. J., C. P. 212; L. R. 5 C. P. 414; 22 L. T. 586.

A sheriff having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.:—Held, that the sheriff having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape. *Morgans* v. *Bridges*, 1 B. & Ald. 647; 2 Stark. 314.

Suicide of Released Prisoner.]—A person was taken upon an attachment in equity for non-payment of money. The sheriff without taking bail allowed him to go at large on his promise to surrender. The sheriff's officer having called on him to surrender, he shot himself before a recapture, but the officer retained his body:—Held, that the sheriff was liable as for an escape. *Moore* v. *Moore*, 25 Beav. 8; 27 L. J., Ch. 385; 4 Jur. (N.S.) 250; 6 W. R. 288.

Release for Ill-health.]—If the sheriff alone, on the ground of a debtor's ill-health, makes any relaxation of the imprisonment, by letting the debtor reside out of prison, it would be an escape. *Haines* v. *East India Co.*, 11 Moore, P. C. 39; 5 W. R. 159.

A defendant to an action, in which the East India Company were plaintiffs, having had a verdict given against him, and judgment signed for damages and costs, was imprisoned in the gaol at Bombay under a writ of capias ad satisfaciendum. The medical officer in attendance having reported that a temporary release from confinement was necessary for his health, the government at Bombay gave orders to the sheriff and the superintendent of police that he should be permitted temporarily to reside outside the gaol, under such surveillance as might prove as little irksome as possible to the prisoner while consistent with its perfect efficiency. On being informed of the proposal the defendant gave a written reply, "I shall be grateful for any change, and the consideration for my health is indeed most welcome." He was removed to a residence outside the gaol, under the charge of the sheriff's peons, and after remaining under their charge for some months he was remitted to the gaol. An application was made to the supreme court at Bombay that he should be discharged from custody, and was refused:—Held, on appeal, by the judicial committee of the privy council, that the removal of the defendant to a residence outside the gaol did not, under the circumstances, operate as a discharge; that the custody continued; and that the defendant, having assented to such removal, was estopped from alleging that he did not continue in the custody of the sheriff; and that the judgment of the court below must be affirmed. *Haines* v. *East India Co.*, 5 W. R. 159.

No Power to Retake after.]—After a voluntary escape, the sheriff cannot retake a prisoner. *Atkinson* v. *Jameson*, 5 Term Rep. 25.

When Guilty of Negligence.]—A., a sheriff's officer, went with B. to the house of C. to arrest him upon a ca. sa. A. read the warrant to C., whereupon C. rushed out against A., who caught C. round the waist, but was unable to hold him, and C. escaped:—Held, that the sheriff was liable for the escape. *Nicholl* v. *Darley*, 2 Y. & J. 399.

If the sheriff, by mistake, releases a defendant, against whom a ca. sa. had been lodged with him, it is a voluntary escape, and the sheriff cannot retake him; and, if he does, the caption being a nullity, lapse of time will not be an objection to his discharge. *Filewood* v. *Clement*, 6 D. P. C. 508; 1 W. W. & H. 165.

If a sheriff's officer, having taken a prisoner in execution, permits him to go about with a follower of his before he takes him to prison, it is an escape. *Benton* v. *Sutton*, 1 Bos. & P. 24.

If a ca. sa. against A., at the suit of B., is delivered to the sheriff, and a warrant issues thereon, and before the return A. is taken in execution by C. and then escapes, B. can sue the sheriff for an escape, though A. was never taken at the suit of B. *Ib.*

Where a sheriff, in obedience to a warrant from a commissioner of bankruptcy, brought a party whom he had in custody in execution for debt beyond the limits of his county, in order to be examined by the commissioner, he was bound to take such prisoner back again within a con-

venient time after the examination was over; but during the time the prisoner was so necessarily beyond the limits of the sheriff's county, it was sufficient if he was accompanied and closely watched by the officer; and it was no escape by the sheriff that such prisoner was during that time allowed to go about with the sheriff's bailiff to several places, and to dine and sleep at an inn. *Nias* v. *Davis*, 2 Car. & K. 280; 4 C. B. 444; 11 Jur. 472.

Return to Custody after Release.]—An attachment for non-payment of money is in the nature of mesne process; and where the party had been taken and permitted to go at large, and returned again into custody, and continued in custody at the return of the writ:—Held, that the sheriff was not liable for an escape. *Lewis* v. *Morland*, 2 B. & Ald. 56.

Contributed to by Plaintiff or his Agent.]—If the agent of the plaintiff takes upon himself to direct the sheriff's officer as to the mode of executing process, and an arrest is made, the legality of which is doubtful, the sheriff cannot be held liable for a subsequent escape. *Doe* v. *Tyre*, 7 D. P. C. 636; 7 Scott, 704; 5 Bing. (N.C.) 573; 8 L. J., C. P. 346.

b. Damages.

How Assessed.]—The true measure of damages in an action against a sheriff, for the escape of a prisoner taken on a ca. sa., is, the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape; but, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages will be materially affected by such conduct. *Arden* v. *Goodacre*, 11 C. B. 371; 2 L. M. & P. 383; 20 L. J., C. P. 184; 15 Jur. 776.

The amount of fine to be imposed on the sheriff, for the negligent escape of an execution debtor, will be measured by the amount of injury likely to result to the execution creditor. *Reg.* v. *Leicestershire Sheriff*, 9 C. B. 659; 1 L. M. & P. 414; 19 L. J., C. P. 320; 14 Jur. 1026.

Where the amount of the injury sustained was doubtful, the court directed an application to stay proceedings on an attachment against the sheriff for the escape, to stand over, with liberty to the execution creditor to bring an action for the sole purpose of ascertaining the amount of damage sustained. *Ib.*

The liability in equity of a sheriff for an escape, is the loss actually sustained, and the court will ascertain the amount of damages. *Moore* v. *Moore*, 25 Beav. 8; 27 L. J., Ch. 385; 4 Jur. (N.S.) 250; 6 W. R. 288.

The principle on which the amount is to be ascertained is, by charging the sheriff with the debt, and throwing on him the onus of proving that less would have been recovered if the debtor had remained in custody or given bail. *Ib.*

In an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the only son of a wealthy father, who was upwards of 100 years old; and that shortly before the arrest the debtor's solicitor had offered to pay a composition on his debts of 6*s.* in the pound. The judge directed the jury to give as damages the value to the creditor of the chance of the debt, or any portion of it, that would have been extracted by the debtor's remaining in custody:—Held, a right direction, and the jury having given substantial damages, the court refused to disturb the verdict. *Ib.*

In an action against a sheriff for the escape of an execution debtor, the measure of damages is the value of the custody of the debtor at the time of the escape; but in estimating such value the jury is not limited to the consideration of the actual available means of the debtor, but they may consider, according to the evidence of the case, the value of the chances of the creditor obtaining payment by continuing such imprisonment. *Macrae* v. *Clarke*, 1 H. & R. 479; 35 L. J., C. P. 247; L. R. 1 C. P. 403; 12 Jur. (N.S.) 708; 14 L. T. 408; 14 W. R. 655.

An attorney having obtained judgment against B. at the suit of A., employed C., another attorney, to sue out execution. C. accordingly sued out a ca. sa. against B., under which he was taken in execution. B. prevailed upon the sheriff's officer to discharge him, upon his paying him the debt and costs, 45*l.* 2*s.* F., a clerk of C. (with, as the jury found, C.'s concurrence), received 20*l.* of the money from the officer. In an action against the sheriff for the voluntary escape, the defendant paid 25*l.* 2*s.* into court, and pleaded payment of the 20*l.*:—Held, that the payment to F., being a payment to C., the defendant was entitled to a verdict, the plaintiff having sustained no damages by reason of the escape, beyond the amount paid into court. *Hemming* v. *Hale*, 7 C. B. (N.S.) 487; 29 L. J., C. P. 137; 6 Jur. (N.S.) 554; 8 W. R. 116.

I. FEES, POUNDAGE, AND COSTS.

1. Right of Sheriff to.

See s. 20 of Sheriffs Act, 1887.

a. Generally.

At Common Law.]—At common law, a sheriff has no right to take fees for the execution of process. *Dew* v. *Parsons*, 2 B. & Ald. 562; 1 Chit. 295; 21 R. R. 404.

Taxation—Review of—Appeal.]—A taxation of sheriffs' costs and charges by a master of the supreme court or district registrar of the high court, under the general order as to fees of the 31st of August, 1888, made in pursuance of the Sheriffs Act, 1887, is not the subject of review under the provision of Ord. LXV. r. 27 (39–41) of the rules of the supreme court. Such taxation is a mere calculation of amount, and, per se, fixes no liability on the person assessed. *Townend* v. *Yorkshire Sheriff*, 59 L. J., Q. B. 156; 24 Q. B. D. 621; 62 L. T. 402; 38 W. R. 381; 54 J. P. 598—D.

Expenses of Enquiries Incurred by Sheriff's Officer—Right of Sheriff's Officer to Sue Execution Creditor.]—A sheriff's officer concerned in the execution of a writ of fi. fa. is not entitled to maintain an action against the execution creditor to recover expenses incurred in making enquiries as to the goods of the execution debtor. The sheriff is the only person empowered by s. 20, s.-s. 2, of the Sheriffs Act, 1887, to sue for the recovery of such expenses. *Smith* v. *Broadbent*, 61 L. J., Q. B. 490; [1892] 1 Q. B. 551; 66 L. T. 260; 40 W. R. 332; 56 J. P. 345.

Bankruptcy of Debtor—Delivery of Goods to Official Receiver.]—After a sheriff has handed over a debtor's goods to the trustee, he is entitled to costs, although the goods prove to be worth nothing to the bankrupt's estate. A sheriff cannot charge in respect of rent paid by him to the debtor's landlord. *Kent, Ex parte, Wells, In re*, post, col. 1203.

b. Fi. fa.

Right to.]—A sheriff is not entitled to poundage until the goods are sold. *Anon.*, Lofft. 433.

If he levies he is entitled to poundage, though the parties compromise before he sells any of the goods. *Alchin* v. *Wells*, 5 Term Rep. 470; 2 R. R. 641.

He has no right to poundage, where the amount of the execution is tendered to him before levy. *Cills* v. *Coates*, 3 P. & D. 511; 11 A. & E. 826; 9 L. J., Q. B. 232.

He is entitled to poundage on the sum he received under the execution only, and not on the amount claimed or seised. *Rex* v. *Robinson*, 2 C. M. & R. 334; 4 D. P. C. 447; 1 Gale, 209; 5 Tyr. 1095; 4 L. J., Ex. 319.

If a sheriff, who has seized pursuant to a writ of fi. fa. the goods of an execution debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods. *Roe* v. *Hammond*, 46 L. J., C. P. 791; 2 C. P. D. 300.

The goods of the defendants were seized by a sheriff under a fi. fa. issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I. poundage and a levy fee. A rule was obtained under 1 Vict. c. 55, s. 3, for a return of these fees and the poundage:—Held, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy fee. *Ib.*

A sheriff, who by compulsion of a fi. fa. recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor without a sale of any portion of the goods seized. *Mortimore* v. *Cragg*, 47 L. J., C. P. 348; 3 C. P. D. 216; 38 L. T. 116; 26 W. R. 363—C. A.

A sheriff's officer went with a warrant for executing a fi. fa. to the execution debtor's shop, told the debtor the particulars of the warrant, and that unless payment was made a man must remain in possession. The debtor thereupon, although he had paid the debt to the creditor, paid the amount demanded, which included poundage and levy fees:—Held, that there was a sufficient seizure and levy to render poundage and levy fees payable. *Bissicks* v. *Bath Colliery Co.*, 47 L. J., Ex. 408; 3 Ex. D. 174; 38 L. T. 163; 26 W. R. 215—C. A.

A sheriff's officer went with a warrant to the defendant's premises for the purpose of levying under a fi. fa., and, without saying or doing anything more, produced the warrant and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest:—Held, that this did not amount to a levy, so as to entitle the sheriff to poundage or the officer to fees. *Nash* v. *Dickenson*, L. R. 2 C. P. 252.

—— **Subsequent Bankruptcy of Debtor.**]—Where the goods of a trader have been taken in execution for a sum exceeding 50*l.*, and bankruptcy ensuing, the sheriff has been restrained from selling, the sheriff is entitled to be paid by the trustee out of the estate of the bankrupt all expenses properly incurred by him in keeping and taking possession of the goods and preparing for a sale, notwithstanding that no sale has taken place. *Craycroft, In re, Browning, Ex parte*, 47 L. J., Bk. 96; 8 Ch. D. 596; 38 L. T. 364; 26 W. R. 559.

A judgment debtor against whom there was an execution in the sheriff's hands had committed an act of bankruptcy of which the sheriff had notice, and on foot of which the judgment debtor was afterwards adjudicated bankrupt. The sheriff, notwithstanding such notice, sold the debtor's goods under the execution, deducted his poundage fees and expenses of the sale, and paid the balance to the assignees:—Held, that the sheriff was not entitled to these deductions. *Priestly, In re*, 23 L. R., Ir. 536.

A writ of fi. fa. for 283*l.* 4*s.* 1*d.* was delivered to a sheriff, under which he seized several musical instruments at the warehouse of P., the execution debtor, who was a pianoforte seller; and without receiving any directions from either P. or the execution creditor, but acting on his own responsibility, the sheriff without, as the court considered, sufficient grounds for doing so, removed the goods from P.'s premises to a sale mart situate close by, where a small part of them were sold by auction for 62*l.* 5*s.*, and in consequence of the insufficient bidding the sale of the remainder was adjourned. P. was adjudicated a bankrupt before the day to which the sale was adjourned. The sheriff claimed, as against P.'s assignees in bankruptcy, to retain out of the proceeds of the sale in his hands fees on the entire sum for which the execution was issued, together with the expenses of removing the goods to the sale mart and the hire of the mart:—Held, that the sheriff was only entitled to retain fees on the amount actually levied, and that the residue of his claim must be disallowed. *Purcell, In re*, 13 L. R., Ir. 489.

—— **Writ Set Aside for Irregularity.**]—He is entitled to retain his poundage though the execution is set aside for irregularity. *Bullen* v. *Ansley*, 6 Esp. 111; 9 R. R. 810.

But a sheriff is not entitled to poundage, where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity. *Miles* v. *Harris*, 12 C. B. (N.S.) 550; 31 L. J., C. P. 361; 6 L. T. 649.

Amount Allowed.]—On foot of a fi. fa. marked for 30*l.* 8*s.* 11*d.*, the sheriff, by seizure and sale of a term of years, levied 530*l.*, and with the assent of the attorney of the execution debtor retained poundage fees on the whole sum levied:—Held, that he was entitled to poundage fees on the sum marked on the writ, and no more. *Byrne* v. *Hutchison*, Ir. R. 9 C. L. 75.

By 7 Will. 4 & 1 Vict. c. 55 (repealed), a sheriff might, under a fi. fa., levy the amount of his fees, authorised by that statute, though not indorsed on the writ, and was not bound to

specify separately the amount of such fees in his return. *Curtis* v. *Mayne*, 2 D. (N.S.) 37.

A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 35; and, although he is put to extra trouble and expense in making the levy, he cannot claim more. *Slater* v. *Haines* or *Hayes*, 7 M. & W. 413; 9 D. P. C. 221; 10 L. J., Ex. 100.

Where, after the goods of a debtor have been seized, the debt and costs are paid by him, the sheriff's officer is not entitled to charge the fees allowed, "for search for detainers," or "for supersedeas, discharge to any writ or process, or for the release of any goods taken in execution." *Masters* v. *Lowther*, 11 C. B. 948; 21 L. J., C. P. 130; 16 Jur. 374.

A sheriff is entitled to poundage on the whole amount realized by the sale, although a portion of it is paid over to the landlord for rent; but the sheriff is not entitled to extra expense caused by an adverse claim to the goods. *Davies* v. *Edmonds*, 1 D. & L. 395; 12 M. & W. 31; 13 L. J., Ex. 1.

Several Writs of Fi. fa.]—Where goods of the debtor have been seized by the sheriff and subsequently another writ of fi. fa. against the same debtor is handed to him for execution, the sheriff is not entitled to charge a levy fee or mileage for a seizure under such second writ unless there is in fact a fresh seizure in a different place. If the sheriff, when the second writ is delivered to him, has seized goods under the first, he may be said, immediately upon the delivery of the latter writ, to have seized the goods under that also. *Kent, Ex parte, Wells, In re*, 5 R. 226; 68 L. T. 231; 10 Morrell, 69.

Amount Recovered—Deductions that may be made by Sheriff.]—A sheriff, previously to a sale by public auction of the goods of a debtor, having issued three advertisements of such sale, claimed to deduct from the proceeds of the sale 15*s.* as the costs of these advertisements, under 24 & 25 Vict. c. 134, ss. 73, 74;—Held, that he was not entitled to do so, and that his charges were regulated by 7 Will. 4 & 1 Vict. c. 55. *Braithwaite* v. *Marriott*, 1 H. & C. 591; 32 L. J., Ex. 24; 9 Jur. (N.S.) 26; 7 L. T. 363; 11 W. R. 93.

A sheriff who has seized goods under a fi. fa., and disposes of them by bill of sale, has no right to deduct from the amount received the charge of appraising the goods previously to the sale. *Phillips* v. *Canterbury* (*Viscount*), 11 M. & W. 619; 1 D. & L. 283; 12 L. J., Ex. 401.

Cost of Keep of Animals.]—The masters will, in a proper case, allow for the keep of animals, by virtue of the general authority given to them by the table of fees, to allow a sum "for any duty not therein provided for." *Gaskell* v. *Sefton*, 14 M. & W. 802; 3 D. & L. 267; 15 L. J., Ex. 107.

What can be Set off against Claim of Sheriff.]—In an action by a sheriff against an execution creditor for poundage, the defendant claimed to set off the expenses which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized:—Held, that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff, and could not be set off. *Marshall* v. *Hicks*, 10 Q. B. 15; 16 L. J., Q. B. 134; 11 Jur. 305.

Preparing for Sale—Withdrawal of Execution—Percentage—Ship.]—By an order dated 31st Aug. 1888, and made under the Sheriffs Act, 1887, a scale of fees to be demanded and received by a sheriff upon the execution of writs of fi. fa. is fixed. Amongst others it provides that he shall demand, "for the inventory and valuation, cataloguing, lotting, and preparing for sale, where no sale takes place by reason of the execution being withdrawn, satisfied, or stopped, 2½ per cent. on the value of the goods":—Held, that the above rule did not apply to the sale of a ship. *Cohen* v. *De Las Rivas*, 64 L. T. 661; 39 W. R. 539.

—— Right to Possession Money—Receiving Order made before Sale—Delay of Sale.]—On 2nd September, 1889, the goods of the bankrupt were seized by the sheriff under a writ of fi. fa., and in consequence of interpleader proceedings the possession was continued without selling until 2nd October, 1889, when, on notice of a receiving order having been made against the bankrupt the goods were delivered by the sheriff to the official receiver. Possession money for 30 days was taxed off the sheriff's bill of costs and the sheriff applied for a review of taxation:—Held, that the proper order was that the amount should be allowed unless the official receiver within seven days required the sheriff to take out a summons before the master to have the costs disposed of. If such summons were taken out the official receiver to be at liberty to appear on it and to contend if so advised that the claimant or the execution creditor ought to pay the possession money in dispute. *Essex Sheriff, Ex parte, Levy, In re*, 63 L. T. 291; 38 W. R. 784; 7 Morrell, 125.

"Incidental Expenses."]—Where proceedings were stayed by a judge's order, on condition of the payment of the debt and costs on a certain day, and in default the plaintiff to be at liberty to sign final judgment and issue execution for the amount of the debt, with costs of the judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses:—Held, that the sheriff would not be justified in levying, under the head of "incidental expenses," the costs of a rule to return the writ. *Hutchinson* v. *Humbert*, 8 M. & W. 638; 1 D. (N.S.) 78.

c. Elegit.

Right to.]—A sheriff is not entitled to poundage upon an elegit, unless he has extended the land under the writ. *Carter* v. *Hughes*, 2 H. & N. 714; 27 L. J., Ex. 225; 6 W. R. 212.

Amount of.]—On the execution of an elegit, the sheriff's poundage, under 3 Geo. 1, c. 15, s. 16, and 8 Geo. 1, c. 25, s. 5 (repealed), was calculated on the yearly value of the lands extended, and not on the sum to be levied under the writ. *Nash* v. *Allen*, D. & M. 16; 4 Q. B. 784; 12 L. J., Q. B. 298.

d. Crown Process.

Right to.]—The 3 Geo. 1, c. 15, which gives the sheriff poundage in cases where the debt is

due to the crown, applies only to cases between party and party; but where the sheriff was put to extra trouble and expense, at the request of the prosecutor, in executing a habere facias possessionem under an extent, he is entitled to such expenses on the taxation of costs. *Capp* v. *Johnson*, 7 Moore, 518; 24 R. R. 689. S. P., *Stephens* v. *Rothwell*, 6 Moore, 338; 3 Br. & B. 143.

No poundage is due on money seized in the crown debtor's possession, under an extent against the latter. *Rex* v. *Villers*, 8 Price, 587; Wightw. 95; 22 R. R. 778.

Nor on money paid by the sureties of a crown debtor who has been arrested on crown process, in order to obtain the release of his person. *Ib.*

A sheriff has no authority, under an extent, as such sheriff, to collect debts due to the crown debtor; and if he receives such debts, he cannot make them the ground of a charge for poundage on the amount. *Ib.*

A sheriff has no right to levy costs or poundage, or any incidental expenses, under an extent on a simple contract debt. *Rex* v. *Tidmarsh*, 5 Price, 189.

Where two extents issued against A., and an extent in aid into another county against B., for the same sums, and B. paid the whole debt, giving notice to the sheriff to retain the money till the legality of the extent in aid was tried; and afterwards A. paid part of the money to B. in consequence of an arrangement between themselves:—Held, that the sheriff who took the inquisitions against A. was not entitled to any share of the poundage. *Rex* v. *Bowles*, Wightw. 116.

If, on an extent issuing against the acceptors of bills for the purpose of levying a debt of the crown, the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay poundage on the levy. *Rex* v. *Freme*, 2 Price, 58.

The sheriff is entitled to levy costs under 42 Geo. 3, c. 99, on an extent against a collector of taxes; and poundage is included in the word "charges," and may be levied. *Rex* v. *Collingridge*, 3 Price, 280.

—— **Selling under a Venditioni exponas.**]—If the sheriff sells under a venditioni exponas, he is not entitled to deduct anything, either for extra expenses or poundage, and he must make a return of the whole sum produced by the sale; when the court will order it to be paid over, deducting poundage. *Rex* v. *Jones*, 1 Price, 205; 15 R. R. 719.

Amount of.]—Where the sheriff, beside his poundage, charged 5 per cent. for an auctioneer to sell malt taken under an extent, the court disallowed the charge. *Rex* v. *Crackenthorpe*, 2 Anst. 412.

Where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage. *Rex* v. *Caldwell*, 1 Anst. 279.

Though the debt is voluntarily paid to him. *Rex* v. *Fry*, 2 Anst. 358.

If paid before a venditioni exponas is issued to either. *Rex* v. *Barber*, 3 Anst. 717.

e. "Costs of Execution" under Bankruptcy Act.

Unreasonable period of Possession at Creditor's Request.]—A sheriff who has remained in possession for an unreasonable period at the instance of the execution creditor, and without the debtor's consent is not entitled under s. 46 of the Bankruptcy Act, 1883, to charge against the debtor the costs of retaining such possession beyond what is a reasonable period. *Essex Sheriff, Ex parte, Finch, In re*, 65 L. T. 466; 40 W. R. 175; 8 Morrell, 284.

Possession retained at request of Execution Creditor and Debtor—Receiving Order.]—After seizure under a writ of fi. fa. the sheriff remained in possession of the debtor's goods without selling, at the request of the execution creditor and of the debtor. A receiving order was subsequently made against the debtor, and the sheriff handed over the goods to the official receiver, and claimed possession-money for the time he remained in possession:—Held, that the sheriff was entitled to the possession-money claimed as being part of the "costs of execution" within s. 11 of the Bankruptcy Act, 1890. *Hurley, In re*, 5 R. 390; 41 W. R. 653; 10 Morrell, 120.

Expenses of Reaping Growing Crops.] — A sheriff, having taken in execution standing corn, expended money in having the same reaped, threshed, and dressed before sale. No authority to do this was given him either by the execution debtor or creditor, but it was done by the sheriff for the purpose of increasing, and did in fact increase, the selling value of the corn:—Held, that the sheriff had no power to incur this expense, and therefore was not entitled to the same as costs of the execution under s. 46 of the Bankruptcy Act, 1883. *Conder, Ex parte, Woodham, In re*, 57 L. J., Q. B. 46; 20 Q. B. D. 40; 58 L. T. 116; 36 W. R. 526.

Poundage.] — When the bankruptcy of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of fi. fa., the sheriff is not entitled to poundage under the words "costs of execution" in sub-s. 1, of s. 46, of the Bankruptcy Act, 1883. *Ludmore* or *Ludford, In re*, 53 L. J., Q. B. 418; 13 Q. B. D. 415; 51 L. T. 240; 33 W. R. 152; 1 Morrell, 131.

f. In Other Cases.

On Jury Process.]—A sheriff has no right to charge the fees in the table authorized by the judges by virtue of 7 Will. 4 & 1 Vict. c. 55, for jury process, in special jury causes, since the alteration in the mode of summoning special juries by 15 & 16 Vict. c. 76, s. 108. *Bennett* v. *Thompson*, 6 El. & Bl. 683; 2 Jur. (N.S.) 613; 4 W. R. 614.

A sheriff will not be allowed extra expenses of summoning special jurors, on account of their residing at a distance from each other; and the court will grant a rule absolute for the sheriff to refund the money received on this account, though he has actually expended it. *Laxe* v. *Sewell*, 1 Chit. 175.

2. Recovery of Fees.

a. By Sheriff.

By Action—On Promise to Pay.]—He may have an action upon a promise to pay his fees due by law; thus, in consideration that the sheriff at the defendant's request would levy an execution, he promised to pay him such fees as

the statute of 29 Eliz. c. 4, allows. *Stanton* v. *Suliard*, Cro. Eliz. 654.

An action will not lie upon an implied promise to repay a sheriff the expenses incurred in seizing and keeping possession under a fi. fa., which was ultimately abandoned on account of the refusal of an indemnity, even after the defendant has recognised the claim by paying money on account. *Bilke* v. *Havelock*, 3 Camp. 374; 14 R. R. 758. S. P., *Lane* v. *Sewell*, 1 Chit. 175.

—— **On Abortive Execution.**]—Where the sheriff levied and received the money, and afterwards, the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff:—Held, that the 43 Geo. 3, c. 46, s. 5, did not take away his remedy by action against the plaintiff for his poundage. *Rawstorne* v. *Wilkinson*, 4 M. & S. 256; 16 R. R. 455.

—— **Against Solicitor in Cause.**]—A sheriff cannot recover his charges for executing a fi. fa. by action against the attorney in the cause, unless there are special circumstances from which a jury may infer an actual undertaking by the attorney to pay. *Maybery* v. *Mansfield*, 9 Q. B. 754; 16 L. J., Q. B. 102; 11 Jur. 60.

—— **Ca. sa.—Against Plaintiff or Defendant.**]—A sheriff may maintain an action for his fees for executing a ca. sa. against either the plaintiff or the defendant in the original action. *Baget* v. *Malone*, 5 L. R. Ir. 454.

——**What can be Set off by Execution Creditor.**]—Where an execution creditor paid the expenses of a sale by appraisement of the goods sold under a fi. fa.:—Held, that, in the absence of all proof of the circumstances under which the appraisement took place, he could not set off the amount so paid against the sheriff's demand for poundage. *Marshall* v. *Hicks*, 10 Q. B. 15; 16 L. J., Q. B. 134; 11 Jur. 305.

—— **Evidence in.**]—In an action by a sheriff for his poundage, proof that he has acted as sheriff is sufficient evidence of his being so, without proof of his appointment. *Bunbury* v. *Matthews*, 1 Car. & K. 380.

In an action for poundage, the sheriff's officer produced the warrant under which he had acted, which concluded, "given under the seal of my office." The only seal to it was a small piece of blue paper wafered to it, and stamped with a wafer-stamp. The officer stated that he did not know this to be the seal of the sheriff, or of his office; but stated that he had received the warrant from Mr. B., who had acted as the sheriff's under-sheriff, and that it was precisely similar to all the other warrants on which he had acted:—Held, sufficient proof of the seal. *Ib.*

By Sale of Goods Seized.]—When goods have been seized under a fi. fa., and the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realize thereby the amount of his possession-money, fees, and expenses. *Sneary* v. *Abdy*, 45 L. J., Ex. 803; 1 Ex. D. 299; 34 L. T. 801.

Goods having been seized under a fi. fa., the execution debtor under the Bankruptcy Act, 1869, s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realize the amount of his possession-money, fees, and expenses. The execution debtor having sued in a county court the sheriff for an unlawful sale, the judge directed the jury, that in the absence of evidence to show that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor:—Held, that the direction by the judge of the county court was correct. *Ib.*

By Retaking Goods.]—If a sheriff leaves goods taken in execution with a person who parts with the possession of them, he has no right to retake them merely to secure his own poundage, in a case where the execution was fraudulent. *Goode* v. *Langley*, 7 B. & C. 26; 5 L. J. (O.S.) K. B. 353.

Against Assignees in Bankruptcy.]—A sheriff having seized under a fi. fa., notice was given of a prior act of bankruptcy by the debtor, and a petition was filed under which he was adjudicated bankrupt, the goods remaining unsold, and the messenger took possession of them:—Held, that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods. *Searle* v. *Blaise*, 14 C. B. (N.S.) 856.

b. By Officers.

By Action—When Maintainable.]—Where there is an express promise, a sheriff's officer may maintain an action for fees. *Ormerod* v. *Foskett*, Peake's Add. Cas. 77.

—— **Against Solicitor of Execution Creditor.**]—The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of fi. fa. at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—Held, that the solicitors were not liable to pay the fees; that the law, apart from a contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied. *Maybery* v. *Mansfield* (supra) followed. *Brewer* v. *Jones* (infra) dissented from. *Royle* v. *Busby*, 50 L. J., Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315—C. A.

A sheriff's officer may maintain an action against the attorney of the plaintiff in the original action for caption fees and conduct money, on proof of an employment by the attorney, and of its being the usual course of business for the attorney to be charged with and to pay such fees. *Newton* v. *Chambers*, 1 D. & L. 869; 13 L. J., Q. B. 141; 8 Jur. 244.

Proof of the usage of business is admissible to establish such liability of the attorney. *Ib.*

In an action by a sheriff's officer against the attorney of the plaintiff, for levy and caption fees, evidence of usage that the sheriff's officer always looks to the attorney and not to the plaintiff in the action, cannot be admitted. *Seal* v. *Hudson*, 4 D. & L. 760 ; 2 B. C. Rep. 55 ; 11 Jur. 610.

The attorney who engages the services of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process. *Walbank* v. *Quarterman*, 3 C. B. 94. S. P., *Maile* v. *Mann*, 6 D. & L. 42 ; 2 Ex. 608 ; 17 L. J., Ex. 336.

The attorney in an action, who lodges a fi. fa. with a sheriff, is liable to the bailiff by whom it is executed, for the fees due to him, although no directions were given by the attorney to the sheriff as to the person by whom the writ should be executed. *Brewer* v. *Jones*, 10 Ex. 655 ; 3 C. L. R. 369 ; 24 L. J., Ex. 143 ; 1 Jur. (N.S.) 240 ; 3 W. R. 215.

A sheriff's officer having made an ineffectual levy upon the goods of a debtor by reason of a claim by an assignee, upon which the officer was obliged to abandon the possession, is not entitled to sue the attorney for the creditor who sent the fi. fa. to the sheriff for execution, for his charges. *Cole* v. *Terry*, 5 L. T. 347.

A sheriff's officer, employed to execute a fi. fa., cannot recover his fees from the attorney at whose instance the writ was issued if the execution becomes abortive, and does not result in any benefit to the party at whose instance it was issued. *Newman* v. *Merriman*, 26 L. T. 397.

The attorney of B., who had recovered judgment against C., issued a fi. fa. and delivered it to the sheriff, who made out his warrant to D. to make a levy on the goods of C. D., however, levied on goods which were claimed by E., and having kept possession for eleven days, he went out of possession pursuant to an interpleader order. D. having sued the attorney for his fees : —Held, that as he had done nothing in respect of the levy that was beneficial, he was not entitled to recover them. *Ib.*

By Detention.]—An officer cannot detain for fees. *Mason* v. *Cutterson*, 1 Raym. (Lord), 4.

By Refusal to Execute Process.]—An under-sheriff cannot refuse to execute process till he has his fees ; if he does he may be indicted for extortion. *Hescott's Case*, 1 Salk. 330.

c. In Ireland.

A recognisance of a tenant under the court, and his sureties, is not a debt due to the crown ; and upon the execution of a levari grounded on such recognisance, the sheriff is only entitled, under the equity of the 6 Ann. c. 7, to such fees as by that act he should have upon the execution of a ca. sa. or fi. fa. at suit of a subject, i.e. to 1*s.* on the first 100*l.*, and 6*d.* on the residue of the sum levied by virtue of the writ ; the 21 & 22 Geo. 3, c. 20, not applying to such an execution. *Creed* v. *Creed*, 4 Ir. Eq. R. 299.

The levari having been marked for 944*l.*, the sheriff, on the 21st December, 1839, levied 139*l.* 3*s.* on account ; and on the 11th June, 1840, received the balance, 624*l.* 17*s.*, but did not pay over the amount until the 1st May, 1841 ; it further appeared that he had received from the defendant in execution the sum of 73*l.* 10*s.*, as and for his fees upon the execution, and a further sum of 50*l.* for forbearance, and afterwards deducted from the sum levied 49*l.* 14*s.* for his fees upon the execution. The court declared him entitled to the sum of 26*l.* 2*s.*, and no more, for fees, and ordered him, within ten days, to refund the 73*l.* 10*s.* and the 50*l.*, and also the difference between 49*l.* 14*s.* and 26*l.* 2*s.*, with interest at 6 per cent. from the time of the payments, and also to pay interest on the sum levied for the time he held it in his hands, and all the costs of the motion as between solicitor and client. *Ib.*

A deed of deputation, by which high sheriffs appoint a sub-sheriff, and which provides that the first 2,400*l.* received by the sub-sheriff for fees in the office, are to be paid to the high sheriff, then the surplus (if any) to the extent of 800*l.* to the sub-sheriff as a salary, and the further surplus (if any) to the high sheriff, is not illegal, nor in violation of 12 Geo. 1, c. 4. *Drummond* v. *Ponder*, 1 Ir. Eq. R. 223.

3. Remedy for Extortion.

By Action—When Maintainable.]—Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law :—Held, that the latter might maintain an action for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. *Dew* v. *Parsons*, 2 B. & Ald. 562 ; 1 Chit. 295 ; 21 R. R. 404.

—— Refusing to Deliver up Goods unless paid Extortionate Sum—Evidence.]—A sheriff seized goods in the possession of S. to satisfy a fi. fa. for 67*l.* S. had previously conveyed all his estate and effects to H. by a deed which, it was contended, was fraudulent and void against creditors ; and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them up, except on payment of 97*l.* (the additional 30*l.* being claimed for expenses), which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of 67*l.* In an action brought by S. against the sheriff to recover back the 30*l.* :—Held, that it was not necessary to prove a tender of the 67*l.* *Searfe* v. *Halifax*, 7 M. & W. 288 ; 10 L. J., Ex. 332.

Costs of Second Man in Possession.]—It is extortion for a bailiff on a fi. fa. to charge costs of a second man in possession, and of a valuation of the goods. *Halliwell* v. *Heywood*, 10 W. R. 780.

Compromise—Undertaking by Officer to Pay—Breach of—Refusal of Court to compel Payment.]—In an action against the plaintiff for the extortion of his officer, the officer undertook, by a written memorandum, in consideration of a sum of money being accepted and proceedings stayed, to pay the sum of money with costs, in seven days, and, on default thereof, that the plea should be withdrawn, and that the plaintiff should have judgment. The under-

taking not being complied with, the court refused a rule nisi to compel the officer to perform his undertaking, he not being an officer of the court. *Brown* v. *Gerard*, 1 C., M. & R. 595; 3 D. P. C. 217; 5 Tyr. 220.

Penalty — Taking or demanding Money or Reward.]—Section 29, sub-s. 2 (*b*), of the Sheriffs Act, 1887, provides that if any officer takes or demands any money or reward under any pretext whatever other than the fees allowed by the act, he shall be liable to penalties:—Held, that "demand" means a demand of an extortionate fee as a condition of properly doing his duty and does not apply to a mere claim after work has been done to retain subject to taxation certain of the moneys levied as and by way of fees. *Woolford's Trustee* v. *Levy*, 8 Morrell, 206.

The penalty of the above section is inflicted for the doing of an act in the nature of a criminal offence; that to constitute such an offence there must be a mens rea; and that, consequently, a sheriff's officer is not liable to the penalty if he makes an overcharge by mistake. In order to constitute an offence under the act, it is not necessary that the improper demand or taking of money should be make a condition precedent to the officer's doing his duty.—Opinion in *Woolford's Trustee* v. *Levy* ([1892] 1 Q. B. 776) dissented from. *Lee* v. *Dangar*, 61 L. J., Q. B. 780; [1892] 2 Q. B. 337; 66 L. T. 548; 40 W. R. 469; 56 J. P. 678—C. A.

The rendering of an account by a sheriff or sheriff's officer, subject to taxation, showing a balance in hand after the deductions of fees and charges, does not constitute a taking or demand of the fees and charges within the meaning of the section. *Woolford's Trustee* v. *Levy*, 61 L. J., Q. B. 546; [1892] 1 Q. B. 772; 66 L. T. 812; 40 W. R. 483; 56 J. P. 694—C. A.

——**Unintentional Overcharge.**]—Owing to a clerical error made by their clerk, a firm of sheriff's officers claimed and received from an execution debtor a sum for poundage which was 3*l.* in excess of the amount due:—Held, that the sheriff's officers were not liable in a penalty under section 29 of the Sheriffs Act, 1887, in respect of such unintentional overcharge. *Shoppee* v. *Nathan*, [1892] 1 Q. B. 245.

Order on Sheriff to Refund.]—When a sheriff had under pressure of a writ extorted different sums from the person against whom the execution had issued, the court ordered him to refund the money with interest at 6*l.* per cent. *Creed* v. *Creed*, Fl. & K. 396; 4 Ir. Eq. R. 299.

A fi. fa. having been delivered to the sheriff to levy 97*l.* 10*s.*, the defendant, being ignorant of the precise amount, sent a person with a banker's bill for 55*l.* 5*s.*, and 40*l.* in country notes, to the officer to whom the warrant had been delivered. This sum was tendered to the officer; but, upon his stating the amount, the person went away, leaving the bill and notes upon the table, for the purpose of obtaining the difference. Whilst he was gone, the officer seized them under the execution, and upon the return of the person with the balance, demanded poundage. He subsequently seized some sheep for this, when it was paid under protest:—Held, that the money was not liable to seizure, and that the court would interfere summarily against the sheriff, to make him refund the sum extorted as poundage. *Brun* or *Bell* v. *Hutchinson*, 2 D. & L. 43; 13 L. J., Q. B. 244; 8 Jur. 895.

J. M. L.

END OF VOLUME XII.

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